IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GARRISON SOUTHFIELD PARK LLC, Plaintiff, v. CLOSED LOOP REFINING AND RECOVERY, INC., *et al*., Defendants.	Case No. 2:17-cv-783-EAS-EPD JUDGE EDMUND A. SARGUS, JR. CHIEF MAGISTRATE JUDGE ELIZABETH PRESTON DEAVERS

OLYMBEC USA LLC, Plaintiff, v. CLOSED LOOP REFINING AND RECOVERY, INC., *et al*., Defendants.	Case No. 2:19-cv-1041-EAS-EPD JUDGE EDMUND A. SARGUS, JR. CHIEF MAGISTRATE JUDGE ELIZABETH PRESTON DEAVERS

EXHIBIT B

(Declaration of Plaintiff Garrison Southfield Park LLC)

OF THE MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT EXECUTED BY PLAINTIFF GARRISON SOUTHFIELD PARK LLC, PLAINTIFF OLYMBEC USA LLC, AND DEFENDANT SONY ELECTRONICS INC.

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DECLARATION OF KARL HEISLER IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT EXECUTED BY PLAINTIFF GARRISON SOUTHFIELD PARK LLC, PLAINTIFF OLYMBEC USA LLC, AND DEFENDANT SONY ELECTRONICS INC.

Pursuant to 28 U.S.C. § 1746, Karl R. Heisler declares the following:

1. I offer this declaration in support of the settlement agreement executed by Plaintiff Garrison Southfield Park LLC ("Garrison"), Plaintiff Olymbec USA LLC ("Olymbec," along with

Garrison referred to as the "Plaintiffs"), and Defendant Sony Electronics Inc. ("the Settlor"). I have personal knowledge of the facts stated herein.

2. The law firm of King & Spalding LLP is one of the law firms that represent Garrison in this matter. I am a partner of this law firm and work in its Chicago, Illinois office, which is located at 353 N. Clark Street, 12th Floor, Chicago, IL 60654. I am admitted to practice in this case *pro hac vice*.

3. My familiarity with this matter arises out of my representation of Garrison. My knowledge of the facts in this declaration is based on documentary evidence, firsthand observations, communications with the State of Ohio, and expert consulting advice that my law firm has obtained and reviewed.

4. Garrison owns two contiguous warehouses located at 1655 and 1675 Watkins Road in Columbus, Ohio. Garrison leased 1675 Watkins Road and space within 1655 Watkins Road to Closed Loop Refining and Recovery, Inc. ("Closed Loop"), which received, stockpiled, and abandoned cathode ray tubes and other electronic wastes ("E-Waste") at these warehouses from 2012 and extending into 2016.

5. According to the declaration of Randall B. Womack, counsel for Olymbec, Closed Loop rented a warehouse owned by Olymbec that is located near Garrison's warehouses. *See* Exhibit C to the Motion for Approval of Settlement Agreement. That declaration states that Closed Loop and/or Closed Loop Glass Solutions (an affiliate of Closed Loop) received, stockpiled, and abandoned E-Waste at Olymbec's warehouse from 2014 and extending into 2016.

6. Garrison has obtained and reviewed Closed Loop records providing detailed accounts of the weight of E-Waste that Closed Loop received from its customers, including accounting

spreadsheets, commodity purchase agreements, bills of lading, weight tickets, purchase orders, and related shipping documentation. Garrison has also obtained discovery from one or more Defendants that evidence contractual relationships between (a) those entities that contracted with Defendant Closed Loop for the disposal or treatment of E-Waste; and (b) original equipment manufacturers ("OEMs") claiming extended producer responsibility ("EPR") credit in various states for such E-Waste. Based on these records and information, Settlor arranged for the transport of E-Waste to Garrison's warehouses and to Olymbec's warehouse (collectively, the "Facility").

7. AECOM, an environmental consultant, collected samples of the E-Waste at Garrison's warehouses. The laboratory analyses of these samples using the Toxicity Characteristic Leaching Procedure reflect that the E-Waste has a total lead content that far exceeds the 5.0 mg/L regulatory threshold under federal and state hazardous waste laws, which is consistent with common industry knowledge of lead content in cathode ray tubes. Based on these analyses and common industry knowledge, the E-Waste is a hazardous substance as defined by Section 101 of Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(14).

8. Atwell, LLC ("Atwell"), an environmental consultant, in consultation with electronic waste recyclers and abatement contractors, estimated the total weight of E-Waste in Garrison's warehouses at approximately 128,187,373 pounds. EnSafe, Inc. ("EnSafe"), an environmental consultant, was retained to prepare the CERCLA action memorandum, the CERCLA engineering evaluation/cost analysis, and the hazardous waste closure plan, as well as to estimate the costs that Garrison will incur to remove the E-Waste, to lawfully recycle or dispose of it, and to decontaminate the warehouses by removing the lead dust deposited on

the floors, walls, columns, rafters, and contents, all consistent with the U.S. Environmental Protection Agency National Contingency Plan at 40 C.F.R. Part 300. Based on Atwell's assessment and proposals from electronic waste recyclers and abatement contractors, EnSafe estimates that these costs, including past costs, will be approximately $17,080,675.

9. According to Randall Womack's declaration, there are an estimated 30,917,116 pounds of E-Waste at Olymbec's warehouse, and the costs of environmental cleanup, including past costs, for that warehouse were estimated at about $4,852,518. *See* Exhibit C. Thus, in total, the Facility contains approximately 159,104,489 pounds (79,552 tons) of E-Waste, and the response costs will be approximately $21,933,193.

10. The State of Ohio requested that the Plaintiffs negotiate joint settlements in which each potentially responsible party ("PRP") pays one sum for all of its E-Waste in the three warehouses, because Closed Loop operated all three warehouses as a single facility. Closed Loop stored the same type of E-Waste at all three warehouses and in the same manner; Garrison's warehouse is a six minute drive from Olymbec's warehouse; and Closed Loop's records reflect the fact that millions of pounds of the E-Waste were transferred from Garrison's warehouses to Olymbec's warehouse, without any documentation regarding which E-Waste came from which defendant. The State of Ohio is also expecting the same or substantially identical cleanup remedy at each warehouse, and the Plaintiffs have retained the same environmental consulting firm to help design that remedy in consultation with the State of Ohio and in compliance with the U.S. Environmental Protection Agency National Contingency Plan.

11. Plaintiffs have been using a straightforward cost recovery formula in settlement negotiations that allocates a percentage of the response costs to each PRP based on records that identify

the total weight of E-Waste that the PRP shipped to the Facility, as compared to the total weight of the E-Waste shipped to the Facility by all PRPs. Plaintiffs then applied this percentage to the cleanup cost estimate of $21,933,193. Plaintiffs, however, have noted in prior motions for approval of settlement agreements that exceptions to this formula may be made for some PRPs when circumstances warrant.

12. In this case, the cost recovery formula used for prior settlements is not suitable to the allocation of liability for Settlor for at least two reasons:

    a. First, OEMs like Settlor are a different class of Defendants as compared to prior Settlors in terms of the factual underpinnings of their alleged liability. OEMs are subject to various state EPR laws requiring them to arrange for the disposition and treatment of E-Waste in exchange for authorization to sell electronic equipment in that state. State EPR laws thus create a basis for CERCLA arranger liability for those OEMs that elect to participate in the electronic equipment market, but in a way that is different from CERCLA arranger liability for the prior Settlors, which contracted directly with Defendant Closed Loop. An OEM's EPR obligation to any given state is generally based on the OEM's market share. Pennsylvania, for example, requires OEMs to "establish, conduct and manage a plan to collect, transport and recycle a quantity of covered devices equal to the manufacturer's market share." 35 PA. STAT. CONS. STAT. § 6031.305(a)(1). An OEM seeking to sell electronic equipment in states like Pennsylvania must therefore accept financial responsibility to provide for the disposition and treatment of a certain quantity of E-Waste commensurate with its market share. These state EPR laws help prop up the CRT recycling industry. As pertinent herein, they also gave OEMs the commercial leverage to set or influence

downstream E-Waste markets by using the prospect of high volumes of E-Waste, and they helped create the opportunity for Defendant Closed Loop to launch and advance the enterprise that culminated with the abandonment of E-Waste at the Facility.

b. Second, the manner in which the EPR obligations are discharged make it exceedingly difficult to ascribe specific weights of E-Waste at the Facility to specific OEMs with any reasonable degree of certainty to support application of the same cost recovery formula used for prior Settlors. The discovery necessary to attempt to attribute specific weights of E-Waste at the Facility to Settlor would be costly and potentially inconclusive. OEMs demonstrate compliance with EPR laws by providing for the disposition of E-Waste through third parties, which complicates E-Waste tracking. In many cases, OEMs contract with third parties to provide for E-Waste to be transported to one location, where some disassembly takes place, and with the residuals transported by yet other third parties to another location. The bill of lading for any given load of E-Waste transported to the Facility, for example, does not identify whether any OEM claimed EPR credit for all or a part of that shipment, making it difficult to attribute individual shipments E-Waste to any particular OEM. Further complicating the analysis is the fact that OEMs "buy" weight for purposes of meeting their EPR obligations as opposed to full loads; E-Waste subject to an OEM's EPR credits can therefore be commingled on the same truck with other E-Waste and delivered on the same bill of lading. OEMs also typically relied on representations made by third parties shipping E-Waste for purposes of securing EPR credits, without any reliable accounting controls or other means of independent verification.

13. Given that the cost recovery formula used for prior Settlors does not appear suitable for the

OEM class of Defendants, Garrison has instead taken into account other considerations, including, but not limited to, (a) information provided by Settlor regarding Settlor's national market share of the electronic equipment sales that generate the type of E-Waste abandoned at the Facility; (b) Settlor's commitment from the outset of settlement negotiations to participate in the funding of cleanup activities; (c) Settlor's commitment to continue to cooperate with Plaintiffs; (d) records and information provided by the Settlor relevant to the matter; (e) the availability of settlement proceeds to address a portion of the growing orphan share created by other PRPs, including PRPs that are bankrupt, defunct, dissolved, or otherwise lack ability to pay; and (f) the inclusion of a "No Windfall" provision in the Settlement Agreement designed to prevent a double recovery by Plaintiffs. Based on these considerations, Plaintiffs have agreed to settle the claims against Settlor for $1,200,000.

14. Garrison reviewed Closed Loop's records to identify the PRPs that arranged for E-Waste to be transported to the Facility. Garrison's counsel, by letter, electronic mail, and/or telephone, invited these PRPs to negotiate settlements to pay for the removal and/or remediation of the E-Waste that they contributed to the Facility, except for bankrupt, dissolved, or defunct PRPs and PRPs that sent a *de minimus* amount of E-Waste that will cost no more than $6000 to remediate. Garrison also reviewed recent discovery responses made by existing Defendants to identify additional PRPs who were then named as Defendants in Garrison's Second Amended Complaint. As those Defendants enter their appearances in this case, Garrison's counsel has been engaging them in settlement negotiations to the extent they have expressed an interest in exploring settlement. Garrison's counsel have negotiated with all PRPs that have expressed in interest in negotiations, and those negotiations are continuing. These

negotiations have resulted in a settlement with the Settlor, and may result in other settlements.

15. The parties to the Settlement Agreement were represented in negotiations by independent counsel. These negotiations included, but were not limited to, evaluations of the Settlor's potential liability, the evidence tying Settlor to the Facility, the defenses asserted by Settlor, the potential legal fees and costs if settlement does not occur, and past and projected response costs. Based on these considerations and the additional considerations identified in Paragraphs 12 – 14 above, Garrison believes that the Settlement Agreement is fair, adequate, and reasonable. Garrison's counsel have used and will continue to consider the same factors to negotiate settlements with other PRPs, as appropriate.
16. Plaintiffs have served a copy of the Motion for Approval of Settlement Agreement on all defendants in these cases and will soon send it to all other currently known existing PRPs, even if they are not defendants.
17. I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 3, 2020.

/s/ Karl R. Heisler_____
Karl R. Heisler