IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

PLAINTIFF STATE OF OKLAHOMA'S RESPONSE TO "DEFENDANT / THIRD PARTY PLAINTIFFS' OPPOSED MOTION FOR LEAVE TO FILE AMENDED THIRD PARTY COMPLAINT" AND REQUEST FOR ORAL ARGUMENT

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), and in response to "Defendant / Third Party Plaintiffs' Opposed Motion for Leave to File Amended Third Party Complaint" ("Poultry Integrator Defendants' Motion") (DKT #816) states as follows:

The State does not object to the Poultry Integrator Defendants' Motion insofar as the proposed amended third-party complaint seeks (A) to dismiss the legally unfounded indemnity claims that were asserted in the original third party complaint, and (B) to dismiss certain of the third-party defendants that were named in the original third party complaint. As is the case with all of the claims in the original third party complaint, these are plainly claims that never should have been asserted by the Poultry Integrator Defendants in the first place.

The State does, however, object to the Poultry Integrator Defendants' Motion insofar as the proposed amended third-party complaint seeks (A) to join additional governmental entities as third party defendants, (B) to assert RCRA claims against additional third-party defendants, (C)

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to amend the allegations against certain third-party defendants, and (D) to "clarify" its previously asserted causes of action. These claims by the Poultry Integrator Defendants -- just like the claims in the original third party complaint -- are futile. Therefore, under controlling Tenth Circuit law, granting leave to amend the original third party complaint to assert such claims would be improper.

Accordingly, consistent with the foregoing, the Poultry Integrator Defendants' Motion should be granted in part and denied in part.

The State requests oral argument on the Poultry Integrator Defendants' Motion.

I. Background

For a number of years, the State engaged in efforts outside of litigation to get the Poultry Integrator Defendants to own up to their responsibility for their past and continuing improper management and disposal of poultry waste within Arkansas and Oklahoma which have caused pollution of the Oklahoma portion of the Illinois River Watershed ("IRW"). These efforts, however, had not proved successful, and so on March 9, 2005, the State served the Poultry Integrator Defendants and other notice parties with a notice of intent to sue under RCRA.[1]

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[1] The Poultry Integrator Defendants assert that this notice was "facially deficient." *See* Poultry Integrator Defendants' Motion, p. 3. The Poultry Integrator Defendants are wrong in this assertion, as fully explained in "Plaintiff's Response in Opposition to 'Defendant Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiff's First Amended Complaint'" (DKT #128). *See also* "State of Oklahoma's Motion for Leave to File a Supplemental Brief in Opposition to 'Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiff's First Amended Complaint'" (DKT #161). Indeed, earlier this year and subsequent to the close of briefing on this issue, yet another court has issued a ruling supporting the State's position and underscoring the error of the Poultry Integrator Defendants' contention. *See Voss v. Waste Management of Illinois, Inc.*, 2006 WL 305781, *5-7 (N.D. Ill. February 2, 2006).

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On June 13, 2005, the State filed, but did not serve, a nine count complaint against the Poultry Integrator Defendants.[2] This complaint included claims under CERCLA, state and federal common law and Oklahoma statutory law. This complaint did not, however, contain a RCRA count.[3] After the negotiations between the parties broke down, the State, on August 18, 2005, filed and served a First Amended Complaint ("FAC"). In addition to the counts contained in its original complaint, the FAC contained a RCRA count.

On October 4, 2005, the Poultry Integrator Defendants filed their original third party complaint, naming 160 third party defendants and 150 "Doe" defendants. This third party complaint asserted claims for indemnity and contribution against the third party defendants. On April 3, 2006, the State filed its "Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #247) and, on May 12, 2006, the State filed its "Reply Brief in Further Support of Its Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #584). These pleadings, which are incorporated herein by reference, made clear that the Poultry Integrator Defendants' indemnity claims were not legally cognizable with respect to any of the causes of action alleged in the FAC.

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[2] Significantly, the State alleged that the Poultry Integrator Defendants' improper conduct with respect to their management and disposal of poultry waste has been knowing and intentional.

[3] The reason a RCRA count was not included at this stage was driven by the fact that the law requires a 90-day notice period before asserting a RCRA claim and the State wanted to ensure that the 90-day notice period had in fact run as to all the various notice parties. For the Poultry Integrator Defendants to now contend that the State "twice revers[ed]" its position as to its RCRA count, and to characterize the State's conduct as "indecision" and the State's RCRA count as "off again and on again RCRA claim," *see* Poultry Integrator Defendants' Motion, pp. 11-13, is simply not in accord with the facts. Efforts by the Poultry Integrator Defendants to blame the State for their own delays in serving RCRA notices is thus improper. In any event, this entire issue is a red-herring inasmuch as the RCRA contribution claim the Poultry Integrator Defendants assert in their third party complaint, and now in their proposed amended third party complaint, is not legally cognizable. *See* Argument, *infra.*

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These pleadings further made clear that -- with the possible exception of the CERCLA contribution claim -- the Poultry Integrator Defendants' contribution claims were not legally cognizable with respect to any of the causes of action alleged in the FAC. The State also explained in those pleadings that the legal cognizability of even the Poultry Integrator Defendants' CERCLA contribution claim was questionable at best given the Poultry Integrator Defendants' intentional conduct and the wide range of other defenses and objections available to the third party defendants. The State's motion has not yet been ruled upon.[4]

The Poultry Integrator Defendants now seek leave to file an amended third party complaint. In their proposed amended complaint the Poultry Integrator Defendants -- quite correctly -- abandon their legally unfounded indemnity claims. In their proposed amended complaint the Poultry Integrator Defendants do, however, continue to assert legally unfounded contribution claims. *See* Proposed Amended Complaint, ¶¶ 2, 205, 213 & 219. The Poultry Integrator Defendants also assert a contribution claim masquerading as an unjust enrichment claim. *See* Proposed Amended Complaint, ¶¶ 206 & 213, 219. And, finally, the Poultry Integrator Defendants purport to "set forth their own cause of action against the Third Party Defendants pursuant to the Citizen Suit provisions of RCRA." *See* Poultry Integrator Defendants' Motion, pp. 5-6. As explained below, these claims are futile.

II. Legal Standard

Fed. R. Civ. P. 15(a) provides that in instances where responsive pleadings have been filed -- as is the case here -- "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." As explained by the Tenth Circuit, however: "[a]lthough Fed. R. Civ. P. 15(a) provides that leave

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[4] Argument on this matter has been set for August 10, 2006.

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to amend shall be given freely, the district court may deny leave to amend where amendment would be futile." *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*, 175 F.3d 848, 859 (10th Cir. 1999) (citation omitted); *see also Scott v. Hern*, 216 F.3d 897, 906 (10th Cir. 2000) ("If the proffered amendments fail to cure the deficiencies of the original complaint or if the newly asserted claims would be futile, denial of a motion to amend is appropriate") (citation omitted). "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Jefferson County School District No. R-1*, 175 F.3d at 859 (citation omitted); *Bauchman v. West High School*, 132 F.3d 542, 562 (10th Cir. 1997) ("A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment").

III. Argument

As was the case with their initial third party complaint, the claims asserted against the third party defendants in the Poultry Integrator Defendants' proposed amended third party complaint sound, at their core, in contribution. *See* Proposed Amended Complaint, ¶ 2. This is so no matter how the Poultry Integrator Defendants might seek to dress up their claims in other legal theories, such as unjust enrichment and RCRA. *See, e.g., Radford-Shelton and Associates Dental Laboratory, Inc. v. Saint Francis Hospital, Inc.*, 569 P.2d 506, 511 (Okla. Civ. App. 1976), *cert. denied* ("Contribution is an equitable remedy designed to apportion the loss between two or more persons liable for harm caused to a third person. *See* 18 Am. Jur. 2d Contribution § 1(1965); Restatement of Restitution § 81 (1937)"); Black's Law Dictionary (6th ed. 1990) (Contribution is the "[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear").

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As extensively explained in the State's "Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #247) and "Reply Brief in Further Support of Its Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #584), claims for contribution under the State's common law claims are not legally viable because these common law claims sound in intentional tort, and third-party contribution claims are thus barred as a matter of law. *See, e.g.,* 12 Okla. Stat. § 832(C) ("There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death") (emphasis added) & Restatement (Second) of Torts, § 886A(3) ("There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm") (emphasis added). Accordingly, such claims are subject to dismissal under *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1498 (10th Cir. 1983), which provides that "[i]f there is no right to relief under the substantive law, impleader is improper." To allow an amendment of the original complaint to reassert such legally unfounded claims is thus futile and should not be permitted. *See Jefferson County School District No. R-1*, 175 F.3d at 859.

As to the unjust enrichment claims asserted in the proposed amended third party complaint, these claims are merely variations of contribution claims. *See, e.g., United States v. Pretty Products, Inc.*, 780 F.Supp. 1488, 1496 (S.D. Ohio 1991) (dismissing unjust enrichment claim, holding that such state law restitutionary claims "differ from contribution claims in form but not substance"). Accordingly, amendment of the original complaint to assert or reassert unjust enrichment claims *qua* contribution claims also is, for the reasons stated above, futile and should not be permitted. *See Jefferson County School District No. R-1*, 175 F.3d at 859.

As to the RCRA claims asserted in the proposed amended third party complaint, the caselaw is clear and unequivocal: as a matter of law there is no right to contribution under

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RCRA. *See* State's "Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #247), pp. 20-21, and "Reply Brief in Further Support of Its Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #584), pp. 5-6. Simply put, "RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996).[5] Nor is RCRA directed at providing compensation for future cleanup efforts. *See United States v. Domestic Industries, Inc.*, 32 F.Supp.2d 855, 870-71 (E.D. Va. 1999); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 617-18 (M.D. Pa. 1997); *Davenport v. Neely*, 7 F.Supp.2d 1219, 1226-30 (M.D. Ala. 1998). Accordingly, amendment of the original complaint to assert or reassert RCRA claims *qua* contribution claims also is futile and should not be permitted. *See Jefferson County School District No. R-1*, 175 F.3d at 859.

To the extent the Poultry Integrator Defendants are attempting to amend their original complaint to assert "<u>their own cause of action</u> against the Third Party Defendants pursuant to the Citizen Suit provisions of RCRA," this too is futile. The amendment would be futile because the Poultry Integrator Defendants have, among other things, failed to satisfy the standing requirements to bring a RCRA claim. In order to satisfy Article III's standing requirements, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-81 (2000). Nowhere in the proposed amended

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[5] Indeed, the Supreme Court has explained that "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig,* 516 U.S. at 484 (citation omitted).

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complaint do the Poultry Integrator Defendants allege that they themselves have suffered an injury to their health, aesthetic, recreational and environmental interests by the alleged conduct of the third party defendants. Further, even assuming *arguendo* that an injury were found to have been alleged by the Poultry Integrator Defendants in the proposed amended third party complaint, such injury is nonetheless alleged to be wholly contingent, rather than "actual or imminent." *See* Proposed Amended Complaint, ¶ 223 ("if the Court finds that . . .) (emphasis added); ¶ 224 ("if the Court finds that . . .) (emphasis added); ¶ 225 ("in the event the Court finds Third Party Plaintiffs liable under SWDA . . .") (emphasis added); *see also* Poultry Integrator Defendants' Motion, p. 5 ("Although Third Party Plaintiffs have denied and continue to deny all of the allegations of wrongdoing as alleged by Plaintiffs in the First Amended Complaint, they allege that should they be adjudged liable . . .") (emphasis added). Accordingly, the RCRA claim asserted by the Poultry Integrator Defendants in their proposed amended third party complaint fails on standing grounds, and thus is futile. Amendment therefore should not be allowed. *See Jefferson County School District No. R-1*, 175 F.3d at 859.

As to the CERCLA contribution claims asserted in the proposed amended third party complaint, there are valid grounds to question the legal viability of these claims as well. Specifically, there is authority indicating that intentional actors under CERCLA do not have a right of contribution. *See* "Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #247), pp. 22-24.[6] Additionally, it is likely that

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[6] The CERCLA contribution provision "uses the term contribution in its traditional, common law sense." *In the Matter of Reading Company*, 115 F.3d 1111, 1124 (3rd Cir. 1997). The State contends, citing to caselaw for support, that courts should look to the Restatement (Second) of Torts for the proper formulation of contribution rights. *See* "Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #247), p. 24, fn. 11. The Restatement (Second) does not provide for contribution where the wrongdoing is intentional. The Poultry Integrator Defendants have contended, in contrast, that courts should

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the third party defendants will have a number of other defenses impacting the legal viability of the Poultry Integrator Defendants' CERCLA contribution claims. Therefore, to allow amendment of the Poultry Integrator Defendants' original third party complaint to merely reassert CERCLA contribution claims that are legally questionable at best -- especially when the remainder of the proposed amendments are futile -- is not warranted.

Indeed, rather than permitting this largely futile amendment, this Court should first decide the State's "Motion to Sever and Stay and / or Strike or Dismiss the Claims Asserted in the Third Party Complaints" (DKT #247). Resolution of that motion first will greatly enhance judicial economy. On the one hand, should the Court determine that the claims asserted in the original third party complaint are not legally viable -- which the State submits is the case -- and dismiss the original third party complaint, the remaining issues, if any, presented by the Poultry Integrator Defendants' Motion can quickly be disposed of as well on futility grounds. On the other hand, should the Court determine that, whatever the legal merits of the claims asserted in the original third party complaint -- and the State submits there are none -- such claims should proceed separately and at the end of the State's case,[7] the Poultry Integrator Defendants' Motion can be addressed at that time.

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look to the Restatement (Third) of Torts. The Poultry Integrator Defendants' contention is wholly unconvincing. The Restatement (Third) does not reflect the "traditional, common law" of contribution. As explained in *Whirlpool Corp. v. CIT Group/Business Credit, Inc.*, 293 F.Supp.2d 1144, 1149 (D. Haw. 2003): "The new Restatement (Third) Torts reflects a new approach [to contribution] taken in some jurisdictions: '[a] person who can otherwise recover contribution is not precluded from receiving contribution by the fact that he is liable for an intentional tort.' Restatement (Third) Torts: Apportionment of Liability, § 23, Comment 1. Jurisdictions that take this approach typically do so pursuant to a statute. Absent a statute, most jurisdictions continue to look to the Second Restatement for guidance." (Emphasis added.)

[7] It is important to recall that the claims asserted in the Poultry Integrator Defendants' third party complaint (and proposed amended third party complaint) are wholly contingent in nature. That is, the Poultry Integrator Defendants have denied all liability and the

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IV. Conclusion

WHEREFORE, premises considered, the Poultry Integrator Defendants' Motion should be granted in part and denied in part. It should be granted only insofar as the proposed amended third-party complaint seeks (A) to dismiss the indemnity claims that were asserted in the original third-party complaint, and (B) to dismiss certain of the third-party defendants that were named in the original third-party complaint. It should be denied in all other respects.

Respectfully submitted,

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third-party claims are contingent upon a finding of liability against the Poultry Integrator Defendants in the State's case-in-chief. Proceeding contemporaneously with both section 107 cost recovery / natural resource damages claims and section 113 contribution claims would unduly complicate the issues. *See, e.g., United States v. Kramer,* 770 F.Supp. 954 (D.N.J. 1991); *City of Wichita v. Aero Holdings, Inc.*, 2000 WL 1480940 (D. Kan. Apr. 7, 2000).

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CERTIFICATE OF SERVICE

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