HON. JEFFREY H. LANGTON
District Judge

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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

RONALD L. KOHLER and BARBARA J. KOHLER, husband and wife; THOMAS F. JONES and RITA JONES, husband and wife; DENNIS A. ARNOLD and GERALDINE N. ARNOLD, husband and wife; and DEBRA K. SYKES,	CASE NO. DV 09-1
Plaintiffs,	**OPINION & ORDER**
-vs-	
KELLER TRANSPORT, INC.; CONOCOPHILLIPS COMPANY; ERICKSON PETROLEUM CORPORATION; WAGNER ENTERPRISES, LLC; AND DOES 1-10,	
Defendants.	

This matter came on for hearing on July 17, 2009, upon motions to dismiss filed by Defendants Keller Transport, Inc. ("Keller"); Erickson Petroleum Corporation ("Erickson"); and Wagner Enterprises, LLC ("Wagner"). After hearing oral argument, and upon review of the briefs and the law, the Court now issues its *Opinion & Order*.

(45)

Also pending is a request by Defendant ConocoPhillips Company ("CPC") that the Court direct Plaintiffs to respond to CPC's motion for summary judgment, and set the motion for hearing.

I. SHOULD ERICKSON'S MOTION TO DISMISS BE GRANTED?

A. Parties' arguments

In their *First Amended Complaint & Jury Demand* ("Complaint") filed on February 4, 2009, Plaintiffs seek various damages for nine causes of action arising out of Defendants' alleged tortious acts. All causes of action are set forth against all Defendants.

Erickson moves for dismissal of all of Plaintiffs' claims against it on the ground that Plaintiffs have not stated any claim against Erickson upon which relief can be granted. Erickson submits the *Affidavit of Richard A. Mills* in support of its motion.

Plaintiffs counter that their Complaint complies with the requirement, pursuant to Rule 8(a), M.R.Civ.P., that it contain a "short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Plaintiffs argue that at this early stage in litigation, this is all the law requires. Plaintiffs have submitted the *Affidavit of Timothy Bechtold*, one of Plaintiffs' attorneys, along with their brief in opposition to Erickson's motion, for the Court's consideration in the event the Court considers Mr. Mills's affidavit on behalf of Erickson.

Because the affidavits of Richard Mills and Timothy Bechtold constitute matters outside the pleading, pursuant to Rule 12(b), M.R.Civ.P., the Court has excluded the affidavits from its consideration of the motions at issue.

B. Legal authority

A motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P. is viewed with disfavor, and a complaint should be dismissed only if the allegations in the complaint clearly demonstrate that

the plaintiff does not have a claim. *Steele v. McGregor*, 1998 MT 85, ¶ 9, 288 Mont. 238, ¶ 9, 956 P.2d 1364, ¶ 9. "In considering a motion to dismiss, 'the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.' " *Id.* In contrast, allegations of conclusions of law contained in a complaint, which present no issuable facts, need not be accepted as true. *Commonwealth Edison Co. v. State*, 189 Mont. 191, 193, 615 P.2d 847, 849 (1980).

A court evaluating a motion to dismiss is only allowed to examine whether a claim has been adequately stated in the complaint; the court's examination is limited to the content of the complaint. *Stokes v. Montana Dept. of Transportation*, 326 Mont. 138, ¶ 7, 107 P.3d 494, ¶ 7, 2005 MT 42, ¶ 7, citing *Plouffe v. State,* 2003 MT 62, ¶ 13, 314 Mont. 413, ¶ 13, 66 P.3d 316, ¶ 13. The Montana Supreme Court has set a high standard for dismissal of a complaint for failure to state a claim:

> As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that the plaintiff does not have a claim.

Glaude v. State Compensation Ins. Fund, 271 Mont. 136, 139, 894 P.2d 940, 942 (1995), citing *Wheeler v. Moe*, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973).

The United States Supreme Court has addressed the issue of the sufficiency of allegations in a complaint, pursuant to Rule 8(a) of the Federal Rules of Civil Procedure, to withstand dismissal, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a case Erickson has cited as legal authority. The *Twombly* plaintiffs brought a putative class action against local exchange carriers, Bell Atlantic Corporation, *et al.*, alleging antitrust conspiracy in violation of the

Sherman Act. *Twombly*, 550 U.S. at 550. The complaint was dismissed in the United States district court for failure to state a claim upon which relief can be granted. *Id.*, 550 U.S. at 552. The Court of Appeals for the Second Circuit reversed, holding that the district court had "tested the complaint by the wrong standard." *Id.*, 550 U.S. at 553. The United States Supreme Court granted certiorari to address the proper standard for pleading an antitrust conspiracy, and ultimately reversed the Court of Appeals. *Id.*, 550 U.S. at 553, 570.

Noting that the rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," language identical to Rule 8(a) of the Montana Rules of Civil Procedure, the United States Supreme Court stated:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, (citation omitted), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do (citation omitted). Factual allegations must be enough to raise a right to relief above the speculative level (citation omitted).

Id., 550 U.S. at 555-56. The court remarked on the need for allegations in a complaint to raise a claim of entitlement to relief in order to avoid groundless claims that would allow a plaintiff to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," and to expose such pleading deficiencies "at the point of minimum expenditure of time and money by the parties and the court." *Id.*, 550 U.S. at 557-58. After observing that the Sherman Act does not prohibit all unreasonable restraints of trade, but only those effected by a contract, combination, or conspiracy, the court went on to analyze the complaint and determined that plaintiffs' allegations "[came] up short." *Id.*, 550 U.S. at 553, 564. Specifically, the court concluded that the factual allegations, separated out from the conclusions of law alleged in the complaint, suggested merely a *possibility* (or mere

conceivability) of entitlement to relief rather than a *plausibility* of entitlement, and thus deserved to be dismissed for failure to state a claim. *Id.*, 550 U.S. at 564-70.

In its discussion, the court commented on language in Justice Black's opinion in *Conley v. Gibson*, 355 U.S. 41 (1957) which "spoke not only of the need for fair notice of the grounds for entitlement to relief but of 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.*, 550 U.S. at 561, citing *Conley*, 355 U.S. at 45-46. (This is the current standard for dismissal under Montana law.) The Supreme Court opined that this oft-quoted phrase has puzzled the legal profession for 50 years and has earned its retirement: "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint (citation omitted)." *Id.*, 550 U.S. at 563.

B. Discussion

Plaintiffs' Complaint alleges the following general factual allegations relevant to all of their causes of action:

- Defendants are engaged in the manufacture, distribution, and/or transportation of petroleum products, including gasoline, in Montana. *First Amend. Compl.*, ¶ 10.

- Each act or omission, including each unlawful and/or negligent act or omission, was committed by an employee and/or agent of Defendants, who was acting within the course and scope of his or her employment and/or agency with Defendants and in furtherance of Defendants' business interests. *Id.*, ¶ 11.

- On April 2, 2008, Defendants "negligently and/or unlawfully caused toxic substances, including gasoline, to enter the soil and groundwater on and near Montana Highway 35 by East Bay of Flathead Lake in Lake County, Montana (release site)." *Id.*, ¶ 12.

- The toxic substances migrated through soil and/or groundwater onto and into Plaintiffs' properties. *Id.*, ¶ 13.

- As a result of Defendants' negligent and/or unlawful conduct, Plaintiffs have suffered damages. *Id.*, ¶ 14.

Plaintiffs' Complaint sets forth nine causes of action against all Defendants: (1) negligence, (2) public nuisance, (3) private nuisance, (4) trespass, (5) strict liability for abnormally dangerous activity, (6) breach of nondelegable duty, (7) violation of Article II, Section 3 of the Montana Constitution, (8) restitution for unjust enrichment, and (9) wrongful occupation of real property.

Plaintiffs' Complaint is long on conclusions of law and short on factual allegations. But for the newspaper reports in April 2008, the Court would not know that this action arises from a highway accident that occurred when a petroleum tanker truck pulling a pup trailer loaded with gasoline overturned and spilled its contents down the side of the highway toward Flathead Lake. However, after analysis, the Court determines that Plaintiffs' scant factual allegations are adequate to withstand Erickson's Rule 12(b)(6) motion for dismissal. Furthermore, they suggest a plausibility of entitlement to relief, rather than a possibility of entitlement to relief.

1. First Cause of Action - Negligence

In support of this claim, Plaintiffs allege Defendants owed Plaintiffs a duty to act with reasonable care and to conduct their business operations in a manner which would not jeopardize Plaintiffs' property, person, and interests; Defendants beached their duty by negligently and/or unlawfully handling, releasing, spilling, and/or failing to control and monitor the toxic substances that were released; and Plaintiffs suffered damages. *Id.*, ¶¶ 16-18. Plaintiffs allege Defendants breached their duty by failing to (a) properly transport toxic substances; (b) use appropriate

transportation and/or containment equipment and methods to prevent contamination of the soil and groundwater; (c) properly train and/or supervise employees, agents, and/or contractors handling toxic substances; (d) contain toxic substances in the soil and groundwater after Defendants knew or should have known they had polluted Plaintiffs' properties; (e) warn Plaintiffs and the public of the hazards and other issues associated with the contamination of Plaintiffs' properties; (f) clean up the pollution on Plaintiffs' properties and restore the properties in a timely and effective manner; and (g) comply with applicable industry standards, internal rules, and laws governing the safe use, handling, disposal, investigation, and/or clean-up of toxic substances. *Id.*, ¶ 17.

Erickson argues that in construing the Complaint in a light most favorable to Plaintiffs, Plaintiffs' allegations of negligence are based on a theory of Erickson's vicarious liability for Keller's activities. In the absence of any factual allegations to support a finding that Keller was an agent of Erickson's—such as, that Erickson engaged Keller to undertake tasks on behalf of a third party or the public generally, or that Erickson delegated to Keller tasks that Erickson undertook to perform for others—Erickson argues this claim must fail.

Plaintiffs counter that under their allegations, Erickson is directly and vicariously liable.

Additionally, Plaintiffs contend that in pursuing its motion to dismiss, Erickson has admitted Plaintiffs' allegations, citing *Missoula City-County Air Pollution Control Bd. v. Board of Envtl. Review*, 282 Mont. 255, 937 P.2d 463 (1997), as legal authority. *Pls.' Br. in Opp'n to Erickson Petroleum's Mot. to Dismiss*, 4. (Plaintiffs make the assertion numerous times throughout their brief that Erickson has admitted their allegations, an assertion Erickson vehemently denies.) Plaintiffs mis-state the law in *Missoula City-County Air Pollution Control*

Board, which holds that a motion to dismiss "has the effect of admitting all well-pled allegations in the complaint." *Missoula City-County Air Pollution Control Bd.*, 282 Mont. at 259, 937 P.2d at 466. (Emphasis added.) Erickson, which has not yet filed its answer, has to date admitted to none of the allegations in Plaintiffs' Complaint.

Erickson's argument is based on facts that are not contained in the Complaint or properly considered on a motion to dismiss. Plaintiffs factual allegations, that Erickson's or its agent's negligent transport of gasoline caused Plaintiffs damages, set forth a claim adequate to withstand dismissal.

2. Second and Third Causes of Action - Public Nuisance and Private Nuisance

Plaintiffs allege Defendants' conduct resulted in a public and private nuisance because the contamination to their properties resulting from Defendants' activities is injurious to health and offensive to the senses; it obstructs the free use of property, interfering with the comfortable enjoyment of life and property; it prevents Plaintiffs' ordinary and lawful use of their property; and it affects a considerable number of persons including all property owners and residents in the vicinity. *First Amend. Compl.*, ¶¶ 20-21, 25.

Noting that the Montana Supreme Court has recognized two types of nuisance—*per se* or at law, and *per accidens* or in fact[1]—Erickson argues that any *per se* nuisance claim must fail pursuant to § 27-30-101(2), MCA, which provides that an activity that is authorized by statute (in this case, the transport of gasoline) cannot constitute an absolute nuisance as a matter of law. Erickson argues that any *per accidens* nuisance claim must also fail because Plaintiffs have failed

[1] *Barnes v. City of Thompson Falls*, 1999 MT 77, ¶ 17, 294 Mont. 76, ¶ 17, 979 P.2d 1275, ¶ 17.

to plead facts which, if proved, would support a finding of negligence against Erickson for torts committed by Keller under Montana law; and thus, because Erickson cannot be found negligent as a matter of law, there are insufficient allegations to support a finding of nuisance *per accidens*.

Plaintiffs respond that Erickson wrongly assumes that the nuisance they have alleged is the transport of gasoline, when the nuisance they allege is the direct contamination of their properties by gasoline. They argue that a nuisance *per se*, or absolute nuisance, which the Montana Supreme Court has described as: "the substance ... of which is not negligence, which obviously exposes another to probable injury,"[2] exists without regard to negligence, and thus their allegations of nuisance *per se* are adequate. Plaintiffs quote the Montana Supreme Court's definition of nuisance *per accidens*, or qualified nuisance: a "nuisance dependent on negligence [that] consists of anything lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which, in due course, results in injury to another"[3]; Plaintiffs argue that because their prior allegations of negligence against Erickson are to be taken as true for purposes of Erickson's motion to dismiss, they have set forth allegations adequate to withstand dismissal regardless of whether the nuisance may have been authorized by statute.

Plaintiffs have set forth factual allegations adequate to withstand dismissal of their nuisance claims.

3. Fourth Cause of Action - Trespass

Plaintiffs allege Defendants intentionally, negligently, without just cause, and/or as a result of abnormally dangerous activity, committed trespass by causing toxic substances,

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[2] *Barnes*, ¶ 18.

[3] *Id.*

including gasoline, to invade the their real property, and by failing to remove the contamination from their properties. *First Amend. Compl.*, ¶ 29.

Erickson argues Plaintiffs have failed to state a claim for intentional trespass as a matter of law because Plaintiffs have not alleged any facts to support a finding that Erickson intentionally caused gasoline to enter their properties or had a duty to remove the gasoline from their properties. Erickson argues Plaintiffs have failed to state a claim for negligent trespass as a matter of law because Plaintiffs have not alleged any facts to show it owed a duty to Plaintiffs and proximately caused their harm.

Plaintiffs contend their allegation of intentional trespass focuses solely on Erickson's failure to remove the gasoline contamination from Plaintiffs' properties. Plaintiffs note that the Montana Supreme Court has adopted the elements of the tort of intentional trespass to real property set forth in the Restatement (Second) of Torts, § 158:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in possession of the other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.

Ducham v. Tuma, 265 Mont. 436, 440, 877 P.2d 1002, 1005 (1994), overruled on other grounds by *Shammel v. Canyon Resources Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912. As to negligent trespass, Plaintiffs contend their allegation that Erickson's negligence was the proximate cause of the trespass of contamination (i.e., gasoline) upon their properties is sufficient to set forth this claim.

Plaintiffs have set forth allegations adequate to survive a motion to dismiss.

4. Fifth Cause of Action - Strict Liability for Abnormally Dangerous Activity

Plaintiffs allege Defendants conducted abnormally dangerous and ultra-hazardous activity at the release site (the site of the accident and gasoline spill), and as a result of this activity, they have suffered damages. *First Amend. Compl.*, ¶¶ 32-33. Plaintiffs allege Defendants' transport and handling of toxic substances, including gasoline, at the release site constituted abnormally dangerous and ultra-hazardous activity in that the activity: (a) creates a high degree of risk of serious harm to the environment, persons, land, and chattels of others; (b) creates a strong likelihood that great harm will result from an escape of the toxic substances; (c) was not a matter of common usage which would be carried on by the great mass of mankind or many people in the community; (d) was inappropriate based on the prevailing conditions including close proximity to residential property; and (e) has value which is outweighed by the likelihood of resulting harm, based on the close proximity to residential property in which it was carried on. *Id.*, ¶ 32.

Erickson contends there is no plausible argument that its activities were in any way a proximate cause of the accident, nor can it be held liable under a strict liability theory. Erickson further argues that transporting gasoline is not an abnormally dangerous activity as a matter of law, citing the Restatement (Second) of Torts, §§ 519 and 520.

Plaintiffs counter that: (1) the Montana Supreme Court has recognized a cause of action arising out of an abnormally dangerous activity; (2) Plaintiffs have clearly alleged a cause of action or abnormally dangerous activity; and (3) after discovery, the Court can review the evidentiary record to determine whether Defendants' activity of transporting and handling gasoline at the release site is abnormally dangerous.

In their general allegations set forth at the beginning of the Discussion section, Plaintiffs have alleged that their damages were caused by Defendants' unlawful and/or negligent act or omission and committed by an employee and/or agent of Defendants. These allegations are adequate to withstand dismissal.

5. Sixth Cause of Action - Breach of Nondelegable Duty

Plaintiffs allege Defendants had a nondelegable duty to ensure that adequate safety precautions were taken by their contractors during the course of the transport and handling of toxic substances, which was inherently dangerous and which posed peculiar unreasonable risks of harm; and Defendants wrongfully breached their nondelegable duties, and their breach caused Plaintiffs damages. *First Amend. Compl.*, ¶¶ 34-35.

Erickson argues that a nondelegable duty arises (1) where a contractor owes a duty, by contract, and the duty may not be delegated to the independent contractor; or (2) where an owner retained authority to direct the manner in which the work was performed and knew or should have known that the independent contractor was performing work in an unreasonably dangerous manner. Erickson argues Plaintiffs have not alleged Erickson assumed any contractual responsibilities for the transporting of the gasoline, and that, in fact, it did not assume any such responsibilities and thus cannot be liable for transporting activities under a nondelegable duty theory. Erickson further argues Plaintiffs do not allege Erickson retained control over any aspect of the transportation of the gasoline, and that, in fact, it did not retain any such control and thus cannot be liable as a matter of law.

Plaintiffs have filed a *Notice of Supplemental Authority* (Doc. No. 43) as to this claim: the Montana Supreme Court's September 29, 2009 ruling in *Paull v. Park County and State of*

Montana, 2009 MT 321, 352 Mont. 465, ___ P.3d ___. In this case, the court held that (1) the long-distance transportation of a probationer is an inherently dangerous activity as a matter of law, such that the County could be held vicariously liable for the acts of an independent contractor that caused injuries to be sustained by the probationer when the transport van crashed, and (2) the State had a duty to exercise ordinary care in transporting the probationer such that the State could be held liable for the tortious acts or omissions of its agents undertaking the transportation. *Paull*, ¶¶ 28, 38.

Whether an activity is inherently dangerous is a question of law. *Id.*, ¶ 21 (citation omitted.) The *Paull* court stated that the first step in applying this law to Park County is determining whether the county was in a contractor-independent contractor relationship with the private prisoner transportation service. *Id.*, ¶ 22. Here, Plaintiffs have alleged that the contamination at issue was caused by Defendants' unlawful and/or negligent act or omission and committed by an employee and/or agent of Defendants. Plaintiffs have set forth allegations adequate to withstand dismissal.

6. Seventh Cause of Action - Violation of the Montana Constitution

Plaintiffs allege Defendants' activities were violative of Plaintiffs' inalienable rights under the Montana Constitution, including the inalienable right to a clean and healthful environment guaranteed in Article II, section 3. *First Amend. Compl.*, ¶¶ 37-39.

Erickson argues that under the Montana Supreme Court's holding in *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, Article II, section 3 of the Montana Constitution cannot support an award of damages where adequate remedies exist under statutory or common law. Erickson contends that because adequate remedies exist at

common law—whether or not Plaintiffs can prove entitlement to them—a proceeding under a constitutional tort theory is precluded.

Plaintiffs counter that Erickson's argument misconstrues the holding in *Sunburst* and note that *Sunburst* was decided on appeal *after* the plaintiffs had received an award of damages. Plaintiffs assert it is premature to dismiss this claim on the ground that other remedies exist, when no award had yet been made, and thus there can be no determination whether any such award would be adequate to restore Plaintiffs to the position they occupied before their properties were contaminated.

In *Sunburst*, the Montana Supreme Court held that the district court erred in instructing the jury on the plaintiffs' constitutional tort theory (under Article II, section 3) where Sunburst "ha[d] not demonstrated that the common law restoration damages would not address adequately any potential damages caused by Texaco's contamination." *Sunburst*, ¶ 64. Here, on this motion to dismiss, the burden is on Erickson to demonstrate that common law restoration damages would not address adequately any damages to Plaintiffs, should Plaintiffs ultimately prove that Erickson is liable for the torts they allege. Erickson cannot meet this burden at this initial stage of the proceeding. Plaintiffs have stated allegations of constitutional tort adequate to withstand dismissal.

7. Eighth Cause of Action - Restitution for Unjust Enrichment

Plaintiffs allege Defendants negligently and/or unlawfully disposed of and/or deposited toxic substances onto their properties; and despite Defendants' knowledge that they had contaminated Plaintiffs' properties, Defendants have failed to timely and properly remove the contamination. *First Amend. Compl.*, ¶ 41. Plaintiffs allege Defendants' "use" of Plaintiffs'

property to dispose of, deposit, and store toxic substances is wrongful and unlawful, and Plaintiffs did not consent to the use of their properties in that manner. *Id.*, ¶ 42. Plaintiffs allege Defendants' unauthorized "use" of Plaintiffs' properties has benefitted Defendants monetarily to Plaintiffs' detriment; thus, Defendants have been unjustly enriched. *Id.*, ¶ 43.

Erickson argues that "[a] situation involving an accidental gasoline spill following a vehicle rollover cannot plausibly support a claim for unjust enrichment," noting that unjust enrichment is an equitable doctrine that requires the plaintiff to show "some element of misconduct or fault on the part of the defendant, or that the defendant somehow took advantage of the plaintiff" and benefitted to the plaintiff's detriment, citing *Randolph v. Peterson, Inc. v. J. R. Simplot Co.*, 239 Mont. 1, 8, 778 P.2d 879, 883 (1989).

Plaintiffs counter that Erickson "has used and intends to continue its use of Plaintiffs' property, without compensation, to store and to remediate its toxic waste," and as a result "is unjustly enriched by avoiding the expense of cleanup and lawful disposal of this carcinogenic waste."

In their general allegations against all Defendants, Plaintiffs have adequately pled that Erickson or its employees or agents contaminated Plaintiffs' property. This assertion is adequate to allege the element of misconduct or fault on the part of Erickson necessary to withstand dismissal.

8. Ninth Cause of Action - Wrongful Occupation of Real Property

Plaintiffs allege Defendants have and continue to wrongfully occupy Plaintiffs' private property in violation of § 27-1-318, MCA; and as a result, Plaintiffs have suffered damages. *First Amend. Compl.*, ¶¶ 45-46.

Erickson argues that § 27-1-318, MCA, provides a measure of damages for wrongful occupation of real property, not a separate cause of action; Erickson seeks dismissal on that basis.

Plaintiffs counter that whether or not § 27-1-318, MCA, creates a cause of action, Montana law recognizes a cause of action for wrongful occupation of real property; and further, if such cause of action did not exist, a statutory declaration of damages available would be unnecessary. Plaintiffs cite Paragraphs 12 and 13 in their Complaint (set forth above on pages 5-6) as the fundamental factual basis for this claim.

Plaintiffs have set forth adequate allegations to withstand dismissal of this claim for failure to state a claim upon which relief can be granted.

II. SHOULD KELLER'S AND WAGNER'S MOTIONS TO DISMISS BE GRANTED?

Keller has moved for dismissal of Plaintiffs' Seventh Cause of Action—Violation of the Montana Constitution—pursuant to Rule 12(b)(6), M.R.Civ.P.

Like Erickson, Keller argues that under Montana law, a constitutional tort claim is prohibited where adequate remedies exist under statutory or common law, such as here where Plaintiffs are seeking several types of damages based upon numerous statutory and common law claims, for which Keller asserts adequate remedies exist; Keller likewise cites *Sunburst School District No. 2 v. Texaco, Inc.*, as legal authority.

Wagner joins in Keller's motion to dismiss Plaintiffs' Seventh Cause of Action.

These motions to dismiss should be denied upon the same rationale as set forth above in Section I.B.6.

III. CPC'S MOTION FOR SUMMARY JUDGMENT

CPC has filed a motion for summary judgment, to which Plaintiffs have not filed a response on the grounds that in the interest of justice and in accordance with standards set forth for determination of liability, the facts should be fully developed as a prerequisite to their response. Having evaluated CPC's motion, the Court determines that Plaintiffs should be ordered to respond to CPC's motion for summary judgment within 20 days of the date of this order. CPC will then have 10 days to file a reply.

CPC has requested a date be set for hearing on its motion. The parties may stipulate to submit the motion on briefs. If a hearing is held, the Court will consider conducting it via video conferencing.

ORDER

IT IS THEREFORE ORDERED that Defendant Erickson Petroleum Corporation's motion to dismiss is hereby **DENIED.**

IT IS FURTHER ORDERED that the motions to dismiss the Seventh Cause of Action filed by Defendants Keller Transport, Inc. and Wagner Enterprises, LLC, are hereby **DENIED.**

IT IS FURTHER ORDERED Plaintiffs are directed to file their answer brief to Defendant ConocoPhillips Company's motion for summary judgment within 20 days. Defendant ConocoPhillips Company may file a reply brief within 10 days of filing of the answer brief. A hearing date shall be set thereafter. This hearing may be waived by the parties' stipulation.

DATED this 15 day of December, 2009.

HON. JEFFREY H. LANGTON, District Judge

cc: counsel of record

Timothy Cockrell Trent Baker W. Scott Mitchell Robert Tech
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