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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

PLAINTIFF STATE OF OKLAHOMA'S MOTION TO SEVER AND STAY AND / OR STRIKE OR DISMISS THE CLAIMS ASSERTED IN THE THIRD-PARTY COMPLAINTS, BRIEF IN SUPPORT, 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"), pursuant to Fed. R. Civ. P. 14(a), 21 and 42(b) and LCvR7.1, and respectfully moves the Court to sever and stay and / or strike or dismiss the claims asserted in the Third-Party Complaint filed by Poultry Integrator Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George's, Inc., George's Farms, Inc. and Willow Brook Foods, Inc. and the claims asserted in the Third-Party Complaint filed by Poultry Integrator Defendant Cargill Turkey Production, LLC, for the reasons that follow.[1] The State requests oral argument on this motion.

I. Introduction

[1] Counsel for the State have conferred with counsel for Poultry Integrator Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George's, Inc., George's Farms, Inc., Willow Brook Foods, Inc., Cargill Turkey Production, LLC, and are informed that they do not consent to the relief being sought by the State in this motion.

On August 19, 2005, the State filed its First Amended Complaint ("FAC") in order to hold the Poultry Integrator Defendants accountable 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"). The Poultry Integrator Defendants' improper conduct with respect to their management and disposal of poultry waste is alleged to be knowing and intentional. *See, e.g.,* FAC, ¶¶ 48-57, 99, 102, 110-13, & 121.

The FAC asserts claims against the Poultry Integrator Defendants under ten distinct common law and statutory causes of action. Certain Poultry Integrator Defendants responded by filing third-party complaints against more than one hundred entities that live, own land or conduct business in the Oklahoma portion of the IRW. As to the named third-party defendants, the third-party complaints seek indemnification and contribution based on alleged activities in the Oklahoma portion of the IRW, such as owning a septic system, that are wholly unrelated to the improper actions of the Poultry Integrator Defendants that are at issue in this case.

Specifically, on October 4, 2005, Poultry Integrator Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., George's, Inc., George's Farms, Inc., and Willow Brook Foods, Inc. (collectively referred to, for purposes of this brief, as "Tyson") filed a third-party complaint ("Tyson's Third-Party Complaint") naming 160 third-party defendants and 150 "Doe" defendants.[2] Notably, although the IRW is split roughly equally between Arkansas and Oklahoma, not one individual, business

[2] The third-party defendants' activities are alleged to range from owning a septic system, to hay production, to operating nurseries, to operating gravel, sand and limestone mines, to operating lawn care services, to operating golf courses, to grazing cattle, to operating RV parks and campgrounds, to operating rental cabins and motels, to operating marinas and canoe and raft rentals, to operating cafes.

or municipality located in the Arkansas portion of the IRW was named in Tyson's Third-Party Complaint.

Also on October 4, 2005, Poultry Integrator Defendant Cargill Turkey Production, LLC ("Cargill") filed a third-party complaint ("Cargill's Third-Party Complaint"), naming two municipalities -- the City of Tahlequah and the City of Westville -- as third-party defendants. Similar to Tyson's Third-Party Complaint, the third-party defendants named in Cargill's Third-Party Complaint are both located in Oklahoma. Poultry Integrator Defendant Cargill did not name a single municipality located in Arkansas as a third-party defendant.

Tyson's Third-Party Complaint and Cargill's Third-Party Complaint assert nearly identical claims against the third-party defendants "under the theory of contribution, or in the alternative indemnity."[3] Tyson's Third-Party Complaint, ¶ 2, & Cargill's Third-Party Complaint, ¶ 2. Specifically, it is alleged as to each of the third-party defendants:

> The operations and activities described above have and continue to result in the release of phosphorus and other constituents into the IRW. Accordingly, if the conduct of the Third Party Plaintiffs gives rise to liability to the [State] under [its] claims set forth in the Complaint (which is denied), then [third-party defendant's name inserted here]'s conduct and operations, which results in the release of some or all of the same constituents into the IRW, give rise to its liability to Third Party Plaintiffs under the theories of contribution and/or indemnity.

See Tyson's Third-Party Complaint, ¶¶ 169-170, & Cargill's Third-Party Complaint, ¶¶ 6-7. No other claims are asserted against the third-party defendants. No contractual or other legal relationship between Poultry Integrator Defendants Tyson or Cargill and the third-party defendants is alleged in either third-party complaint.

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[3] The State does not agree with the characterizations of the allegations of the State's FAC contained in Tyson's Third-Party Complaint and Cargill's Third-Party Complaint. Inasmuch as the accuracy of Poultry Integrator Defendants Tyson's and Cargill's characterizations are not relevant to resolving the State's present motion, the State need not correct them here. This should not be construed, however, as a concession by the State of their accuracy or a waiver of the State's right to challenge and correct them at the appropriate juncture.

To the best of the State's knowledge, as of the date of filing, service of Tyson's Third-Party Complaint has not been completed on all of the third-party defendants.[4] Service on at least some of the municipalities named in Tyson's Third-Party Complaint and Cargill's Third-Party Complaint has occurred, however, and these third-party defendants have answered, interposing both affirmative defenses and counterclaims. As to the remaining third-party defendants, Poultry Integrator Defendant Tyson, on February 24, 2006, moved for an order enlarging the time to serve the third-party complaints, contending that such an extension would effectuate "efficient case management" inasmuch as it, among other things, "postpones [the third-party defendants'] need to retain counsel and the onset of litigation expenses until such time as it is absolutely necessary." *See* Third Party Plaintiffs' Opposed Motion to Enlarge Time in Which to Serve Third Party Complaint, p. 5. This motion was granted on March 20, 2006.

The State's motion to sever and stay and / or strike or dismiss Tyson's Third-Party Complaint and Cargill's Third-Party Complaint should be granted for the following reasons:

(1) Assuming *arguendo* that Poultry Integrator Defendants Tyson's and Cargill's contribution and indemnity claims are even legally cognizable with respect to any of the State's causes of action, permitting these claims to proceed contemporaneously with the State's case will result in a case management nightmare, will complicate the proceedings and will severely prejudice the State. Therefore, these claims should be severed and stayed.

(2) In any event, however, Poultry Integrator Defendants Tyson's and Cargill's contribution and indemnity claims are <u>not</u> legally cognizable with respect to any of the

[4] On or about March 15, 2006, a large number of summons for the third-party defendants were issued.

State's causes of action, with the only conceivable exception, as explained below, of the CERCLA contribution claim. The CERCLA contribution claim is 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. Therefore, these claims should be stricken or dismissed.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 14(a) provides that "[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . . ." Significantly, the rule further provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial." Fed. R. Civ. P. 14(a).

For a third-party complaint to be proper under Rule 14(a), the third-party defendant must be one who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. "Third party practice under Rule 14(a) neither creates nor enlarges upon the substantive rights of the parties, but merely provides the procedure for the assertion of those rights under applicable . . . law." *Weil v. Dreher Pickle Company*, 76 F.R.D. 63, 66 (W.D. Okla. 1977). Put another way, "[a] Defendant may bring in a third party defendant only if the prospective third party defendant is or may be liable to the Defendant under substantive law." *Weil*, 76 F.R.D. at 65. As explained by the Tenth Circuit, "[i]f there is no right to relief under the substantive law, impleader is improper." *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1498 (10th Cir. 1983) (citation omitted). "If, for example, the governing law does not recognize a right to contribution or indemnity, impleader for these purposes cannot be allowed."

Wright & Miller, 6 *Fed. Prac. & Proc. Civ. 2d* § 1446.

However, "even when there is a substantive right that creates secondary liability in favor of a third-party plaintiff, it must be remembered that the court may exercise its discretion to dismiss a third-party complaint." *Blais Construction Company, Inc. v. Hanover Square Associates*, 733 F.Supp. 149, 158 (N.D.N.Y. 1990) (quotations and citation omitted). "The decision as to whether or not the claim should remain in the proceeding is left to the sound discretion of the court." *In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. 435, 437 (N.D. Okla. 2003). "Courts, in exercising their discretion whether third-party claims should be allowed or stricken, generally balance the benefits of allowing the claim to proceed against the potential prejudice to the plaintiff and the defendant in the lawsuit and, the third-party defendant." *In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. at 437. "Even if a Court concludes that a third-party action should not be stricken, Fed. R. Civ. Pro. 14(a) expressly recognizes that severance of the third-party claims may nevertheless be warranted. Alternatively, severance may be sought under Fed. R. Civ. Pro. 21, which provides that '[a]ny claim against a party may be severed and proceeded with separately.'" *In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. at 437. For instance, Fed. R. Civ. P. 42(b) provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . third-party claim." District courts have the inherent power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

III. ARGUMENT

Assuming *arguendo* that Poultry Integrator Defendants Tyson's and Cargill's contribution

and indemnity claims might be legally cognizable with respect to any of the State's causes of action -- and the State does not concede that they are -- these claims should be severed and stayed pending the outcome of the State's case. Impleader of hundreds of third-party defendants based on diverse facts separate and apart from the State's case -- each requiring its own science, independent proofs and expert testimony -- would not only prolong and add to the expense of the final adjudication of the State's lawsuit, but would also complicate and confuse the jury regarding the State's original claims against the Poultry Integrator Defendants. Because of the complexity of the issues at bar, the potential prejudice to the State would greatly outweigh the virtually non-existent benefits of third-party pleading practice in this case.

In any event, Poultry Integrator Defendants Tyson's and Cargill's third-party claims are solely for contribution and indemnity. As a matter of law, with the possible exception of CERCLA, Poultry Integrator Defendants Tyson's and Cargill's contribution claims are not legally cognizable with respect to any of the State's causes of action. Further, as a matter of law, Poultry Integrator Defendants Tyson's and Cargill's indemnity claims are not legally cognizable with respect to any of the State's causes of action. These contribution and indemnity claims should therefore be stricken or dismissed.

A. Assuming *Arguendo* that Poultry Integrator Defendants Tyson's and Cargill's Third-Party Claims Were Legally Cognizable, this Court Should Exercise its Discretion and Sever and Stay these Claims Pending the Outcome of the State's Case

In order to avoid the complication of the proceedings and undue prejudice to the State that the addition of more than 300 third-party defendants will create, this Court -- assuming *arguendo* that Poultry Integrator Defendants Tyson's and Cargill's third-party claims of contribution and indemnity were even legally cognizable -- should exercise its discretion to sever and stay those claims. *See* Fed. R. Civ. P. 14(a) ("Any party may move to strike the third-party

claim, or for its severance or separate trial"); Fed. R. Civ. P. 21 ("Any claim against a party may be severed and proceeded with separately"); Fed. R. Civ. P. 42(b) ("The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . third-party claim . . ").

When faced with a decision whether to sever and / or stay a third-party complaint, courts must use caution and guard against the numerous pitfalls that proceeding with a third-party action under Fed. R. Civ. P. 14 can create. "When considering a request to sever the impleader claim and for its separate trial, the court typically is concerned with the effect the additional parties and claims will have on the adjudication of the main action -- in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Arthur Andersen LLP v. Standard & Poor's Credit*, 260 F.Supp.2d 1123, 1125 (N.D. Okla. 2003) (quotations and citation omitted); *see also In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. at 438 (related ruling setting forth factors to be considered in whether to sever third-party claims and concluding that severance was appropriate). As explained by the Tenth Circuit, "[i]f impleading a third party defendant would require the trial of issues not involved in the controversy between the original parties without serving any convenience, there is no good reason to permit the third-party complaint to be filed." *United States Fidelity & Guaranty Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968) (quotations and citation omitted) (noting that the proposed third-party claims would have caused the "case to mushroom in all directions").[5]

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[5] Additionally, it is important to note that it is not at all unusual to sever third-party claims that are contingent in nature, such as indemnity and contribution, until the conclusion of the main case. *See, e.g., In re Kaiser Steel Corp.*, 110 B.R. 20, 25 (D. Colo. 1990) (holding that severance and stay of indemnification claims "until the outcome of the principal action is known" was proper "as a matter of expedition and economy"); *Beights v. W.R. Grace & Co.*, 62

Severance has been used by the courts in complex environmental cases. For example, in *United States v. Kramer*, 770 F.Supp. 954 (D.N.J. 1991), the court was asked to sever third-party contribution claims filed by defendants in a CERCLA cost recovery action.[6] Refusing to allow the defendants to join almost 300 third-party defendants, the court expressed a desire to prevent the trial of primary claims from becoming "bogged down by the contribution claims." *Kramer*, 770 F.Supp. at 959. The court explained:

> Trial of the third-party claims would involve both a significant multiplication of the number of parties (through the addition of nearly 300 third-party defendants) and a significant multiplication of the issues in the case (through the addition of, for example, the numerous equitable defenses not otherwise relevant to the primary [42 U.S.C. § 9607(a)] action). This would unduly complicate the issues in the trial of the primary claims, and would delay plaintiffs' prompt recovery of their response costs -- thereby frustrating section 107(a)'s purposes.

Kramer, 770 F.Supp. at 959. While acknowledging the arguments posed by the defendants that, if the third-party action were severed, some of the testimony and evidence might be repetitive, the *Kramer* court noted that those "concerns [were] outweighed by the prospect of overburdening the primary litigation." *Kramer*, 770 F.Supp. at 959. Central to the court's reasoning was the sheer number of third-party defendants: "[T]his is not an ordinary case -- it involves more than 50 primary defendants and almost 300 third-party defendants. In addition, the underlying statute in this case reflects Congress' intention that plaintiffs be able to recover their response costs

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F.R.D. 546, 548-49 (W.D. Okla. 1974) (holding that indemnity claim under Oklahoma law would be severed pending resolution of underlying suit).

[6] There is no presumption that CERCLA contribution claims be tried in the primary action. While 42 U.S.C. § 9613(f) provides for a contribution cause of action, CERCLA leaves the decision whether to sever claims against third parties for contribution to the discretion of the trial judge. In fact, "[o]n its face, the [CERCLA] statute expresses no preference either way with regard to whether the contribution claims should be severed; rather, it provides only that those claims may be brought 'during or following' the primary action." *Kramer*, 770 F.Supp. at 957 (emphasis added).

expeditiously." *Kramer*, 770 F.Supp. at 960 (emphasis in original).

Similarly, in *City of Wichita v. Aero Holdings, Inc.*, 2000 WL 1480490 (D. Kan. Apr. 7, 2000), the City of Wichita filed a CERCLA cost recovery action against 26 defendants. The defendants, in turn, moved for leave to assert contribution claims against 738 third-party defendants. The court weighed the benefit of a single action "against the delay, confusion, and complexity of adding" more than 700 third-party defendants, concluding that "[i]f the motion were granted, the case would 'mushroom' in all directions and greatly delay resolution of the principal case." *Aero Holdings*, 2000 WL 1480490, *2. In denying the motion, the court added that "[t]he impleading of 700-plus third party defendants would also create undue confusion and complexity." *Aero Holdings*, 2000 WL 1480490, *2.

In the instant action, impleader of more than 300 diverse third-party defendants based on numerous independent and unrelated facts and the adjudication of a host of legal and factual issues materially different from those presented in the original claim would unduly prolong, complicate, obscure, confuse, and add to the expense of the efforts of the State to establish its claims. Impleading the third-party defendants would introduce new sets of issues and require evidence distinct from that necessary for the adjudication of the primary claims. For example, for each of the 300+ third-party defendants, Poultry Integrator Defendants Tyson and Cargill would be required to prove, among other things, that the third-party defendant generated waste, that the waste constituents of the third-party defendant are the same as those of Poultry Integrator Defendants Tyson and Cargill, that the waste constituents of the third-party defendant were released into the IRW, and that the waste constituents of the third-party defendant contributed to the injury caused by Poultry Integrator Defendants Tyson and Cargill. The increased discovery burden on all the parties would be enormous.

Additionally, to the extent they are even subject to CERCLA, the third-party defendants are likely to assert multiple defenses to Poultry Integrator Defendants Tyson's and Cargill's claim to contribution under CERCLA. In that the defenses available to a 42 U.S.C. § 6907(a) cost recovery or NRD claim are limited to only those three provided for in 42 U.S.C. § 6907(b), while the defenses to a 42 U.S.C. § 6913(f) action are substantially broader and varied, there is the real risk that trying both claims at the same time "would unduly complicate the issues in the trial of the primary claims, and would delay plaintiffs' prompt recovery of their response costs -- thereby frustrating section 107(a)'s purposes." *See Kramer*, 770 F.Supp. at 959.

Further, the third-party claims will give (and have already given) rise to a sideshow of separate defenses, counterclaims and cross-claims. *See, e.g.,* City of Watts' Answer and Counterclaim to Third Party Complaint; Cross-Claim of Cargill Turkey Production, LLC Against City of Watts; Cross-Claim of Cargill, Inc. Against City of Tahlequah, City of Westville and City of Watts. If the third-party claims are not severed, the case will "mushroom in all directions" and result in a case management nightmare. In addition to tying up judicial resources, this will, in turn, delay the final adjudication of the merits of the State's claims, which would severely prejudice both the State and its citizens. Unless the third-party complaints are stricken or dismissed as the State requests below, the only way to prevent this incredible burden on the State, the third-party defendants, and the Court is severance of Poultry Integrator Defendants Tyson's and Cargill's third-party claims.

Finally, it is within the Court's discretion to stay all the proceedings against the third-party defendants. *See Landis*, 299 U.S. 248. A stay of <u>all</u> proceedings against the third-party defendants would be perfectly consistent with the logic of the "Third Party Plaintiffs' Opposed Motion to Enlarge Time in Which to Serve Third Party Complaint," wherein Poultry Integrator

Defendant Tyson reasoned that an extension would effectuate "efficient case management" inasmuch as it, among other things, "postpones [the third-party defendants'] need to retain counsel and the onset of litigation expenses until such time as it is absolutely necessary."[7]

B. Dismissal or Striking a Third-Party Complaint Is Appropriate Where, as in the Instant Action, Poultry Integrator Defendants Tyson and Cargill Seek Relief to Which They Are Not Entitled.

Underscoring the questionable motives of Poultry Integrator Defendants Tyson and Cargill in filing the third-party complaints is the fact that, with the possible exception of the third-party CERCLA contribution claim, none of the claims asserted by Poultry Integrator Defendants Tyson and Cargill is even legally viable. Interposing legally deficient claims does nothing but complicate and delay an already complex case and should not be tolerated. These claims should therefore be dismissed or stricken.

1. There Is No Right of Contribution or Indemnity in Favor of a Poultry Integrator Defendant Found Liable to the State under its Nuisance and Trespass Claims

a. State Law Nuisance and Trespass

The State has asserted claims against the Poultry Integrator Defendants under state law nuisance and trespass. FAC, ¶¶ 98-108 & 119-27. With respect to its state law nuisance and trespass claims, the State seeks to recover from the Poultry Integrator Defendants, jointly and severally, *inter alia,* monetary damages caused by the nuisance and trespass and equitable relief,

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[7] Assuming *arguendo* that a claim might even be made out against them legally or factually, it is worth noting that the cost of litigating against many of the individuals named as third-party defendants in the instant action would far outweigh any amount that these parties might eventually be called upon to contribute. This, as well as the previously-noted fact that the named third-party defendants are all located in Oklahoma, calls the motives of Poultry Integrator Defendants Tyson and Cargill into question. Poultry Integrator Defendants Tyson's and Cargill's real intention in asserting the third-party claims, it appears to the State, is to complicate this proceeding rather than to assert economically viable contribution claims (to the extent they even exist).

including an injunction requiring abatement of the conduct, payment of the costs of remediation and costs of assessment. Additionally, under these claims, the State is seeking exemplary and punitive damages. *See* FAC, ¶¶ 105-08 & 124-27. Tyson's Third-Party Complaint and Cargill's Third-Party Complaint, in turn, attempt to assert claims for contribution and indemnity under the State's state law nuisance and trespass claims against the third-party defendants. *See* Tyson's Third-Party Complaint, ¶ 203, & Cargill's Third-Party Complaint, ¶ 39. Inasmuch as the State's state law nuisance and trespass claims sound in intentional tort, however, claims for contribution do not exist against the third-party defendants. *See* FAC, ¶¶ 48-57, 99, 102 & 121. Specifically, 12 Okla. Stat. § 832(C) provides in unequivocal terms that "[t]here 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.)

Likewise, Poultry Integrator Defendants Tyson's and Cargill's claims for indemnity under the State's state law nuisance and trespass claims are unavailing. "The general rule of indemnity is that one without fault, who is forced to pay on behalf of another, is entitled to indemnification." *National Union Fire Insurance Co. v. A.A.R. Western Skyways, Inc.*, 784 P.2d 52, 54 (Okla. 1989) (emphasis added). In the State's lawsuit, the Poultry Integrator Defendants are being sued for their own actions, not for the actions of the third party defendants. Thus, the doctrine of indemnity is plainly not applicable.

Further, as explained by the Oklahoma Supreme Court, "the right of indemnity may arise out of an express (contractual) or implied (vicarious) liability. However, Oklahoma case law has always premised this right of indemnity on the understanding that a legal relationship exists between the parties. . . . Clearly then, there must exist a legal relationship arising out of either contractual or vicarious liability on which to base the remedy [of indemnity]." *A.A.R. Western*

Skyways, Inc., 784 P.2d at 54-55 (emphasis in original). In their third-party complaints, Poultry Integrator Defendants Tyson and Cargill have not alleged the existence of a contractual relationship between themselves and the third-party defendants. Neither have Poultry Integrator Defendants Tyson and Cargill alleged the existence of a legal relationship between themselves and the third-party defendants such that Poultry Integrator Defendants Tyson's and Cargill's liability to the State is solely a vicarious liability for the third-party defendants' primary alleged wrongful acts. These facts are fatal to Poultry Integrator Defendants Tyson's and Cargill's third-party indemnity claims.

Finally, in any event, it must be noted that "an intentional wrongdoer is not eligible to recover indemnity." *Olson Farms, Inc. v. Safeway Stores, Inc.*, 649 F.2d 1370, 1379 (10th Cir. 1979); *Tillman v. Shofner*, 90 P.3d 582, 585 (Okla. Civ. App. 2004). As noted above, the Poultry Integrator Defendants' conduct is alleged to be intentional. *See* FAC, ¶¶ 48-57, 99, 102 & 121. Thus, even assuming *arguendo* the existence of a cognizable relationship between Poultry Integrator Defendants Tyson or Cargill and the third-party defendants, Poultry Integrator Defendants Tyson's and Cargill's third-party indemnity claims would fail. Simply put, Poultry Integrator Defendants Tyson and Cargill have "no right to relief under the substantive law" of state law nuisance and trespass to contribution or indemnity, and therefore their third-party claims for contribution and indemnity are improper. *See Hefley*, 713 F.2d at 1498.

b. Federal Common Law of Nuisance

The State has also asserted a claim against the Poultry Integrator Defendants under the federal common law of nuisance. FAC, ¶¶ 109-18. With respect to the federal common law of nuisance claim the State seeks to recover from the Poultry Integrator Defendants, jointly and severally, *inter alia,* monetary damages caused by the nuisance and equitable relief, including an

injunction requiring abatement of the conduct, payment of the costs of remediation, and costs of assessment. Additionally, under this claim, the State is seeking exemplary and punitive damages. *See* FAC, ¶¶ 116-18. Tyson's Third-Party Complaint and Cargill's Third-Party Complaint, in turn, attempt to assert claims for contribution and indemnity under the federal common law of nuisance against the third-party defendants. *See* Tyson's Third-Party Complaint, ¶ 203, & Cargill's Third-Party Complaint, ¶ 39. In this case, claims for contribution and indemnity under federal common law of nuisance, however, do not exist against the third-party defendants.

"Federal common law is generally based on the prevailing view among the states. These prevailing views are in turn distilled primarily from the American Law Institute's Restatements of the Law and treatises." *La Belle Management, Inc. v. Great-West Life Assurance Co.*, 2001 WL 1924620, *1 (E.D. Mich. Oct. 24, 2001) (citations omitted); *see also In re Sunrise Securities Litigation*, 793 F.Supp. 1306, 1317 (E.D. Pa. 1992) ("The Restatements of Law, which represent comprehensive statements of general principles adhered to by the various states, can also serve as a source of the federal common law"). It logically follows that the Restatement (Second) of Torts should be looked to in determining whether, under the federal common law of nuisance, Poultry Integrator Defendants Tyson's and Cargill's claims for contribution or indemnity against the third-party defendants are viable. Inasmuch as the State has alleged that Poultry Integrator Defendants' conduct has been intentional, *see* FAC, ¶¶ 48-57 & 110-13, the claims for contribution against the third-party defendants plainly are not viable. Section 886A(3) of the Restatement of Torts expressly provides that "[t]here is <u>no</u> right of contribution in favor of any tortfeasor who has intentionally caused the harm." Restatement (Second) of Torts, § 886A(3) (emphasis added).

Similarly, under the federal common law of nuisance, Poultry Integrator Defendants Tyson's and Cargill's claims against the third-party defendants for indemnity are not viable either. Given that no contractual basis is alleged for Poultry Integrator Defendants Tyson's and Cargill's indemnification claims, it necessarily follows that if they are to be viable the claims must arise out of vicarious liability. *See* Restatement (Second) of Torts, § 886B (listing instances where indemnity is appropriate). However, no legal relationship is alleged to exist between Poultry Integrator Defendants Tyson or Cargill and the third-party defendants, and thus there can be no vicarious liability. Further, as noted above, even assuming *arguendo* that such a relationship were to exist, given that Poultry Integrator Defendants Tyson's and Cargill's conduct has been intentional, the claims would as a matter of law fail. *See Olson Farms*, 649 F.2d at 1379 (the rule that an intentional wrongdoer is not eligible to recover indemnity "applies whether recovery is being sought under federal common law . . . or state law . . ."). Therefore, Poultry Integrator Defendants Tyson's and Cargill's claims for indemnification against the third-party defendants under the State's federal common law of nuisance claim must fail. *See Hefley*, 713 F.2d at 1498.

2. There Is No Right of Contribution or Indemnity in Favor of a Poultry Integrator Defendant Found Liable to the State under its Unjust Enrichment Claim

The State has asserted an unjust enrichment claim against the Poultry Integrator Defendants. FAC, ¶¶ 140-47. With respect to the unjust enrichment claim the State seeks restitution and disgorgement of all gains the Poultry Integrator Defendants have realized in consequence of their wrongful conduct. *See* FAC, ¶ 147. Tyson's Third-Party Complaint and Cargill's Third-Party Complaint, in turn, have attempted to assert claims for contribution and indemnity under unjust enrichment against the third-party defendants. *See* Tyson's Third-Party

Complaint, ¶ 203, & and Cargill's Third-Party Complaint, ¶ 39.

These claims fail, however, because they fail to appreciate that the focus of the remedies of restitution and disgorgement is on the unjust enrichment (*i.e.*, gain) enjoyed by the violator. *See, e.g., French Energy, Inc. v. Alexander*, 818 P.2d 1234, 1237 (Okla. 1991) ("Recovery, based on unjust enrichment depends upon a showing that [defendants] have money in their hands that, in equity and good conscience, they ought not be allowed to retain"). In the present case, that unjust enrichment is "the costs of properly managing and disposing of their poultry waste." *See* FAC, ¶ 142. As the FAC presently stands, the State has not alleged that each of the Poultry Integrator Defendants is jointly and severally liable for the whole of the unjust enrichment -- that is both each Poultry Integrator Defendant's individual unjust enrichment, as well as all of the other Poultry Integrator Defendants' respective unjust enrichments. The Oklahoma contribution statute makes clear that a prerequisite to a right of contribution under Oklahoma law is joint or several liability. *See* 12 Okla. Stat. § 832(A) ("When two or more persons become <u>jointly or severally</u> liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them except as provided in this section") (emphasis added). Accordingly, the third-party claims for contribution under the claim for unjust enrichment should be stricken. *See Hefley*, 713 F.2d at 1498.

Additionally, the third-party claims for indemnity should be stricken because -- as noted above -- Poultry Integrator Defendants Tyson and Cargill have not alleged in the third-party complaints either a contractual relationship or a basis for vicarious liability between themselves and the third-party defendants, thereby dooming these claims as well. *See A.A.R. Western Skyways, Inc.*, 784 P.2d at 54-55. Further, as noted above, the Poultry Integrator Defendants'

conduct is alleged to be intentional, thus further underscoring the lack of merit of the indemnity claims. *See Tillman*, 90 P.3d at 585.

3. There Is No Right of Contribution or Indemnity in Favor of a Poultry Integrator Defendant Found Liable to the State under its State-Law Statutory Claims

The State has asserted claims against the Poultry Integrator Defendants for violations of the Oklahoma Environmental Quality Code, *see* FAC, ¶¶ 128-32, the Oklahoma Agricultural Code, *see* FAC, ¶¶ 128-32, the Oklahoma Registered Poultry Feeding Operations Act, *see* FAC, ¶¶ 133-36, and the Oklahoma Concentrated Animal Feeding Operations Act, *see* FAC, ¶¶ 137-39.[8] With respect to these claims, the State seeks, *inter alia,* an assessment of penalties against the Poultry Integrator Defendants for each violation together with attorney fees and costs, injunctive relief, and all such other relief as may be provided for under the law. *See* FAC, ¶¶ 132, 136 & 139. Tyson's Third-Party Complaint and Cargill's Third-Party Complaint, in turn, attempt to assert claims for contribution and indemnity under the State's state-law statutory claims against the third-party defendants. *See* Tyson's Third-Party Complaint, ¶ 203, & Cargill's Third-Party Complaint, ¶ 39. Inasmuch as the focus of these state-law statutory claims is regulating and deterring conduct rather than compensating for injury, however, claims for contribution do not exist against the third-party defendants.

The language of each of the state-law statutory provisions at issue demonstrates this underlying purpose. First, each provision speaks in terms of prosecuting "violations" by individual actors. *See, e.g.,* 27A Okla. Stat. § 2-3-504(E) ("prosecution of a violation by any person"); 2 Okla. Stat. § 10-9.11(A)(2) ("prosecution of a violation by any person"); 2 Okla. Stat.

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[8] These claims are distinct from the nuisance *per se* claims made within Count 4 of the FAC. As explained in *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982), "[w]hen the conditions giving rise to a nuisance are also a violation of a statutory prohibition, those conditions constitute a nuisance *per se* . . . ."

§ 20-26(E) ("prosecution of a violation by any person"). Second, each provision speaks in terms of regulating and deterring conduct rather than compensating injury caused by violations. 27A Okla. Stat. § 2-3-504(E) & (F) (providing for recovery of penalties, mandatory or prohibitive injunctive relief, interim equitable relief and punitive damages); 2 Okla. Stat. § 10-9.11(C) (providing for recovery of penalties, mandatory or prohibitive injunctive relief, interim equitable relief and punitive damages); 2 Okla. Stat. § 20-26(E) & (F) (providing for recovery of penalties, mandatory or prohibitive injunctive relief, interim equitable relief and punitive damages). Since none of the state-law statutory schemes at issue expressly provides for compensatory damages, an injury is not being compensated for, and it follows that a right of contribution would be inconsistent with these state-law statutory schemes.

Indeed, underscoring that a right of contribution does not exist with respect to violations of these state-law statutes, and the remedies provided therein, is the fact that these state-law statutes nowhere provide for the imposition of joint or several liability.[9] A prerequisite to a right of contribution under Oklahoma law is joint or several liability in tort. *See* 12 Okla. Stat. § 832(A). Where a statutory scheme does not provide for a right of contribution, courts should not create one. *See, e.g., Sears v. Atchison, Topeka & Santa Fe Railway Co.*, 749 F.2d 1451, 1454 (10th Cir. 1984) ("The Supreme Court stated that it was unwilling to create a contribution remedy for a statutory violation when Congress had not manifested any intent that a right of contribution should exist"). Simply put, Poultry Integrator Defendants Tyson's and Cargill's third-party claims for contribution that arise out of their violations of these state-law statutes must fail.

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[9] Given that the activities of many of the third-party defendants do not even bring them within the ambit of conduct the Oklahoma Agricultural Code is intended to regulate, it would in fact be impossible for their conduct to constitute a violation of that Code. *See, supra,* footnote 3.

As to the third-party indemnity claims asserted by Poultry Integrator Defendants Tyson and Cargill under the State's state-law statutory claims, as noted above, Poultry Integrator Defendants Tyson and Cargill have not alleged in the third-party complaints either a contractual relationship or a basis for vicarious liability between themselves and the third-party defendants. *See A.A.R. Western Skyways, Inc.*, 784 P.2d at 54-55. Therefore, these claims fail as well.

4. There Is No Right of Contribution or Indemnity in Favor of a Poultry Integrator Defendant Found Liable to the State under its RCRA Claim

The State has asserted, pursuant to RCRA, a citizen suit claim under 42 U.S.C. § 6972(a)(1)(B) against the Poultry Integrator Defendants. FAC, ¶¶ 90-97. With respect to the RCRA claim the State seeks, *inter alia,* an injunction requiring the Poultry Integrator Defendants to abate the endangerment to health or the environment, as well as reasonable attorney and expert witness fees. *See* FAC, ¶¶ 96-97. Tyson's Third-Party Complaint and Cargill's Third-Party Complaint, in turn, have attempted to assert claims for contribution and indemnity under RCRA against the third-party defendants. *See* Tyson's Third-Party Complaint, ¶ 221, & and Cargill's Third-Party Complaint, ¶ 56.

Claims for contribution and indemnity under RCRA, however, do not exist. *FCA Associates v. Texaco, Inc.*, 2005 WL 735959, *3 (W.D.N.Y. Mar. 31, 2005) ("There is no remedy of contribution under RCRA . . ."); *Aero-Motive Company v. Becker*, 2001 WL 1699194, *6 (W.D. Mich. Dec. 6, 2001) ("Under § 6972(a)(1)(B) of RCRA, contribution claims are not available . . ."); *Davenport v. Neely*, 7 F.Supp.2d 1219, 1226-31 (M.D. Ala. 1998) (holding that defendants did not have a right to indemnity and contribution under RCRA); *see also United States v. Domestic Industries, Inc.*, 32 F.Supp.2d 855 (E.D. Va. 1999) (declining to recognize contribution or indemnity claim for civil penalties under RCRA). The simple reason that there is

no right of contribution or indemnity under RCRA is because RCRA is not a statute aimed at compensation. As explained by the Supreme Court:

> . . . RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. RCRA's primary purpose, rather, 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." . . . RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts. Under a plain reading of this remedial scheme, a private citizen suing under § 6972(a)(1)(B) could seek a mandatory injunction, *i.e.*, one that orders a responsible party to "take action" by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, *i.e.*, one that "restrains" a responsible party from further violating RCRA.

Meghrig v. KFC Western, Inc., 516 U.S. 479, 484-85 (1996) (internal citation omitted). In sum, Poultry Integrator Defendants Tyson's and Cargill's third-party claims for contribution and indemnity under the State's RCRA claim are not viable.

5. There Is No Right of Indemnity in Favor of a Poultry Integrator Defendant Found Liable to the State under its CERCLA Claims, and, Further, Whether a Poultry Integrator Defendants Found Liable to the State under its CERCLA Claims Is Entitled to Contribution Is Questionable.

The State has asserted, pursuant to CERCLA, a cost recovery claim and a natural resource damages claim against the Poultry Integrator Defendants. FAC, ¶¶ 70-77 & 78-89. With respect to the CERCLA cost recovery claim, the State seeks to recover from the Poultry Integrator Defendants, jointly and severally, *inter alia,* all of its past and present necessary response costs, as well as being entitled to a declaratory judgment holding the Poultry Integrators liable, again jointly and severally, for all future further necessary response costs. *See* FAC, ¶ 77. With respect to the CERCLA natural resource damages claim, the State seeks to recover from the Poultry Integrator Defendants, jointly and severally, *inter alia,* damages for injury to, destruction of, and loss of these natural resources, including but not limited to (a) the cost to restore, replace,

or acquire the equivalent of such natural resources, (b) the compensable value of lost services resulting from the injury to such natural resources, and (c) the reasonable cost of assessing injury to the natural resources and the resulting damages. *See* FAC, ¶ 89. Tyson's Third-Party Complaint and Cargill's Third-Party Complaint, in turn, attempt to assert CERCLA contribution and indemnity claims pursuant to 42 U.S.C. § 9613(f) against the third-party defendants. *See* Tyson's Third-Party Complaint, ¶¶ 209-11 & 215-16, & and Cargill's Third-Party Complaint, ¶¶ 45-46 & 51-52.

Taking the issue of the indemnity claims first, it is clear that Poultry Integrator Defendants Tyson's and Cargill's third-party claims for indemnity are not viable under the State's CERCLA claims. *See, e.g., United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 (1st Cir. 1990) ("we refuse to read into the [CERCLA] statute a right to indemnification"); *Central Illinois Public Service Co. v. Industrial Oil Tank & Line Cleaning Service*, 730 F.Supp. 1498, 1507 (W.D. Mo. 1990) ("[I]nferring equitable indemnity would be inconsistent with the letter and intent of CERCLA. . . . CERCLA does not establish a right to indemnity"). As explained by the *Cannons Engineering* court, "Appellants allege no contractual basis for indemnification. Their noncontractual indemnity claim, by definition and extrapolation, 'is in effect only a more extreme form of [a claim for] contribution.'" *Cannons Engineering*, 899 F.2d at 92 (citations omitted). The identical reasoning applies here. Therefore, Poultry Integrator Defendants Tyson's and Cargill's third-party claims for indemnity under the State's CERCLA claims are not viable and should be stricken.

That leaves Poultry Integrator Defendants Tyson's and Cargill's CERCLA contribution claims to be addressed. Before proceeding, however, it must be recognized at the outset that there exists a clear distinction between a CERCLA cost recovery or natural resource damages

claim under 42 U.S.C. § 9607(a) and a CERCLA contribution claim under 42 U.S.C. § 9613(f). 42 U.S.C. § 9607(a) establishes a federal cause of action in strict liability. *See United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995) ("[I]t is now well settled that § 107 [42 U.S.C. § 9607(a)] imposes strict liability on PRPs for costs associated with hazardous waste cleanup and site remediation. . . . It is also well settled that § 107 imposes joint and several liability on PRPs regardless of fault") (citations omitted). In contrast, contribution claims under CERCLA are fault-based. *See Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1240 (7th Cir. 1997) ("§ 113(f) [42 U.S.C. § 9613(f)] exists for the express purpose of allocating fault among PRPs"). Notably, because of these differences, trial of cost recovery claims together with contribution claims results in "a significant multiplication of the issues in the case" and "unduly complicates the trial of the primary claims." *See Kramer,* 770 F.Supp. at 959.

Against this backdrop -- namely that, unlike CERCLA cost recovery and NRD claims, CERCLA contribution claims are fault-based -- it is open to question whether, under the facts, the Poultry Integrator Defendants found liable to the State under its CERCLA claims would even be entitled to contribution from the third-party defendants. Specifically, there is authority indicating that intentional actors under CERCLA do not have a right of contribution.[10] *See United States v. Ward*, 618 F.Supp. 884, 911 (E.D.N.C. 1985) (defendant "may not seek contribution from the third-party defendants for the cleanup costs of the spills in those counties as he is an intentional tortfeasor") (citing, *inter alia*, Restatement (Second) of Torts, §

[10] To the extent they are even subject to CERCLA, the third-party defendants will likely also have a number of other defenses which would impact Poultry Integrator Defendants Tyson's and Cargill's claims for contribution under CERCLA.

886A(3)).[11] Thus, there are valid grounds to question the viability of Poultry Integrator Defendants Tyson's and Cargill's CERCLA contribution claims against the third-party defendants. Given the uncertainties of Poultry Integrator Defendants Tyson's and Cargill's third-party CERCLA contribution claims and the fact that such claims raise issues that materially differ from the State's 42 U.S.C. § 9607(a) strict liability claim, prudence dictates that the third-party CERCLA contribution claim be stricken or dismissed, or at least severed and stayed. *See* Fed. R. Civ. P. 14(a). To do otherwise would inject an unnecessary level of complication and confusion into the case at the expense of the State's CERCLA claims. *See Kramer*, 770 F.Supp. at 959.

IV. CONCLUSION

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[11] While the *Ward* decision predates the 1986 amendment of CERCLA codifying the previously implied right of contribution, there is nothing in either the language of 42 U.S.C. § 9613(f) -- the CERCLA contribution provision -- nor the legislative history to indicate that Congress intended to abrogate the long-standing rule that intentional tortfeasors are not entitled to contribution. Indeed, the legislative history indicates just the opposite. *See* H.R. Rep. No. 99-253, Part I, at 80 (Committee on Energy and Commerce) (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 ("As with joint and several liability issues, contribution claims will be resolved pursuant to Federal common law"). That Congress did not intend to change the common law should come as no surprise, however. "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104, 108 (1991). "Statues which invade the common law . . . are to be read with a presumption favoring retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citations and quotations omitted). Plainly, "§ 113(f) uses the term contribution in its traditional, common law sense." *In the Matter of Reading Company*, 115 F.3d 1111, 1124 (3rd Cir. 1997).

Against this backdrop, courts in this Circuit have looked to the Restatement (Second) of Torts in determining the federal common law as it pertains to contribution. *See, e.g., United States v. Colorado & Eastern Railroad Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (citing Restatement (Second) of Torts, § 886A and stating that "any claim that would reapportion costs between these parties is the quintessential claim for contribution"); *Sand Springs Home v. Interplastic Corp.*, 670 F.Supp. 913, 917 (N.D. Okla. 1987) (noting that "the parties do not disagree that § 886A governs the mechanics of contribution under CERCLA"); *accord United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 577 (6th Cir. 1991) ("The proper standard for contribution is that contained in section 886A of the Restatement") (concurring opinion). Section 886A(3) of the Restatement is explicit: "There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm." Restatement (Second) of Torts, § 886A(3).

WHEREFORE, premises considered, the State respectfully requests this Court to enter an Order severing and staying and / or striking or dismissing the claims asserted in Tyson's Third-Party Complaint and Cargill's Third-Party Complaint. The State requests oral argument on this motion.

Respectfully submitted,

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