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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CITY OF RIVERSIDE, Plaintiff and Appellant, v. BLACK & DECKER (U.S.), INC. et al., Defendants and Respondents.	B292133 (Los Angeles County Super. Ct. No. BC376008)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Reversed and remanded.

Miller & Axline, Duane C. Miller, Michael Axline, Tracey L. O'Reilly, and Bryan Barnhart, for Plaintiff and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, James L. Meeder, Kamran Javandel, and Emily L. Murray, for Defendants and Respondents Black & Decker, Inc., Emhart Industries, Inc., and Kwikset Locks, Inc.

Alston & Bird, Jeffrey D. Dintzer and Matt Wickersham, for Defendant and Respondent Goodrich Corporation.

Downey Brand, Steven H. Goldberg, Donald E. Sobelman, and Christopher I. Rendall-Jackson, for Defendant and Respondent American Promotional Events, Inc.-West.

The Gallagher Law Group, Martin N. Refkin and Thomas C. Sites, for Defendants and Respondents Zambelli Fireworks Manufacturing Company, AKA Zambelli Fireworks Internationale and Zambelli Fireworks Manufacturing.

Kirkland & Ellis, Robert Boldt and Steven E. Soule, for Defendant and Respondent Raytheon Company.

Newmeyer & Dillon, John Van Vlear and Jason Moberly Caruso, for Defendant and Respondent Trojan Fireworks Company.

Van Ness Feldman, Brian L. Zagon, Allison E. McAdam, and Justin R. Panitchpakdi, for Defendant and Respondent Pyro Spectaculars, Inc.

Wolfe & Wyman, Matthew C. Bures and Christopher T. Johnson, for Defendant and Respondent Whittaker Corporation.

In 2009, plaintiff and appellant the City of Riverside (Riverside) filed a complaint alleging the defendant and respondent companies in this appeal[1] (defendants) had conducted operations in Rialto, California that polluted Riverside's public drinking water with the chemical perchlorate. The case was stayed for many years while some of the defendants litigated a federal case involving the United States that also concerned alleged perchlorate contamination in Rialto. After the stay was lifted, and some nine years after the litigation commenced, Riverside amended its complaint to eliminate a statutory cause of action, which ultimately meant the case would be decided by a jury, not the trial judge. Defendants then moved to dismiss the amended complaint, arguing the United States was both a necessary and indispensable party that Riverside failed to name as a defendant. The trial court agreed and dismissed the case. We consider whether the trial court's implied determination that the United States is a necessary party—which rests almost exclusively on documents the court agreed to judicially notice—was an abuse of the court's discretion.

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[1] The defendants and respondents are Black & Decker (U.S.), Inc. (Black & Decker), Kwikset Locks, Inc. (Kwikset), Emhart Industries, Inc. (Emhart), Goodrich Corporation (Goodrich), American Promotional Events, Inc. – West (American Promotional), Pyro Spectaculars, Inc. (Pyro), Trojan Fireworks Co. (Trojan), Zambelli Fireworks Manufacturing Co. (Zambelli), Raytheon Co. (Raytheon), and Whittaker Corporation (Whittaker).

I. BACKGROUND

A. Riverside's Complaint

Riverside filed its original complaint in this action in April 2009. It alleged causes of action for trespass, negligence, nuisance, and equitable relief, and a cause of action under the California Superfund Act against all defendants. Generally, the original complaint alleged defendants owned and/or operated businesses that used perchlorate, which the State of California has deemed hazardous waste. It also alleged that defendants' actions caused the contamination alleged in the complaint and that perchlorate in the soil and groundwater are an imminent and substantial threat to public drinking water, health, natural resources, and the environment. The complaint further alleged defendants were legally responsible for and had committed tortious and wrongful acts, and were liable for each other's acts under various theories.

The complaint included specific allegations regarding each defendant's role in the alleged perchlorate pollution. A subsidiary of Kwikset called West Coast Loading Corporation (WCLC) constructed a manufacturing plant on a 160-acre property in Rialto, California in 1951 and 1952. WCLC wholly owned and occupied that property until 1957. From 1952 to 1957, WCLC used the property to manufacture explosive cartridges, photoflash cartridges, flares, ground burst simulators, and other incendiary devices, and to process chemicals for use in the manufacture of solid rocket propellant, flares, and other products containing perchlorate. During this time period, chemicals including ammonium perchlorate and potassium perchlorate were used, stored, and processed at the site. Approximately 2,000 pounds of perchlorate was estimated to

have been lost during the manufacturing process, and spillage and mobilization of perchlorate powder would have occurred. Cleaning procedures used at the site would have resulted in the disposal of water containing residual perchlorate salts onto the ground. Explosives and incendiary devices, many of which contain perchlorate salts, were stored both on the 160-acre property and on adjacent land to the southwest.

Goodrich purchased the 160-acre Rialto property in 1957. Its post-acquisition operations included experimentation with and formulation of perchlorate-based propellants, as well as the design, manufacture, and testing of perchlorate-containing products.

Through a series of corporate transactions, Emhart assumed the liabilities of WCLC. After another series of corporate transactions and dissolutions, Kwikset, Emhart, Kwikset Corporation, and Black & Decker became the corporate successors of WCLC and legally liable for the discharges of pollutants it caused.

American Promotional, Pyro, Trojan, and Zambelli operated fireworks-related businesses in Rialto at various points from the 1970s to the present. Each of their fireworks-related operations involved the testing and/or receipt of fireworks containing perchlorate and resulted in the release of perchlorate into the environment.

Raytheon leased property in Rialto from 1984 to 1994 and purchased Hughes Missile Systems in 1998. Raytheon handled, stored, and arranged for the disposal of perchlorate-containing products including squibs, detonators, toy rocket motors, and propellants. As a result of its activities, Raytheon was alleged to

have released perchlorate and other substances into the environment.

Whittaker owned and operated properties and facilities in Rialto from approximately 1964 to 1974 and operated facilities at which perchlorate-containing pyrotechnic and explosive devices were designed, tested, fabricated, and stored. Whittaker manufactured, designed, tested, handled, stored, and arranged for the disposal of perchlorate-containing products including flares and explosive signaling devices, rockets, detonators, and propellants. Whittaker is alleged to have processed and mixed perchlorate and other chemicals for use in its products, and the company tested explosives and regularly burned perchlorate-containing waste, causing them to be released into the environment.

B. Relevant Procedural History

The case was stayed for years after Riverside filed the complaint. Eventually, pursuant to a stipulation, defendants answered the complaint in October 2014. Each defendant's answer asserted as an affirmative defense that Riverside had not joined necessary and/or indispensable parties.

Many of the defendants' answers also admitted certain facts that are relevant for our purposes. Emhart, Kwikset, and Black & Decker admitted WCLC had assembled, pursuant to contracts with the United States, munitions and other perchlorate-containing products on 28 acres of a 160-acre leased parcel in Rialto, California. Goodrich admitted it owned and operated the 160-acre Rialto property previously owned and operated by WCLC. It also admitted its operations at the site included the research, development, and manufacturing of a

relatively small amount of propellant that contained, among other substances, ammonium perchlorate. Pyro admitted to having leased real property in Rialto, California to store fireworks and create special effects devices, some of which contained perchlorate. American Promotional admitted to leasing property in Rialto, California, to being and having been an importer, wholesaler, and distributor of fireworks, and to conducting operations like safety tests of fireworks that may contain small amounts of perchlorate constituents. Whittaker admitted a company it merged with had owned or operated real property in Rialto from approximately 1969 to 1974. Raytheon admitted a company that it had acquired leased property in Rialto for two years, and stored small, self-contained explosive and mechanical devices in a regulated and impermeable bunker. Trojan admitted it manufactured fireworks in Rialto from approximately 1974 to 1987, and that testimony and documents from prior litigation indicate it used some perchlorate in those operations.

Around the same time, many of the defendants were engaged in related federal litigation, which resulted in the entry of three consent decrees. Riverside did not participate in the federal proceedings.

In 2016, the trial court in this case denied a motion for judgment on the pleadings and two motions for summary judgment.[2] In denying one of the motions for summary judgment, the trial court proposed severing certain issues and holding a

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[2] Though the orders denying these motions and certain related pleadings and declarations are included in the record on appeal, the motions themselves are not.

bench trial on those issues before holding a jury trial on any remaining issues.

Riverside then filed a motion for leave to amend its complaint in early 2018. The motion proposed the amended complaint would eliminate causes of action that were to be the subject of the first bifurcated bench trial (claims under the California Superfund Act and for equitable relief), as well as all requests for an equitable remedy in its remaining causes of action and its prayer for relief. The trial court granted the motion, and Riverside's first amended complaint was filed on March 16, 2018. The first amended complaint contained the same substantive allegations as the original complaint, but it alleged only causes of action for trespass, negligence, and nuisance.

C. Goodrich's Demurrer or Motion to Dismiss for Failure to Join an Indispensable Party

Goodrich filed a demurrer or, alternatively, motion to dismiss Riverside's first amended complaint for failure to join an indispensable party. Goodrich argued the United States was a necessary and indispensable party to the litigation because (a) the United States was an active participant in the type of activities that Riverside alleged caused perchlorate contamination in the Rialto-Colton Groundwater Basin, (b) the United States owned the raw materials and equipment allegedly disposed of by Goodrich, and (c) the United States controlled and dictated the manner in which Goodrich operated and disposed of waste pursuant to its government contracts. Goodrich also argued dismissal should be granted because Riverside's dismissal of its California Superfund Act claim meant Goodrich could be held jointly and severally liable and could no longer limit its

liability by arguing only a portion of Riverside's claimed costs were attributable to Goodrich's actions.

In support of its motion, Goodrich submitted a slew of exhibits and asked the trial court to judicially notice them. The exhibits were attached to an attorney declaration that represented most of the documents (those not generated in this matter or not filed in federal court) had been obtained from third parties or produced by the United States in the federal proceedings.

The exhibits proffered by Goodrich included eight general categories of documents: (1) documents generated in the course of this litigation, including meet and confer letters and filings; (2) two consent decrees entered in the federal cases in July 2013; (3) correspondence from the California Regional Water Quality Control Board to the U.S. Army Corps of Engineers; (4) United States military memoranda and safety bulletins from the 1940s; (5) amendments to contracts between Goodrich and the Navy's Bureau of Ordnance and related documents; (6) Armed Services Procurement Regulations and revisions from the 1950s; (7) letters and notices from Naval officials in the 1960s; and (8) other regulations and safety manuals and procedures. Beyond identifying the documents and explaining how Goodrich had obtained, stored, and retrieved the documents, the declaration did not establish why the documents were pertinent to the motion nor how they were related to the issues under consideration. Because the documents figure prominently in the trial court's rationale for dismissing the case, we shall pause to describe them in greater detail.

In 1943, the War Department's Office of the Chief of Ordnance issued a Safety Bulletin regarding the "Rough

Handling of Containers of Fused Ammunition and Components Containing Initiating Explosives." The bulletin stated "[m]any cases have been reported where shipments have been received in damaged conditions at Ordnance plants," including with "powder strewn" on the floors of railway cars transporting them.[3] In May 1944, an individual identified only as the "Chief of Transportation" requested additional holding yard facilities at the Rialto Ammunition Back-up Storage Point (RABSP) and indicated the ammunition storage point was "being operated in violation of ordnance safety rules and that new construction will be required to remedy this situation."

In 1955, an Armed Services Procurement Regulation provided the government was to review and approve contractors' property control procedures and procedures relating to physical control of scrap. A 1956 General Safety Procedures for Chemical Guided Missile Propellants included instructions on the method of disposal of various missile propellants. A 1956 Department of the Army Technical Manual and Department of the Air Force Technical Order regarding the care, handling, preservation, and destruction of ammunition stated solid propellant could be safely destroyed by burning it on bare ground.

In 1960, the Department of the Navy and Goodrich amended a contract pursuant to which Goodrich was to research and develop rocket propellant and propulsion units. Pursuant to the contract, the United States retained title to all property it

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[3] Though defendants characterize this document as warning that munitions moved by railcar "often arrived at the RABSP damaged," the document does not appear to specifically mention the RABSP.

furnished to Goodrich, and the contract further provided title to all property for which the United States reimbursed Goodrich vested in the United States. The United States was to have access to any premises where its property was located "at all reasonable times." Upon completion of the contract, property not consumed was to be delivered or disposed of as directed or authorized by the contracting officer. Goodrich was also required to comply with the Manual for Control of Government Property in Possession of Contractors.[4]

In May 1962, the commander of a Naval Ordnance Test Station instructed an Inspector of Naval Material to transfer residual government-owned property to the station.

In 2004, the California Regional Water Quality Control Board sent a letter to officers at the U.S. Army Corps of Engineers regarding the operational history of the RABSP stating that 10,000 tons of military products containing perchlorate passed through the RABSP during World War II.

In July 2013, the U.S. District Court for the Central District of California entered a consent decree involving, among other parties, the United States and Goodrich Corporation. The terms of the consent decree indicate the United States had filed a complaint under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) seeking reimbursement of costs incurred for response actions at a

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[4] Goodrich also submitted a May 1959 note to file regarding a contract with Goodrich signed by the contracting officer at the Bureau of Ordnance, which included an estimated cost breakdown stating ammonium perchlorate was to be used in the completion of the contract.

Superfund site in Rialto, California and seeking to force the defendants to undertake certain response actions. Goodrich, in turn, had asserted claims against the United States for reimbursement of costs it incurred for response actions at the RABSP. During and after World War II, certain United States agencies owned that tract, which sits atop the Rialto-Colton Groundwater Basin. After World War II, the United States agencies sold the property off in different parcels, including a 160-acre parcel. Goodrich and other parties to the case owned and/or operated businesses within the area formerly occupied by the RABSP. Pursuant to the consent decree, Goodrich agreed to perform certain remedial actions. The consent decree also laid out a fairly complex funding agreement pursuant to which Goodrich was allowed to obtain reimbursement of half of certain costs after expending specified initial amounts of money.

Pursuant to another July 2013 consent decree, this one involving Emhart, Black & Decker, Kwikset, and the United States (among other parties), Emhart also agreed to perform certain work, with reimbursement for some of the cost once it had spent a specified initial amount of money. Other parties to the consent decree agreed to pay funds into an escrow account.[5]

Both July 2013 consent decrees contain a clause that states notwithstanding their waiver of Civil Code section 1542, the settling defendants and federal agencies reserved all rights with respect to "claims for contribution whether based on federal or

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[5] Goodrich submitted excerpts from these consent decrees with its motion to dismiss. The excerpt included in the appellate record does not contain the appendix that identified the parties who agreed to pay funds into the escrow account.

state statutes or common law arising out of . . . claims in *City of Riverside v. Black & Decker (U.S.), Inc., et al.,* Case No. BC410878 . . . .," i.e., the action at issue in this appeal.[6]

D. Joinders in Goodrich's Request for Dismissal

The other defendants filed joinders in Goodrich's motion, with some caveats. American Promotional and Raytheon joined in the motion without substantive qualifications. Whittaker joined except for the portions of Goodrich's motion that address ownership and control over raw materials used by Goodrich at the 160-acre site and contend the United States was an active participant in the alleged activities. Trojan Fireworks, Pyro, and Zambelli similarly joined except for the portions addressing ownership and control over raw materials used by Goodrich at the 160-acre site.

The joinder filed by Emhart, Kwikset, and Black & Decker argued the United States owned certain equipment and all raw materials used by WCLC to manufacture munitions, including perchlorate, and controlled the subsidiary's operations, which rendered it strictly liable under CERCLA. In support of that

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[6] Defendants submitted a Respondent's Appendix that included an Interim Consent Decree filed December 4, 2012, an Initial Consent Decree dated March 19, 2013, and a Final Consent Decree dated March 26, 2013. Respondent's Appendix, however, contains no document indicating those particular consent decrees were submitted to the court in connection with the motion to dismiss. (An accompanying declaration states they were submitted in connection with a prior motion for summary judgment.) We rely only on documents that were before the trial court when it considered the motion to dismiss.

joinder, those parties submitted a copy of their answer in one of the federal matters, a copy of a 1952 Department of Defense Negotiated Contract with Kwikset (produced in the consolidated federal actions) pursuant to which Kwikset was to manufacture "Shell, Illuminating," and a copy of portions of the 1955 Armed Services Procurement Regulation. Like the Goodrich contract amendments, this contract indicated the United States obtained title to all materials, inventories, and works in progress under the contract. Emhart, Kwikset, and Black & Decker also requested judicial notice of those documents, contending in pertinent part that the latter two documents could be noticed as official acts and records of federal agencies.

E. Riverside's Opposition and the Reply Papers

Riverside opposed the motion, arguing the federal government was neither a necessary party nor an indispensable one. Riverside contended Goodrich had a contractual right to reimbursement from the United States, could seek contribution from the federal government under the existing consent decrees, and could bring a claim under the Federal Tort Claims Act if judgment were ultimately entered against it. Riverside also objected to the declaration of Goodrich's attorney and opposed and moved to strike Goodrich's request for judicial notice.

In addition to a reply on the merits of its request to dismiss the case, Goodrich filed a response to the motion to strike the request for judicial notice. Goodrich contended the documents it sought to have judicially noticed were legally operative documents, and thus, the court could take notice of not only their existence but also any facts that clearly derive from their legal effect. Goodrich also filed a response to the objections to its

attorney's declaration, arguing the documents had been properly authenticated.

Kwikset, Emhart, and Black & Decker filed their own reply in which they argued their contracts with the federal government did not require the federal government to reimburse them for any costs incurred as a result of liability to a third party. They also argued that though the applicable consent decrees provided the pertinent parties reserved their rights with respect to claims for contribution arising out of claims in Riverside's case, that reservation of rights did not create federal subject matter jurisdiction absent Riverside filing a CERCLA cause of action. Similarly, they argued their right to sue the United States under the Federal Tort Claims Act did not obviate the risk of inconsistent obligations.

F. The Trial Court Dismisses the Case, Determining—Only Impliedly—that the United States Was a Necessary Party

The trial court orally ruled on Goodrich's motion to dismiss (as joined by the other defendants) after hearing argument from the parties.

Toward the beginning of the hearing, the court stated it was "inclined to agree" the United States is an indispensable party to Riverside's case. It then emphasized the question before it was "an equitable determination." The court explained Code of Civil Procedure section 389, subdivision (b) enumerates four factors that determine to what extent a judgment rendered in the absence of the United States might be prejudicial to those already

parties.[7] It then stated defendants had stressed the United States was arguably responsible for the alleged perchlorate contamination, due to the history of the site hosting railroad cars full of bombs before Goodrich used the property for rocket testing. The court noted those facts were laid out in materials appropriate for judicial notice and stated it would take judicial notice of those materials. It also noted its consideration of that evidence was why it viewed the motion as an evidentiary motion, not a challenge to the pleadings, and thus why a motion to dismiss was a more apt vehicle.

In its extensive remarks for the record that comprised its ruling, the court admitted it was initially persuaded by Riverside's argument that any fear regarding joint and several liability for damages resulting from the United States' actions could be resolved by having the defendants go to federal court under the consent decrees. But, the court explained, after reading the replies the court determined any finding regarding the allocation of fault in state court would not be binding on the United States and the finding would have to be replicated again in federal court. In other words, the court believed, the fault allocation would be a waste of time. The court also stated the public's interest in efficient, global, and consistent resolution of disputes was "the most compelling" interest in the case.

The trial court also cited a defense argument that the comparative fault doctrine does not allow Goodrich to shift liability to a nonparty the way the California Superfund Act claim would have allowed. The court agreed the dismissal of that

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[7] Undesignated statutory references that follow are to the Code of Civil Procedure.

claim constituted a "fundamental readjustment" of the case, and determined "this change in the ability to escape joint and several liability [was] a reasonable and justifying explanation for delay in bringing [the] motion." The court then stated the first factor in section 389, subdivision (b) is prejudice to those already parties in the case, and noted it had just explained why the factor was "so important in [its] decision."

Turning to the second factor, the extent to which protective provisions can lessen prejudice, the trial court concluded there was nothing it could do to force the United States to accept a state court jury's allocation of fault. Regarding the third factor, the adequacy of a judgment rendered in absence of the United States, the trial court concluded this was largely the same issue under the facts of this case. Finally, regarding the fourth factor (whether Riverside has an adequate remedy), the court concluded it did, noting Riverside could bring its case in federal court, where the United States can be sued. The court acknowledged it had spent a "tremendous amount" of energy in the nine-year case, and someone would have to relearn many of the details the court had learned. It also acknowledged, however, that this was "a self-inflicted injury . . . attributable to the decision . . . to change the case so drastically so late in the day." It deemed the federal court remedy "adequate," while acknowledging it was "not a perfect remedy."

In response to Riverside's argument that the defendants could have demurred to their complaint after they signed the consent decrees, and that they face a statute of limitations problem in federal court, the trial court stated Riverside would "have a powerful equitable tolling argument from parties who are telling me all about what an available forum there is. And if I

dismiss without prejudice and you find attorneys speaking out of two sides of their mouths in two different fora, come on back."

Riverside contended the dismissal of the Superfund Act claim did not affect the joint and several liability issue, arguing the United States would not have had to accept an allocation under the Superfund Act either. Riverside also argued that in order to sue defendants in federal court, it would also have to bring a CERCLA cause of action, which would impose a number of additional procedural requirements on Riverside and potentially force it to undergo the court trial it avoided. In response, the court repeated it was basing its decision "in an important way on the defendants' representation that you have an adequate remedy in federal court." During its discussion with counsel, the trial court also noted it was "not basing my ruling on some notion that a joint tortfeasor must be joined, it is indispensable."

II. DISCUSSION

To determine the United States is an indispensable party without which this action should not proceed, the trial court must have impliedly determined the United States was a necessary party. Riverside's operative complaint, however, alleges only that defendants were liable for the perchlorate pollution—not the United States—which means the trial court's implied determination is necessarily founded almost entirely on the evidence defendants asked the court to judicially notice. In our view, that is far too slender a reed to support a determination that the United States was more than a mere joint tortfeasor, and thus, justify a discretionary departure from the general rule that joint tortfeasors should not be considered necessary parties.

A. Standard of Review

"Joinder of parties is governed by section 389 of the Code of Civil Procedure (section 389)." (*Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 791 (*Countrywide*).) Subdivision (a) "defines persons who should be joined in a lawsuit if possible, sometimes referred to as 'necessary' parties." (*TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1365.) "If such a person . . . cannot be joined, subdivision (b) requires the court to consider 'whether in equity and good conscience' the suit can proceed without the absent party, or whether the suit should instead be dismissed without prejudice, 'the absent person being thus regarded as indispensable.' (*Id.*, subd. (b).)" (*Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1017.)

"'Whether a party is necessary and/or indispensable is a matter of trial court discretion in which the court weighs "factors of practical realities and other considerations."' [Citation.]" (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 84.) On appeal, we review an indispensable party determination for abuse of discretion. (*Verizon California Inc. v. Board of Equalization* (2014) 230 Cal.App.4th 666, 680.)

Despite the foregoing, Riverside contends we should review the trial court's decision de novo because it believes the trial court committed an error of law by finding the United States "indispensable" under section 389, subdivision (b) without first discussing why the United States was a necessary party under section 389, subdivision (a). Underlying this argument is the assumption that the trial court was required to articulate the

reasoning behind its ruling. But the only authority Riverside cites for that proposition is a federal case from the First Circuit. (*Bacardí Int'l Ltd. v. V. Suárez & Co.* (1st Cir. 2013) 719 F.3d 1, 9.) Though we may look to federal precedent in evaluating necessary party issues (*Countrywide*, *supra*, 69 Cal.App.4th at 791-792 [appropriate to use federal precedents as guide to application of section 389 because it tracks the language of Federal Rule of Civil Procedure 19]), the issue Riverside highlights here is one of procedure, not one substantively related to the necessary party determination. Accordingly, California law dictates whether the trial court was required to make express findings.

The transcript of the hearing on defendants' motion to dismiss does not reveal the trial court disregarded the section 389, subdivision (a) requirements, believed it did not need to find the United States a necessary party, or found the United States was *not* a necessary party under subdivision (a) but nevertheless concluded it was an indispensable party under subdivision (b). Since there is no indication to the contrary, we presume that the trial court considered the relevant factors. (See *Dubois v. Corroon & Black Corp.* (1993) 12 Cal.App.4th 1689, 1696 ["the court is presumed to be correct in its ruling and need not specifically state that it has considered all of the relevant factors . . . "].) Accordingly, we consider whether "there exists a reasonable or fairly debatable justification under the law for the trial court's decision or, alternatively stated, if that decision falls within the permissible range of options set by the applicable legal criteria." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.)

B. The Trial Court Abused Its Discretion by Implicitly Finding the United States Was a Necessary Party

There are three grounds upon which a party may be found necessary under section 389, subdivision (a): (1) if "in his absence complete relief cannot be accorded among those already parties"; (2) if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest"; or (3) if he claims an interest relating to the subject matter of the action and his absence may "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." (§ 389, subd. (a).) Based on the evidence presented to the trial court, there exists no reasonable or fairly debatable justification for concluding the United States was a necessary party under any of these tests.

1. It was an abuse of discretion to conclude complete relief cannot be accorded in the United States' absence

"The 'complete relief' clause 'requires joinder when nonjoinder precludes the court from effecting relief not in some overall sense, but between *extant parties*. In other words, joinder is required only when the absentee's nonjoinder precludes the court from rendering complete justice *among those already joined*. . . . Properly interpreted, [the "complete relief" clause] is not invoked simply because some absentee may cause future litigation. The effect of a decision in the present case on the absent party is immaterial . . . . The fact that the absentee might later frustrate the outcome of the litigation does not by itself

make the absentee necessary for complete relief. The "complete relief" clause does not contemplate other potential defendants, or other possible remedies.' [Citation.] Simply put, 'the term complete relief refers only "to relief as between the persons already parties, and not as between a party and the absent person whose joinder is sought."' [Citation.]" (*Countrywide*, *supra*, 69 Cal.App.4th at 793-794.)

That a joint tortfeasor was not named a party to a lawsuit does not mean complete relief cannot be accorded among those who are parties. On the contrary, "[i]t has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." (*Temple v. Synthes Corp., Ltd.* (1990) 498 U.S. 5, 7.) A joint tortfeasor is not necessary for complete relief where damages can be ascertained and judgment rendered against those named as defendants. (See, e.g., *Countrywide*, *supra*, 69 Cal.App.4th at 794.) This is true even where there may be future litigation between the named defendants and the unnamed joint tortfeasor. (*Mastercard Int'l Inc. v. Visa Int'l Serv. Assoc., Inc.* (2d Cir. 2006) 471 F.3d 377, 387.)

Some prior cases have recognized an exception to this general rule. As described in these cases, "'a joint tortfeasor will be considered a necessary party when the absent party "emerges as an active participant" in the allegations made in the complaint that are "critical to the disposition of the important issues in the litigation." [Citation.]' (*Laker Airways, Inc. v. British Airways, PLC* (11th Cir. 1999) 182 F.3d 843, 848[ ].)" (*Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of America* (2015) 234 Cal.App.4th 1168, 1175 (*Dreamweaver*).) Defendants contend complete relief cannot be accorded without the United States

because it was an "active participant" in "important allegations in the FAC." Taking the "active participant" doctrine on its own terms,[8] defendants' arguments for affirmance still do not carry the day. The judicially noticed documents are an unsound foundation for the necessary party determination we assume the trial court made.

The operative complaint alleges defendants' business operations resulted in the pollution of Riverside's water supplies with perchlorate and seeks related damages. It does not mention the United States or imply the United States had any role in the alleged damages. Nor do defendants' answers aver the United States is responsible. Only the answer by Emhart, Kwikset, and Black & Decker even mentions the United States, and the only pertinent fact it asserts is that the Kwikset subsidiary WCLC had assembled munitions and photoflash cartridges and ground burst simulators pursuant to contracts with the United States. It did not establish the extent of the United States' involvement, or that WCLC was working exclusively for the United States.

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[8] The "active participant" rule is not universally accepted. It has not been adopted by the Ninth Circuit. (See *JNK Entm't, LLC v. SP Sales & Distrib.* (C.D.Cal. Mar. 2, 2016, No. CV 15-01908-RGK (FFMx)) 2016 U.S.Dist. Lexis 187778, at *8; *Oculus Innovative Scis., Inc. v. Nofil Corp.* (N.D.Cal. Jan. 25, 2007, No. C 06-01686 SI) 2007 U.S.Dist. Lexis 8288, at *8 ["There is no such exception in the Ninth Circuit"].) Additionally, some courts have also been reluctant to apply it outside of the context in which it was originally developed—antitrust litigation. (*United States v. Janke* (S.D.Fla. Aug. 17, 2009, No. 09-14044-CIV-MOORE/LYNCH) 2009 U.S.Dist. Lexis 72874, at *10.)

Given the absence of allegations in the complaint and the paucity of relevant facts asserted in defendants' answers, a determination that the United States was an active participant in the perchlorate contamination, and thus a necessary party, turns on two asserted premises that purport to derive from the judicially noticed documents: (1) the United States itself released perchlorate at the RABSP during World War II; and (2) the United States was responsible for any perchlorate released in Rialto by WCLC and Goodrich because both companies manufactured or developed perchlorate-containing items pursuant to contracts with the United States that provided the United States owned the material and equipment used and had the right to direct and control their operations, including their waste disposal methods. The problem is the documents themselves do not reliably establish either premise.

Defendants (and presumably the trial court), for instance, rely on a 2004 letter from the California Regional Water Quality Control Board (CRWQCB) to the U.S. Army Corps of Engineers as evidence the United States released perchlorate during World War II. In that letter, CRWQCB asserts, based on its review of a report not in the record and additional research not in the record, that 10,000 tons of products containing perchlorate passed through the RABSP. Though the letter asserted this constituted an adequate basis to suspect perchlorate could have been released during those operations and required the Army Corps of Engineers to conduct further investigation, it does not establish the United States' actions actually resulted in the release of perchlorate into the area.

The other documents upon which defendants rely (and presumably the trial court relied) similarly do not establish the

United States released perchlorate in Rialto. While a 1943 Safety Bulletin states shipments of military explosives and ammunition arrived in "damaged condition" with "powder strewn upon the . . . car," it neither establishes the "powder" was ultimately dispersed into the environment or that it contained perchlorate. A 1944 memorandum upon which defendants rely states the RABSP was being operated in violation of ordnance safety rules, but it does not say what the consequences of any such violation were, much less state the violation led to the release of perchlorate. These missing factual links could, perhaps, be established by pertinent testimony or a declaration, but none were provided to the trial court.

The documents submitted to establish the United States directed and controlled WCLC and Goodrich's operations similarly fall short. First, though defendants assert the contracts between the United States and WCLC and Goodrich, respectively, establish the United States owned all equipment and raw materials those defendants used at the site, they point to no provisions establishing WCLC and Goodrich were limited to working for the federal government at the time. Nor do they cite any other document or testimony establishing WCLC and Goodrich did not perform any other work, much less any other work involving perchlorate, at the Rialto sites. Second, though defendants assert the United States directed and controlled WCLC and Goodrich's loading and assembly of their products, including the processing and disposal of waste and scrap, the documents themselves indicate the United States had authority (and perhaps the responsibility) to review and approve contractors' property control and scrap-related procedures—they do not establish the United States actually did so. In addition,

while the safety procedures and technical manuals provided to the trial court outline instructions and "safe" methods for destroying items like missile propellants, no testimony or document establishes WCLC or Goodrich obeyed these instructions or procedures, or that the government enforced them in any way. Nor is there any testimony or document that establishes what waste or scrap WCLC and Goodrich disposed of, which of the specific procedures outlined applied to that scrap, and whether such purportedly mandated method of disposal would have caused the release of perchlorate.

In short, the evidence presented to the trial court was a cobbled-together collection of documents that, in defendants' view, linked instructions and statements made by the government with actions performed by Goodrich and WCLC. That assertion was unsupported by evidence or testimony sufficient to permit a reliable conclusion about the extent of the United States' role in perchlorate contamination. Though we accord the trial court considerable deference when reviewing a decision for abuse of discretion, the documents actually before the trial court provide little information about what perchlorate contamination is fairly attributable to acts (or omissions) of the United States.[9] The judicially noticed documents certainly

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[9] Naturally, nothing we say about the record as we now find it necessarily controls future developments in this case. An objection to the nonjoinder of an indispensable party may be raised at any time. (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 370, fn. 11.) If the evidentiary picture dramatically changes as trial court proceedings progress, we do not foreclose the possibility that the trial court could reassess the matter. (See, e.g., *Union Carbide Corp. v. Superior Court* (1984)

cannot support a conclusion that the United States met the higher "active participant" threshold that may warrant dispensing with the usual rule that unjoined joint tortfeasors are not necessary parties. (*Dreamweaver*, *supra*, 234 Cal.App.4th at 1175 ["'a joint tortfeasor will be considered a necessary party when the absent party "emerges as an active participant" in the allegations made in the complaint that are "critical to the disposition of the important issues in the litigation." [Citation.]'"].)

In *Dreamweaver*, the primary case upon which defendants rely, the plaintiffs alleged in their complaint that a government employee had been negligent in the preparation, engineering, and supervision of work on a hillside that ultimately collapsed on plaintiffs' property. (*Dreamweaver, supra*, 234 Cal.App.4th at 1172.) The plaintiffs dismissed the employee from the case even though their engineering expert opined the slope was unsuitable for development and certain additional work done on the hillside was the most significant factor in the collapse. (*Ibid.*) The remaining defendants then moved to dismiss the case for failure to join the former defendant's employer, a division of the United States Department of Agriculture. (*Ibid.*) The trial court found the employee had prepared the engineering plans plaintiff contended were the cause of the landslide and concluded the agency was an active participant, and a necessary party, in part

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36 Cal.3d 15, 24 ["We do not foreclose the possibility that through discovery or other means petitioners may be able later to make a showing . . . that would entitle them to a joinder order. . . . We simply reject petitioners' contention that on the present record they are entitled to joinder . . . ."].)

because the complaint alleged the negligent engineering caused the collapse of the hillside. (*Ibid.*) Based on this, the court concluded the agency's presence was necessary to determining the issue of liability. (*Id.* at 1175.)

The operative complaint here does not suggest the United States played a role in any of the alleged torts or performed any actions that caused perchlorate pollution. Additionally, the judicially noticed documents do not establish the United States was an "active participant" in allegations "made in the complaint" that are "'critical to the disposition of important issues in the case.'" At most, they suggest the United States might have exposed the relevant area to perchlorate before any defendant engaged in the perchlorate-containing business that is the subject of the complaint, contracted with some defendants for the manufacture of perchlorate-containing items, retained ownership over some or all of the materials those defendants used to manufacture items for the United States, and potentially had some oversight regarding their operations. This does not establish the United States was more than an ordinary joint tortfeasor.

Comparison of the documents before the trial court to the facts in *Laker Airways, Inc. v. British Airways, PLC* (11th Cir. 1999) 182 F.3d 843, 848 demonstrates an even starker factual contrast. The complaint in that case alleged a named defendant conspired with a nonparty to favor the defendant over the plaintiff in an airport slot allocation process. Here, the United States' role is not so central to the allegations, particularly since there does not appear to be anything in the record demonstrating WCLC or Goodrich were exclusively performing government-contracted work on the pertinent land.

Additionally, and contrary to defendants' contentions, the United States' participation in the consent decrees does not render it an "active participant." The relevant consent decrees were entered in 2013. The pollution alleged in the complaint took place decades before. The United States' participation in current and future remediation of perchlorate in the same area does not signify that it was an "active participant" in the term of art sense developed in prior cases.

2. It was an abuse of discretion to conclude the United States was a necessary party under section 389, subdivision (a)(2)

In order for a nonparty to be a necessary party under the test described by subdivision (a)(2), it must first have claimed an interest relating to the subject matter of the litigation. (§ 389, subd. (a)(2).) The United States implicitly did so by participating in the federal matters that led to the consent decrees and by reserving its rights against other parties to those decrees with respect to claims for contribution based on claims arising out of this case. (*Van Zant v. Apple Inc.* (2014) 229 Cal.App.4th 965, 975 (*Van Zant*) [third party had implicitly claimed an interest in subject matter of litigation where it actively claimed an interest in federal multidistrict litigation that was closely related to the subject of state court action].) Riverside does not contend otherwise.

While that satisfies the first requirement of subdivision (a)(2), the trial court nevertheless could not have concluded, within the scope of its discretion, that the United States was a necessary party under subdivision (a)(2)(i). Subdivision (a)(2)(i) provides a party who claims an interest in the subject matter of

the litigation is a necessary party if his absence may "as a practical matter impair or impede his ability to protect that interest." There is no indication the exclusion of the United States would impair or impede its ability to protect any interest it has in the alleged perchlorate pollution. Indeed, one of defendants' main contentions is that the United States would not be bound by any liability allocation reached in state court. An absent party's interests are only "impeded when that party could become legally bound by the result of the present action that they were not a part of." (*Boggs v. Landmark 4 LLC*, 2012 U.S.Dist. Lexis 114263, at *11 (N.D.Ohio Aug. 13, 2012); see also *Nickelsen v. Bank of N.Y. Mellon* (C.D.Cal. Sep. 23, 2014, No. 2:14-cv-05827-SVW-JC) 2014 U.S.Dist. Lexis 195792, at *6 [interest not impeded where it was unclear how judgment against defendants would bind third party].) The United States' interests would not be impeded here.

Nor could the trial court have concluded within the scope of its discretion that the United States was a necessary party under subdivision (a)(2)(ii). "Under the second prong of section 389(a)(2), a party claiming an interest relating to the subject of the action may be deemed necessary if the disposition of the action in his absence may 'leave any of the persons already parties subject to a *substantial risk* of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.' (Italics added.)" (*Van Zant*, *supra*, 229 Cal.App.4th at 977.) However, "inconsistent *rulings* are not the same as inconsistent *obligations*. [Citation.]" (*Ibid.*)

"'"[I]nconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident." [Citation.] In contrast,

inconsistent adjudications or results occur when a party wins on a claim in one forum and loses on another claim from the same incident in another forum.' [Citation.]" (*Van Zant, supra*, 229 Cal.App.4th at 977; see also *Delgado v. Plaza Las Americas, Inc.* (1st Cir. 1998) 139 F.3d 1, 3.)

Defendants point to the consent decrees and argue they have, in various ways, "resolved their liability for the same alleged releases of perchlorate that are the subject of the FAC," by either agreeing to pay money for the cleanup of perchlorate or by agreeing to construct and operate remedies with funding from the United States.[10] This does not, however, demonstrate the continuation of this action without the United States will subject any defendants to inconsistent obligations. Riverside seeks damages from defendants, and if Riverside ultimately prevails, defendants will be required to pay Riverside some amount of money damages. Though this may be in addition to the funds they have committed to paying or expending through the consent decrees, an order to pay Riverside for damage it incurred is not inconsistent with the obligations defendants have undertaken pursuant to the consent decrees. Indeed, each of the consent decrees contains a specific reservation of rights regarding this specific litigation, pursuant to which the defendants who participated in the consent decrees reserved all rights with respect to claims for contribution whether based on federal or

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[10] In support of this argument, defendants again cite versions of the consent decree included in their Respondent's Appendix. Because the record does not indicate those versions of the consent decree were before the trial court on this motion, we do not consider them.

state statutes or common law arising out of this lawsuit filed by Riverside.

Defendants also argue that without the United States in this litigation, they could be forced to pay the United States' share of any liability. While accurate, this is no more than is true for any other joint tortfeasor and is not sufficient to constitute an inconsistent obligation under section 389. (*Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.* (3d Cir. 1993) 11 F.3d 399, 412 ["The possibility that [the defendant] may bear the whole loss if it is found liable is not the equivalent of double liability. It is instead a common result of joint and several liability and should not be equated with prejudice. Inherent in the concept of joint and several liability is the right of a plaintiff to satisfy its whole judgment by execution against any one of the multiple defendants who are liable to him, thereby forcing the debtor who has paid the whole debt to protect itself by an action for contribution against the other joint obligors"].)

Finally, defendants insist they "have no clear pathway to recovering contribution from the United States should they face an unfavorable judgment." This, too, is unpersuasive. Defendants have asserted Riverside "has not identified any real cause of action by which Respondents could pursue contribution in federal court," but they have not demonstrated those avenues of relief (or others of which they might be aware) are foreclosed. That any fault allocation the trial court may reach would not be binding on the United States is not a reason to find the United States a necessary party under subdivision (a)(2)(ii). Nor is defendants' contention that dismissal of the case is an "easy solution" to the problem sufficient to render the United States a necessary party.

Because we conclude the trial court erred in impliedly finding the United States is a necessary party to this action, that is the end of the matter. The motion to dismiss should not have been granted.

DISPOSITION

The judgment is reversed and the matter is remanded with directions to vacate the order granting defendants' motion to dismiss and enter an order denying the motion. Riverside is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.