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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-2696-GW (Ex)	Date	April 5, 2018
Title	*United States of America, et al. v. Abex Aerospace., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Deborah Gitin, USDOJ Olivia Karlin, CAAG Hope Schmeltzer, USEPA Gene Lucero, OPOG	None Present

PROCEEDINGS: MOTION TO ENTER AMENDMENT TO CONSENT DECREE [52]

Court and counsel confer. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court would GRANT Plaintiffs' Motion to Enter Consent Decree.

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Initials of Preparer JG

United States, et al. v. Abex Aerospace, et al., Case No. CV-16-2696-GW-(Ex)
Tentative Ruling on Motion to Enter Amendment to Consent Decree

I. Background

The United States, on behalf of the Environmental Protection Agency (the "EPA), and the State of California, on behalf of the Department of Toxic Substances Control and Toxic Substances Control Account ("DTSC") (collectively, "Plaintiffs"), moved for an amendment to the Consent Decree entered by this Court in March 2017. *See generally* Motion to Enter Amendment to Consent Decree Consent Decree ("Mot. to Am."), Docket No. 52.

On April 20, 2016, Plaintiffs filed the Complaint in this action, asserting two causes of action for injunctive relief and recovery of costs under Sections 106(a) and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1989 ("CERCLA"), 42 U.S.C. §§ 9606(a) and 9607; and one cause of action under Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973. *See generally* Complaint ("Compl."), Docket No. 1. The Complaint names 237 entities (the "Settling Defendants") that Plaintiffs have identified as Potentially Responsible Parties ("PRPs") for groundwater contamination at the Operable Unit 2 ("OU2") (or which have come to be located at OU2), a portion of the Omega Chemical Corporation Superfund Site in Los Angeles County, California ("Site"). *Id.* ¶¶ 5,10; *see also* Mot. at 3:7-22. In the Complaint, Plaintiffs seek reimbursement for past response costs incurred at OU2, with accrued interest, as well as the performance of additional response actions by the Settling Defendants. *See* Docket No. 1 at 19-20 of 22.

Along with the Complaint, Plaintiffs simultaneously filed a proposed Consent Decree that would resolve the claims raised in the Complaint against the Settling Defendants. *See* Docket No. 4-1. On October 6, 2016, Plaintiffs filed a corrected Consent Decree reflecting ministerial changes made to the initial decree. *See* Docket No. 19-1.

The EPA and the DTSC published notice of the Consent Decree in the Federal Register on April 27, 2016, and accepted public comments for thirty days thereafter. *See* 81 Fed. Reg. 24885-01. Plaintiffs thereafter provided the Court with the comments received and Plaintiffs' responses, including four adverse comments raising objections to the Consent Decree by parties

that have not been sued by Plaintiffs in connection with OU2, but who are parties[1] in the private *Alcoa* litigation, *see Alcoa, Inc., et al. v. APC Inv., et al.*, 14-CV-06456-GW, pending before this Court.[2] *See* Mot. Exs. M-R, Docket No. 22-5 at pages 260-324 (comments and responses). The United States also held a public meeting near the Site on August 18, 2016; there were no questions from the public at the meeting. *See id.* Ex. U, Docket No. 22-5 at page 329 (transcript of hearing).

No Settling Defendant opposed the Consent Decree, however, four entities – Palmtree Acquisition Corporation ("Palmtree"), First Dice Road Company ("First Dice"), Philbro-Tech, Inc. ("Philbro-Tech"), and Pilot Chemical Corporation ("Pilot") (collectively, "Intervenors") – who are all owners/operators of facilities overlaying the OU2 contamination plume, filed an Opposition requesting that the Court defer its decision on Plaintiffs' Motion until a "proper record is submitted." *See* Opp'n, Docket No. 24.

On December 15, 2016, the Court issued a Tentative Ruling ("Tent. Ruling") and held a hearing regarding the United States on the Plaintiffs' Motion to Enter Consent Decree. *See generally* Tent. Ruling, Docket No. 28; Pl.'s Mot. to Enter Consent Decree ("Mot."), Docket No. 22. In that ruling, the Court indicated that it would not grant Plaintiffs' Motion at that time because Plaintiffs had failed to provide the Court with evidence substantiating their assertion that the Consent Decree is both procedurally and substantively fair. *See generally* Tent. Ruling. With respect to procedural fairness, the Court explained that there was no supporting documentation or evidence describing the settlement process or explaining how the parties agreed on the terms of the Consent Decree. *Id.* at 12. With respect to substantive fairness, the Court agreed with Plaintiffs that the Court may assess the settlement amount in the aggregate, rather than with respect to each individual Settling Defendant. *Id.* at 13-16. However, the Court explained that there was no evidence indicating the proportion of liability attributable to the Settling Defendants in the aggregate, and therefore the Court could not adequately assess the substantive fairness of the Consent Decree. *Id.* at 16. Finally, the Court noted that the inclusion of three owners/operators of facilities overlaying the OU2 plume with the group of Settling Defendants, which consist of entities that are only liable as generators, was potentially

[1] These parties include Union Pacific Railroad Company and Intervenors. *See* Mot. at 6:3-20.

[2] The private *ALCOA* litigation is a contribution action brought by OPOG members for response costs incurred at the Site. *See* Mot. at 6:3-20.

problematic, because Plaintiffs had not provided the Court with any information regarding the liability of these entities as owners/operators in comparison to the liability of the remaining Settling Defendant as generators only. *Id.* at 17-18.

In light of the above deficiencies, the Court requested that Plaintiffs submit supplemental briefing providing sufficient evidence for the Court to determine whether the Consent Decree is substantively and procedurally fair. *Id.* at 18. The Court also asked for further information regarding the Omega PRP Organized Group ("OPOG") and its relationship with Plaintiffs, as well as OPOG's role in the settlement process.[3] *Id.*

After further briefing by Plaintiffs and Intervenors the Court held a second hearing on the motion on March 23, 2017. The Court issued a second tentative ruling that indicated it would approve the consent decree in consideration of the materials on record. *See* Docket No. 39. The following week the Court issued a final ruling granting Plaintiffs' motion. *See* Final Ruling on Plaintiffs' Motion to Enter Consent Decree ("Ruling"), Docket No. 40.

The case was dismissed on May 10, 2017, but the Court retained jurisdiction under a provision of the Consent Decree that provided as much for the purposes of adding additional settling defendants via amendment. *See* Docket No. 45; *see also* Consent Decree at ¶¶ 75, 78-79, 93. On November 13, 2017 the Court reopened the case for the limited purpose of considering such an amendment. *See* Docket No. 50. On March 5, 2018 Plaintiffs filed a Motion to Enter Amendment to the Consent Decree. *See generally* Mot. to Am. The proposed amendment seeks to add additional settling Defendants, none of whom have opposed or otherwise objected to the now pending motion. Plaintiffs published a notice of proposed amendment in the Federal Register on November 16, 2017. *See* 82 Fed. Reg. 53, 529030. No comments were received during the 30-day comment period. *See* Memorandum in Support of Mot. to Am. ("MPA"), Docket No. 52-1 at page 4. No other entity has sought to intervene to oppose the motion or otherwise object to the proposed amendment.

II. <u>Motion to Amend the Consent Decree</u>

A. Additional Background

[3] The Consent Decree divides the Settling Defendants into two groups: the "Settling Work Defendants" and the "Settling Cash Defendants." *See* Consent Decree, Mot. to Enter Consent Decree Ex. A ¶ 1, Docket No. 29-1. The Settling Work Defendants consist of 65 generators who are OPOG members and are required to perform the response work (the "Work") proscribed by the Consent Decree and the accompanying Statement of Work. *Id.* ¶ 4. The Settling Cash Defendants consist of an additional 169 generators, as well as McKesson, Burke, and Stadler, who have agreed to contribute to the Settling Work Defendants' reimbursement of past response costs and the future response costs incurred by the Settling Work Defendants for the Work. *Id.*

1. The Original Settling Defendants

In the Complaint, Plaintiffs alleged that all of the Settling Defendants,[4] with the exception of McKesson Corporation ("McKesson"), Burke Street LLC ("Burke Street"), and Stadler Family Limited Partnership ("Stadler") have − either directly or by virtue of their predecessors − contracted, agreed, or otherwise arranged for disposal or treatment of hazardous substances at OU2, or of hazardous substances which came to be located at OU2, or have arranged for hazardous substances to be transported to OU2, and are thereby considered to be liable as generators. *Id.* ¶ 19. McKesson, Burke, and Stadler, on the other hand, are subject to liability as owners/operators of facilities overlaying the OU2 plume. McKesson operated a chemical repackaging and distribution facility located at 9005 Sorensen Avenue, Santa Fe Springs, California (the "McKesson Facility"), which is downgradient of Omega Chemical and within the area where OU2 contamination is located. *Id.* ¶ 20. Burke, through its parent company Stadler, owns a facility located at 12128 Burke Street, Santa Fe Springs, California (the "Burke Facility), which is downgradient of Omega Chemical and within the area of OU2 contamination. *Id.* ¶ 23.

The Complaint alleged that Defendants are jointly and severally liable for all unrecovered response costs incurred by Plaintiffs in connection with OU2, as well as future response costs for the work to be performed under the ROD. *Id.* ¶¶ 30, 36-37.

2. The Consent Decree

The Consent Decree, as entered in 2017, divides the Settling Defendants into two groups: the "Settling Work Defendants" and the "Settling Cash Defendants." *See* Mot. Ex. A ¶ 4. The Settling Work Defendants consist of 65 generators who are OPOG members, and who are required to perform the response work (the "Work") proscribed by the Consent Decree and the accompanying Statement of Work. *See* Mot. at 3:8-18; *id.* Ex. A ¶ 4. The Court summarized the relevant details of the Consent Decree in its initial tentative ruling. *See* Tent. Ruling. The settling Defendants committed to provide future settlors with the same covenants and releases which they received in the Consent Decree. *Id.* ¶ 78.

3. Additional Settling Defendants

There are three groups of Settling Defendants participating in this Amendment to the

[4] The Complaint names only the Settling Defendants; those PRPs who have not reached a settlement are not included in the instant action.

Consent Decree. *See* MPA at 5. The first of the three groups of Settling Defendants consists of Mission Linen Supply Company ("Mission") and Pilot Chemical Corp., on its own behalf and as successor to Pilot Chemical Company of California ("Pilot"). *Id.* Mission and Pilot are parties that owned or currently own facilities that overlay the middle portion of the OU2 groundwater plume and who Plaintiffs allege have contributed contamination from their properties to the contaminated Omega plume. *Id.*; *see also* Declaration of Wayne Praskins in Support of Plaintiffs' Motion to Enter Amendment to Consent Decree ("Praskins Decl."), Docket No. 52-2 at ¶ 7. The second of the three groups of settling defendants are Hexion Inc. (f/k/a Momentive Specialty Chemicals. Inc.) ("Hexion") and MCP Foods, Inc. dba Firmenich ("Firmenich"). Mot. to Am. at 5. Plaintiffs assert that these two parties sent hazardous waste to the former Omega Chemical Company. Praskins Decl. ¶ 8. The final group of Settling Defendants consists of 26 generator parties who had previously settled with OPOG for the entire Site. *Id.* The first two groups of Settling Defendants will collectively pay $12,625,000 towards the Work being performed at OU2 of the Site as well as towards EPA's unrecovered past costs incurred in connection with OU2 at the Site. *See* Mot. to Am. at 6.

B. Legal Standard

"The Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99-499, § 101 *et seq.*, 100 Stat. 163, authorized a variety of types of settlements which the EPA may utilize in CERCLA actions, including consent decrees providing for PRPs to contribute to cleanup costs and/or to undertake response activities themselves." *United States v. Cannons Eng'g Corp.* ("*Cannons*"), 899 F.2d 79, 85-86 (1st Cir. 1990) (quoting 42 U.S.C. § 9622). "Congress sought through CERCLA . . . to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation." *Arizona v. City of Tucson*, 761 F.3d 1005, 1011 (9th Cir. 2014) (citations omitted).

Where the EPA enters a proposed consent decree in a CERCLA action, "the trial court's review function is only to 'satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.'" *Id.* at 1020 (quoting H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985)); *see also United States v. Montrose Chem. Corp. of Cal.* ("*Montrose*"), 50 F.3d 741, 748 (9th Cir. 1995). As the First Circuit explained in *Cannons*, a court should "take a broad view of proposed settlements, leaving highly technical issues and relatively petty inequities to the discourse between parties," and should "treat each case on its

own merits, recognizing the wide range of potential problems and solutions." *Id.* "When a court considers approval of a consent decree in a CERCLA case, there can be no easy-to-apply check list of relevant factors." *Id.*

A district court must employ a deferential standard in reviewing a proposed settlement, particularly where "a government agency charged with protecting the public interest 'has pulled the laboring oar in constructing the proposed settlement.'" *Montrose*, 50 F.3d at 746 (quoting *Cannons*, 899 F.2d at 84). "[A] district court reviewing a proposed consent decree 'must refrain from second-guessing the Executive Branch.'" *Id.* (quoting *Cannons*, 899 F.2d at 84). "A consent decree is essentially a settlement agreement subject to continued judicial policing. It is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise." *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (internal quotation marks and citations omitted).

However, a court's reliance on an agency's recommendation "cannot be so complete that it takes the place of the court's obligation to independently 'scrutinize' the terms of a settlement." *Montrose*, 50 F.3d at 747 (citation omitted). In performing this obligation, the court "must gauge the adequacy of settlement amounts to be paid by settling parties by comparing the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them, and then factor into the equation any reasonable discount for litigation risks, time savings, and the like." *City of Tucson*, 761 F.3d at 1012 (internal quotation marks and citations omitted). "The district court must actually engage with [the evidence provided] and explain in a reasoned disposition why the evidence indicates that the consent decrees are procedurally and substantively fair, reasonable, and consistent with CERCLA's objectives." *Id.* (internal quotation marks and citations omitted).

Where not all PRPs are parties to a judicially approved consent decree, any party that has not resolved its CERCLA liability "shall not be liable [to other responsible parties] for claims for contribution regarding matters addressed in the settlement." *See* 42 U.S.C. § 9613(f)(2). This is because PRPs "who do not enter into early settlement agreements may ultimately bear a disproportionate share of the CERCLA liability." *Id.* In addition, "[PRPs] who do not enter into such agreements have standing to intervene in CERCLA actions to oppose the entry of CERCLA consent decrees." *Id.* (citing *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1150-53 (9th Cir. 2010)).

C. *Analysis*

In approving a CERCLA consent decree, a district court must "determine whether the decree was both (1) the product of a procedurally fair process, and (2) substantively fair to the parties in light of a reasonable reading of the facts." *Montrose*, 50 F.3d at 746 (citation omitted). A court must also evaluate whether the proposed decree is consistent with the policies of CERCLA. *Id.*; *see also Arizona v. Ashton Co., Inc.*, CIV 10-634-TUC-CKJ, 2016 WL 3745979, at *1 (D. Az. July 13, 2016).

1. Procedural Fairness

In assessing procedural fairness, "a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." *Cannons*, 899 F.2d at 86. "Such a process generally involves good faith, arm's-length negotiations among experienced counsel, during which all parties have an opportunity to participate." *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.* ("*Dobbas*"), No. 2:14-595 WBS EFB, 2015 WL 7188230, at *2 (E.D. Cal. Nov. 16, 2015) (citing *Montrose*, 50 F.3d at 746; *Cannons*, 899 F.2d at 87). Once a court is satisfied that a decree is the product of good faith, arm's length bargaining, the decree "is presumptively valid and the objecting party 'has a heavy burden of demonstrating that the decree is unreasonable.'" *Oregon*, 913 F.2d at 581 (quoting *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)).

Here, Plaintiffs provide evidence that the proposed settlement was the result of good faith, arm's length negotiations among experienced counsel and each party had the opportunity to participate. *See* Praskins Decl. ¶¶ 2, 10; *see also* Declaration of Gene A. Luvero in Support of Plaintiffs' Proposed Amendment to Consent Decree ("Luvero Decl."), Docket No. 52-3 at ¶¶ 2-5. As such, the decree is presumptively valid. *See Oregon*, 913 F.2d at 581. Because there is no objecting party, and in light of declarations submitted, the Court would find that the proposed amendment is procedurally fair.

2. Substantive Fairness

"Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *Cannons*, 899 F.2d at 87 (citation omitted). Thus, the settlement terms "must be based upon, and

roughly correlated with, some acceptable measure of comparative fault, apportioning liability among settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done." *Id.* (citations omitted); *see also United States v. Coeur d'Alenes Co.*, 767 F.3d 873, 877 (9th Cir. 2014).

As the First Circuit explained in *Cannons*:

> Even accepting substantive fairness as linked to comparative fault, an important issue still remains as to how comparative fault is to be measured. There is no universally correct approach. It appears very clear to us that what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances should be left largely to the EPA's expertise. Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs.

Cannons, 899 F.2d at 87; *see also United States v. Rohm & Haas Co.*, 721 F.Supp. 666, 680-81 (D. N.J. 1989) (the "Court's task is not to make a finding of fact as to whether the settlement figure is exactly proportionate to the share of liability appropriately attributed to the settlement; rather, it is to determine whether the settlement represents a reasonable compromise").

The Ninth Circuit has further explained that a district court:

> has an obligation to independently scrutinize the terms of the agreement. In so doing, the court must gauge the adequacy of settlement amounts to be paid by settling parties by comparing the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them, and then factor into the equation any reasonable discount for litigation risks, time savings, and the like. A district court abuses its discretion where it does not fulfill its obligation to engage in this comparative analysis.

City of Tucson, 761 F.3d at 1012 (internal quotation marks and citations omitted). For this reason, a district court's evaluation may not be made in an "informational vacuum, or where the record contains no evidence at all on an important point." *Id.* (internal quotations and citation omitted).

Here, Plaintiffs assert that the Consent Decree is substantively fair because:

> the settlement results in the payment of over $12 million to help fund the Work at the Site and to reimburse certain of EPA's past costs. See Praskins Decl., Paragraph 11 (In evaluating the fairness

> of the proposed Amendment, EPA took into consideration factors such as the relative contribution to the OU2 plume by the Settling Defendants, the existence of others sources of contamination, litigation risks and the avoided costs of litigation).

See MPA at 9:1-19:11; *see also* Praskins Decl. ¶ 11. Plaintiffs also assert that amendment process complies with the procedure provided by the Consent Decree and approved by the Court. MPA at 10:10-17.

The Court would find that the declaration testimony, along with all the materials previously submitted to the Court in connection with the Consent Decree, establishes that the proposed amendment is substantively fair.

C. Consistency with CERCLA

The Court would also find that the Consent Decree is consistent with CERCLA's objectives. As Plaintiffs pointed out in their initial Motion, one of CERCLA's primary purposes is to "foster settlement through its system of incentives and without unnecessarily further complicating already complicated litigation." *See* Mot. at 12:11-16 (citing *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc*., 710 F.3d 946, 971 (9th Cir. 2013)). In addition, CERCLA's other primary goals include "(1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created." *See Chubb Custom Ins. Co*., 710 F.3d at 968 (citing , 635 F.3d 440, 447 (9th Cir. 2010)).

Here, as Plaintiffs point out, the Consent Decree encourages PRPs to perform cleanup and secures substantial cleanup for the OU2 site, recovers for the government previously expended EPA costs incurred in connection with response efforts at OU2, and avoids the expenditure of public money and time on unnecessary litigation. *See* Mot. at 21:6-14. Indeed, upon entry of the Consent Decree, the cleanup work at OU2 will begin within days. *Id.*; *see also* Pl.'s Supp'l Br. at 20:21-27. As such, the Court would find that the Consent Decree is consistent with CERCLA's objectives.

III. <u>Conclusion</u>

In sum, the Court would GRANT Plaintiffs' Motion to Enter Consent Decree.