

**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

**MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT EXECUTED
BY PLAINTIFF GARRISON SOUTHFIELD PARK LLC, PLAINTIFF
OLYMBEC USA LLC, AND THE KUUSAKOSKI DEFENDANTS**

Plaintiff Garrison Southfield Park LLC (“Garrison”), Plaintiff Olymbec USA LLC (“Olymbec,” along with Garrison referred to as the “Plaintiffs”), and Defendants Kuusakoski, Inc., Kuusakoski US LLC, Kuusakoski Glass Recycling LLC, Vintage Tech, LLC a.k.a. Vintage Tech Recyclers, Inc., and Vintage Tech Recycling (“Vintage Tech”) (with Defendants Kuusakoski, Inc., Kuusakoski US LLC, Kuusakoski Glass Recycling LLC, and Vintage Tech, respectively and together, the “Settlor”) jointly move the Court to enter an order approving the

Settlement Agreement between Plaintiffs and Settlor as a final judgment in accordance with Federal Rules of Civil Procedure 54(b) and 58. This motion is supported by the attached Memorandum in Support and the attached Settlement Agreement.

For the Court’s convenience, a proposed order has been attached hereto.

MEMORANDUM IN SUPPORT

i. Combined Table of Contents and Executive Summary

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<p><u>Summary:</u> Plaintiffs and Settlor have negotiated a settlement and seek the Court’s approval of the Settlement Agreement as well as contribution protection for the Settlor. The Settlement Agreement resolves Plaintiffs’ claims arising under CERCLA Section 107 and Ohio common law for the recovery of costs to investigate the extent of and to remove electronic wastes abandoned at Plaintiffs’ properties by Defendant Closed Loop Refining and Recovery, Inc.</p> <p><u>Citations to Primary Authority:</u></p> <p style="padding-left: 40px;">42 U.S.C. § 9607 42 U.S.C. § 9613(f)(1)</p> <p style="padding-left: 40px;">40 C.F.R. Part 300</p>	
II. Argument	X
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<p><u>Summary:</u> CERCLA settlements are evaluated for fairness, reasonableness and consistency with CERCLA. The settlement negotiations satisfy procedural fairness and substantive fairness. The settlement is reasonable because it is based on the relative strengths and weaknesses of the evidence and the chances of prevailing on the merits. The settlement is also consistent with CERCLA, which is designed to ensure prompt and efficient cleanup.</p> <p><u>Citations to Primary Authority:</u></p> <p style="padding-left: 40px;"><i>United States v. Atlas Lederer</i>, 494 F. Supp. 2d 629 (S.D. Ohio 2005) <i>United States v. Cantrell</i>, 92 F. Supp. 2d 718 (S.D. Ohio 2000)</p>	

<p><i>Responsible Env'tl. Solutions Alliance v. Waste Mgmt., Inc.</i>, No. 3:04-cv-013, 2011 WL 382617 (S.D. Ohio Feb. 3, 2011)</p> <p><i>United States v. 3M Co.</i>, No. 3:14-cv-32, 2014 WL 1872914 (S.D. Ohio May 8, 2014)</p> <p><i>United States v. Lexington-Fayette Urban Cnty. Gov't</i>, 591 F.3d 484 (6th Cir. 2010)</p> <p><i>United States v. Akzo Coatings of Am., Inc.</i>, 949 F.2d 1409 (6th Cir. 1991)</p> <p><i>United States v. Cannons Eng'g Corp.</i>, 899 F.2d 79 (1st Cir. 1990)</p> <p><i>Nurad, Inc. v. William E. Hooper & Sons Co.</i>, 966 F.2d 837 (4th Cir. 1992), <i>cert. denied</i>, 506 U.S. 940 (1992)</p> <p><i>Kelley v. Thomas Solvent Co.</i>, 717 F. Supp. 507, 517 (W.D. Mich. 1989)</p>	
<p>B. The Court Should Approve the Contribution Bar in the Settlement Agreement.</p>	<p>X</p>
<p><u>Summary</u>: The Court has the authority to issue contribution protections to settling defendants pursuant to CERCLA Section 113(f)(1). Courts, including this Court, have routinely done so in the past, and this Court should exercise that authority for Settlor. The contribution bar should bar claims for all potential causes of action, consistent with prior orders in this case and the approach followed in <i>Hobart Corp.</i></p> <p><u>Citations to Primary Authority</u>:</p> <p>42 U.S.C. § 9613(f)(1)</p> <p><i>Hobart Corp. v. Dayton Power & Light Co.</i>, No. 3:13-cv-115 (S.D. Ohio 2014)</p> <p><i>Responsible Env'tl. Solutions Alliance v. Waste Mgmt., Inc.</i>, No. 3:04-cv-013, 2011 WL 382617 (S.D. Ohio Feb. 3, 2011)</p> <p><i>United States v. Alcan Aluminum Corp.</i>, 990 F.2d 711, 724 (2d Cir. 1993)</p> <p><i>Allied Corp. v. ACME Solvent Reclaiming, Inc.</i>, 771 F. Supp. 219 (N.D. Ill. 1990)</p> <p><i>Evansville Greenway & Remediation Tr. v. S. Ind. Gas & Elec. Co.</i>, No. 3:07-CV-66-SEB-WGH, 2010 WL 3781565 (S.D. Ind. Sept. 20, 2010)</p> <p><i>Foamseal, Inc. v. Dow Chem. Co.</i>, 991 F. Supp. 883 (E.D. Mich. 1998)</p> <p><i>Stearns & Foster Bedding Co. v. Franklin Holding Corp.</i>, 947 F. Supp. 790 (D.N.J. 1996)</p> <p><i>Mavigliano v. McDowell</i>, No. 93 C 7216, 1995 WL 704391 (N.D. Ill. Nov. 28, 1995)</p> <p><i>Hillsborough Cnty. v. A & E Rd. Oiling Serv., Inc.</i>, 853 F. Supp. 1402 (M.D. Fla. 1994)</p> <p><i>United States v. SCA Servs. of Indiana, Inc.</i>, 827 F. Supp. 526 (N.D. Ind. 1993)</p> <p><i>Am. Cyanamid Co. v. King Indus., Inc.</i>, 814 F. Supp. 215 (D.R.I. 1993)</p> <p><i>Barton Solvents, Inc. v. Sw. Petro-Chem, Inc.</i>, 834 F. Supp. 342 (D. Kan. 1993)</p> <p><i>Allied Corp. v. ACME Solvent Reclaiming, Inc.</i>, 771 F. Supp. 219 (N.D. Ill. 1990).</p>	

<p><i>San Diego Unified Port Dist. v. Gen. Dynamics Corp.</i>, No. 07-CV-01955-BAS-WVG, 2017 WL 2655285 (S.D. Cal. June 20, 2017)</p> <p><i>City of San Diego v. Nat'l Steel & Shipbuilding Corp.</i>, No. 09CV2275 WQH BGS, 2015 WL 1808527 (S.D. Cal. Apr. 21, 2015)</p> <p><i>AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.</i>, No. CIVS 00-113 LKK JFM, 2007 WL 1946635 (E.D. Cal. July 2, 2007)</p> <p><i>Lewis v. Russell</i>, No. CIV 2.03-2646 WBS, 2012 WL 671670 (E.D. Cal. Nov. 9, 2012)</p>	
<p>C. Settlor's Payment Should Be Credited <i>Pro Tanto</i>, and Not <i>Pro Rata</i>, in Determining Other Defendants' Equitable Shares at Trial.</p>	<p>X</p>
<p><u>Summary</u>: The Court's order approving settlement should credit the settlement payment <i>pro tanto</i>, as opposed to <i>pro rata</i>, in determining other the Defendants' equitable shares of response costs, as this Court has done for prior settlements in this case. The <i>pro tanto</i> approach encourages early settlements and voluntary site cleanups, promotes faster site remediation, and serves judicial economy.</p> <p><u>Citations to Primary Authority</u>:</p> <p>42 U.S.C. § 9613(f)(2)</p> <p><i>Responsible Env'tl. Solutions Alliance v. Waste Mgmt., Inc.</i>, No. 3:04-cv-013, 2011 WL 382617 (S.D. Ohio Feb. 3, 2011)</p> <p><i>Am. Cyanamid Co. v. Capuano</i>, 381 F.3d 6 (1st Cir. 2004)</p> <p><i>United States v. Cannons Eng'g Corp.</i>, 899 F.2d 79 (1st Cir. 1990)</p> <p><i>Action Mfg. Co. v. Simon Wrecking Co.</i>, 428 F. Supp. 2d 288 (E.D. Pa. 2006), <i>aff'd</i>, 287 Fed. App'x. 171 (3d Cir. 2008)</p> <p><i>Akzo Nobel Coatings, Inc. v. Aigner Corp.</i>, 197 F.3d 302 (7th Cir. 1999)</p> <p><i>Ameripride Servs. Inc. v. Texas E. Overseas Inc.</i>, 782 F.3d 474 (9th Cir. 2015)</p> <p><i>Veolia Es Special Servs., Inc. v. Hiltop Invs., Inc.</i>, No. CIV.A. 3:07-0153, 2010 WL 898097 (S.D. W.Va. Mar. 12, 2010)</p>	
<p>D. The Court Should Enter the Settlement Agreement as a Final Judgment.</p>	<p>X</p>
<p><u>Summary</u>: The Court's order approving the Settlement Agreement merits explicit entry as a final judgment pursuant to Federal Rules of Civil Procedure 54(b) and 58, based on recent developments and the current litigation posture. The Court is authorized to direct entry of a final judgment as to one or more, but fewer than all, claims or parties if the Court expressly determines that there is no just reason for delay. There is no just reason for delay given the need to allocate these settlement proceeds to the cleanup and in view of CERCLA's policy supporting prompt cleanup and statutory goal of providing finality to settling defendants.</p>	

<p><u>Citations to Primary Authority:</u></p> <p>42 U.S.C. § 9613(f)(1) 42 U.S.C. § 9613(f)(2)</p> <p>Fed. R. Civ. P. 54(b) Fed. R. Civ. P. 58</p> <p><i>Ball v. Kasich</i>, No. 2:16-cv-282, 2020 WL 4528822 (S.D. Ohio Aug. 6, 2020) (Sargus, J.), <i>appeal docketed</i>, No. 20-3927 (6th Cir. Sept. 3, 2020) <i>United States v. Pretty Products, Inc.</i>, 780 F. Supp. 1488 (S.D. Ohio 1991) <i>Curtis–Wright Corp. v. Gen. Elec. Corp.</i>, 446 U.S. 1 (1980) <i>Gen. Acquisition, Inc. v. GenCorp., Inc.</i>, 23 F.3d 1022 (6th Cir. 1994) <i>United States v. Akzo Coatings of Am., Inc.</i>, 949 F.2d 1409 (6th Cir. 1991) <i>Solomon v. Aetna Life Ins. Co.</i>, 782 F.2d 58 (6th Cir. 1986) <i>Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc.</i>, 807 F.2d 1279 (6th Cir. 1986) <i>United States v. Cannons Eng’g Corp.</i>, 720 F. Supp. 1027 (D. Mass. 1989), <i>aff’d</i>, <i>United States v. Cannons Eng’g Corp.</i>, 899 F.2d 79 (1st Cir. 1990) <i>Witasick v. Minnesota Mut. Life Ins.</i>, 803 F.3d 184 (3rd Cir. 2015) <i>Otis v. City of Chicago</i>, 29 F.3d 1159 (7th Cir. 1994) <i>Paktootas v. Teck Cominco Metals, Ltd.</i>, 905 F.3d 565 (9th Cir. 2018)</p>	
<p>III. Conclusion</p>	<p>X</p>
<p><u>Summary:</u> For all of the reasons set forth below, Plaintiffs and Settlor request that the Court approve the Settlement Agreement.</p>	

I. Background

Plaintiffs and Settlor have negotiated a settlement and seek the Court’s approval of the Settlement Agreement attached hereto as Exhibit A (“the Settlement Agreement”). The Settlement Agreement resolves Plaintiffs’ claims against Settlor pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607, and Ohio common law, for past and projected response costs to clean up cathode ray tubes and other electronic wastes (collectively, “E-Waste”) at Garrison’s two contiguous warehouses located at 1655 and 1675 Watkins Road in Columbus, Ohio and at Olymbec’s warehouse located at 2200 Fairwood Avenue in Columbus, Ohio (collectively, the “Facility”).

Defendant Closed Loop Refining and Recovery, Inc. (“Closed Loop”) leased the Facility or portions thereof from the Plaintiffs, and Closed Loop and/or Closed Loop Glass Solutions (an affiliate of Closed Loop) then received, stockpiled, and abandoned E-Waste received from their customers at the Facility. Declaration of Karl R. Heisler (“Heisler Decl.”), ¶¶ 4, 6 (Exhibit B); Declaration of Randall B. Womack (“Womack Decl.”), ¶¶ 4, 6 (Exhibit C). Plaintiffs allege that the E-Waste constitutes hazardous substances subject to CERCLA, based on total lead content from samples collected from the Facility and common industry knowledge. Heisler Decl., ¶ 7; Womack Decl., ¶ 7. Plaintiffs retained consultants to estimate the total weight of E-Waste in the Facility and to estimate the necessary costs that Plaintiffs will incur to remove it, to lawfully dispose of it, and to decontaminate the Facility 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. Heisler Decl., ¶ 8; Womack Decl., ¶ 8. The consultants estimated that the Facility contains approximately 159,104,489 pounds (79,552 tons) of E-Waste, and that the response costs will be approximately \$21,933,193. Heisler Decl., ¶¶ 8, 11; Womack Decl., ¶¶ 8, 11.

Plaintiffs have obtained 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. Heisler Decl., ¶ 6; Womack Decl., ¶ 6. According to these records, and as confirmed by Settlor’s reasonable inquiry, Settlor arranged for the transport of the weight of E-Waste to the Facility that appears in Appendix A to its Settlement Agreement. Heisler Decl., ¶ 6; Womack Decl., ¶ 6.

Plaintiffs have been using a straightforward cost recovery formula in settlement

negotiations that allocates a percentage to each potentially responsible party (“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. Heisler Decl., ¶ 11; Womack Decl., ¶ 11. Plaintiffs then applied this percentage to the cleanup cost estimate of \$21,933,193. Heisler Decl., ¶ 11; Womack Decl., ¶ 11. Using this formula, Plaintiffs calculated Settlor’s share for settlement purposes at \$8,242,482. Heisler Decl., ¶ 11; Womack Decl., ¶ 11. Plaintiffs, however, have noted in prior motions for approval of settlement agreements that exceptions to this formula may be appropriate for some PRPs when circumstances warrant. In this case, Plaintiffs have taken into consideration additional factual information provided by Settlor that is relevant to the matter, the fact that Settlor obtained and paid the premiums for pollution legal liability insurance that provided coverage for cleanup costs, and Settlor’s commitment to continue to cooperate with Plaintiffs. Plaintiffs and Settlor have thereupon agreed to settle the claims against Settlor for approximately 73% of Settlor’s calculated share (under Plaintiffs’ formula) -- \$6,000,000. Heisler Decl., ¶ 11; Womack Decl., ¶ 11; Defendant’s Decl., ¶ 5.

In addition to the reasons set forth by Plaintiffs herein, Settlor believes the settlement is fair, adequate, and reasonable because, in Settlor’s opinion, the settlement takes into consideration legal defenses and allocation arguments raised by Settlor, which include the application of the Superfund Recycling Equity Act (“SREA”), 42 U.S.C. § 9627, as well as *Carolina Pines I, LLC v. City of Abbeville Pu. Works, et al.*, Case No. 3:16-cv-1124-TLW, Doc. # 142 (D.S.C. Nov. 14, 2018) (discussing appropriate allocation for a different e-waste site). Although Plaintiffs did not agree with Settlor that SREA or the *Carolina Pines* decision warranted a downward adjustment from the cost recovery formula, the fact there may be

different rationales why a settlement should be judged as fair supports rather than detracts from the fairness determination.

Based on considerations identified above, as informed by their respective positions, both Plaintiffs and Settlor agree that, under the terms of the Settlement Agreement, \$6 million is a fair, adequate, and reasonable settlement of Settlor's liability. Heisler Decl., ¶ 13; Womack Decl., ¶ 13; Defendant's Decl., ¶ 5.

It is also worth noting that the State of Ohio will not object to the Settlement Agreement and will consider Settlor's CERCLA liability to the State of Ohio satisfied, subject to certain preconditions, including this Court's issuance of contribution protection pursuant to CERCLA Section 113(f)(1). *See* Exhibit G.

Plaintiffs and Settlor now ask the Court to approve the Settlement Agreement. Pursuant to Section 6 of the Settlement Agreement, consummation of the settlement is ultimately contingent on the entry of an Order and a final, non-appealable judgment providing that Settlor's settlement payments be credited *pro tanto*, and not *pro rata*, in determining the equitable share of defendants other than Settlor. The proposed order contains language to that effect.

Plaintiffs and Settlor also request the Court to discharge and/or bar all past, present, and future counterclaims, cross-claims and other claims against Settlor relating to the Facility, including any claims that have been or which could be made by any party to this case or any other person, except for certain claims listed in Paragraphs 4 and 9 of the Settlement Agreement. These exceptions include a reopener in Paragraph 9 if new information reveals that Settlor contributed at least 500,000 pounds more than the weight of E-Waste currently attributed to that Settlor in Appendix A to its Settlement Agreement. This reopener is designed to make sure that Settlor pays its fair share even if evidence obtained in future discovery discloses that the Settlor

is responsible for a quantity of E-Waste not considered in calculating the settlement amount in the Settlement Agreement.

II. Argument

A. The Settlement Agreement Should Be Approved By The Court Because Settlements Are Favored, And The Settlement Agreement Is Fair, Is Reasonable, And Satisfies The Requirements of CERCLA.

“The general policy of the law is to support voluntary settlements.” *United States v. Cantrell*, 92 F. Supp. 2d 718, 723 (S.D. Ohio 2000) (approving CERCLA consent decrees). *See also United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (“In the first place, it is the policy of the law to encourage settlements.”). While a trial court must evaluate a settlement agreement, “public policy generally supports ‘a presumption in favor of voluntary settlement’ of litigation.” *United States v. Lexington-Fayette Urban Cnty. Gov’t*, 591 F.3d 484, 490 (6th Cir. 2010) (quoting *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991)).

The Sixth Circuit has stated that district courts must evaluate a CERCLA settlement for “fairness, reasonableness and consistency with the statute.” *Akzo Coatings*, 949 F.2d at 1426. *Accord Cannons Eng’g*, 899 F.2d at 85. The same standards apply to CERCLA settlements between private parties. *Responsible Env’tl. Solutions Alliance v. Waste Mgmt., Inc.*, No. 3:04-cv-013, 2011 WL 382617, at *2 (S.D. Ohio Feb. 3, 2011).

A district court is not required to delve into the fine points of a settlement, or to determine if other options are available. It is not the court’s “function to determine whether [a settlement] is the best possible settlement that could have been obtained, but only whether it is fair, adequate and reasonable.” *Akzo Coatings*, 949 F.2d at 1436. As explained in Subsections 1 through 4 below, the proposed settlement is fair, reasonable, and consistent with CERCLA.

1. The Settlement Negotiations Satisfy Procedural Fairness.

A CERCLA settlement “must be both procedurally and substantively fair.” *Responsible Env'tl. Solutions*, 2011 WL 382617 at *2 (citing *Cannons Eng'g*, 899 F.2d at 86). With respect to procedural fairness, “[t]here is a strong presumption in favor of voluntary settlements in CERCLA litigation.” *United States v. 3M Co.*, No. 3:14-cv-32, 2014 WL 1872914, at *5, (S.D. Ohio May 8, 2014) (citing *Akzo Coatings*, 949 F.2d at 1436).

The procedural component is satisfied if the negotiations were conducted fairly. “To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance.” *Cannons Eng'g*, 899 F.2d at 86. While “there can be no easy-to-apply check list of relevant factors” to measure fairness, one factor to be considered is whether all defendants have “had an opportunity to participate in the negotiations.” *Id.* at 86-87. “The Court must determine that the negotiators bargained in good faith.” *Cantrell*, 92 F. Supp. 2d at 724 (citing *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 517 (W.D. Mich. 1989)). *See also id.* (“The Court should gauge the candor, openness, and bargaining balance of the negotiations” (citing *Cannons Eng'g.*)).

In this case, Plaintiffs have reviewed Closed Loop’s records as well as recent discovery responses to identify the PRPs that arranged for E-Waste to be transported to the Facility. Heisler Decl., ¶¶ 6, 12; Womack Decl., ¶¶ 6, 12. Plaintiffs’ counsel have, by letter, electronic mail, and/or telephone, invited 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 only a *de minimus* amount of Waste that will cost no more than \$6000 to cleanup. Heisler Decl., ¶ 12; Womack Decl., ¶ 12. Plaintiffs have negotiated with those PRPs that have expressed an interest in negotiations, and those negotiations are continuing.

Heisler Decl., ¶ 12; Womack Decl., ¶ 12. These negotiations led to the settlement with Settlor, and may result in other settlements. Heisler Decl., ¶ 12; Womack Decl., ¶ 12.

The parties to the Settlement Agreement were represented in negotiations by independent counsel. Heisler Decl., ¶ 13; Womack Decl., ¶ 13; Defendant's Decl., ¶ 4 (Exhibit D). These negotiations included, but were not limited to, evaluations of Settlor's potential liability, the evidence tying Settlor to Plaintiffs' Facility, the defenses asserted by Settlor, the potential legal fees and costs if settlement does not occur, and past and projected response costs. Heisler Decl., ¶ 13; Womack Decl., ¶ 13; Defendant's Decl., ¶ 5. The settlement is accordingly the product of arm's length negotiations conducted in good faith. Plaintiffs' counsel have used and will continue to consider the same factors to negotiate settlements with other PRPs, except where warranted by particular circumstances. Heisler Decl., ¶ 13; Womack Decl., ¶ 13. For this settlement, Plaintiffs also considered additional information provided by the Settlor, as well as the availability of insurance proceeds in agreeing to a reduction from the allocation provided by the allocation formula. Thus, the procedural fairness test has been met.

2. The Settlement Agreement Is Substantively Fair.

The substantive fairness test relates to the actual harm caused by a party at the subject site. “[A] party should bear the cost of the harm for which it is legally responsible.” *3M Co.*, 2014 WL 1872914 at *5 (quoting *Cannons Eng’g*, 899 F.2d at 87). But “[t]here is no universally correct approach” to determining substantive fairness. *United States v. Atlas Lederer*, 494 F. Supp. 2d 629, 636 (S.D. Ohio 2005) (quoting *Cannons Eng’g*, 899 F.2d at 87).

Settlements must be “based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done.” *Cannons Eng’g*, 899

F.2d at 87. A settlement, however, is not held to a rigid formula for comparing fault, but can “diverge from an apportionment formula in order to address special factors not conducive to regimented treatment,” such as uncertainty about a settlor’s liability and discounts for early settlements. *Id.* at 87-88. “There is no universally correct approach” for assessing comparative fault, and a settlement allocation with “a plausible explanation” will be approved. *Id.* at 87.

Consistent with these principles, Plaintiffs have developed a cost recovery formula for purposes of settlement negotiations that is fair, equitable, and straightforward. As described in Section I above, Settlor has agreed to pay nearly 73% of the total cleanup costs attributable to the percentage of the E-Waste contributed by the Settlor and has provided information of assistance to Plaintiffs in the remaining litigation. The Settlement Agreement contains reopeners that allow Plaintiffs to seek additional costs from Settlor if new evidence reveals that the amount of Settlor’s E-Waste generates cleanup costs that are substantially higher than the amount of E-Waste currently attributed to Settlor. Plaintiffs and Settlor also utilized an independent, third party mediator experienced with CERCLA litigation to facilitate settlement. Thus, Plaintiffs and Settlor have entered into a Settlement Agreement that is fair to everyone and satisfies the substantive fairness test.

3. **The Settlement Agreement Is Reasonable Because It Reflects Settlor’s Actual or Potential Liability.**

The Court has the task of determining if a Settlement Agreement compensates “for the actual (and anticipated) costs of remedial and response measures.” *Cannons Eng’g*, 899 F.2d at 90. Plaintiffs have evaluated the alleged quantity of E-Waste disposed by Settlor and other factors bearing on Settlor’s liability, and have determined that Settlor’s settlement amount is fair and reasonable given the past and projected response costs and Settlor’s connection to the Facility. Heisler Decl., ¶¶ 6, 11, 13; Womack Decl., ¶¶ 6, 11, 13.

The strength of the evidence and the probability of success on the merits also come into play in determining if a specific settlement agreement is reasonable. *Cannons Eng'g*, 899 F.2d at 90. Thus, a “reasonableness equation relates to the relative strengths of the parties’ litigation positions.” *Id.* The strengths and weaknesses of plaintiffs’ and defendants’ evidence in a contribution action will by necessity impact the outcome of settlement negotiations.

The negotiations between Plaintiffs and Settlor included, but were not limited to, evaluations of Settlor’s potential liability, the strengths and weaknesses of the evidence tying Settlor to Plaintiffs’ Facility, the defenses asserted by Settlor, potential legal fees and costs if settlement does not occur, past and projected response costs, the allocation formula for calculating Settlor’s fair share of cleanup costs, and the availability of insurance proceeds. Heisler Decl., ¶ 13; Womack Decl., ¶ 13; Defendant’s Decl., ¶ 5. Based on these considerations, Plaintiffs and Settlor believe that the Settlement Agreement is fair, adequate, and reasonable. Heisler Decl., ¶ 13; Womack Decl., ¶ 13; Defendant’s Decl., ¶ 5. Thus, this settlement is reasonable, since it is based on the relative strengths and weaknesses of the evidence and the chances of prevailing on the merits for both Plaintiffs and Settlor.

4. The Settlement Agreement Is Consistent With CERCLA.

The primary policy underlying CERCLA’s provisions is “to ensure prompt and efficient cleanup of hazardous waste sites and to place the costs of those cleanups on the PRPs.” *Akzo Coatings*, 949 F.2d at 1417. Settlement agreements with PRPs further the primary policy of CERCLA to investigate and remediate hazardous substances in a prompt and efficient manner. Settlement funds help to continue the work commenced by Plaintiffs to address the E-Waste, including the onsite removal activities that Plaintiffs have already commenced while this litigation remains pending.

In addition, the settlement furthers CERCLA's goal of requiring that "those responsible for problems caused by the disposal ... bear the costs and responsibility for remedying the harmful conditions they created." *3M Co.*, 2014 WL 1872914 at *7 (quoting *Cannons Eng'g*, 899 F.2d at 90-91). See also *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992) ("The statute encourages private cleanup of such [environmental] hazards by providing a cause of action for the recovery of costs incurred in responding to a 'release' of hazardous substances at any 'facility.'").

Finally, the Settlement Agreement relieves the settling parties and the Court of the burden of proceeding with the claims against Settlor all the way to trial, thereby conserving the Court's and the parties' resources in time and in money. The Settlement Agreement reached with Settlor is consistent with the underlying intent and policies of CERCLA.

B. The Court Should Approve the Contribution Bar in the Settlement Agreement.

The Court should approve the contribution bar in the Settlement Agreement so that Settlor can be dismissed from this case without facing claims from other PRPs. Defendants who wish to settle will have little incentive to do so if they cannot exit the litigation and avoid additional monetary claims from non-settlers, as aptly noted by one court that granted the settling parties' request for a contribution bar:

Courts have recognized a strong federal interest in promoting settlement. This interest is especially pronounced in complex matters such as CERCLA claims, where the amount of evidence to be gathered for assessing liability is voluminous. It is hard to imagine that any defendant in a CERCLA action would be willing to settle if, after the settlement, it would remain open to contribution claims from other defendants. The measure of finality which a cross-claim bar provides will make settlements more desirable. A settling defendant therefore "buys its peace" from the plaintiff, as being relieved of liability to co-defendants frees the settling defendant from the litigation. The court finds that the degree to which a bar on contribution cross-claims will facilitate settlement outweighs the prejudice of such a bar on non-settling

defendants. Accordingly, the court grants this aspect of the motions of Plaintiffs and Defendants Hydrosol and Henkel.

Allied Corp. v. ACME Solvent Reclaiming, Inc., 771 F. Supp. 219, 222 (N.D. Ill. 1990) (internal citations omitted).

The Court has the authority to encourage settlement by terminating and precluding all present and future claims against Settlor, and should do so because it furthers the purposes of CERCLA. *See Responsible Envtl. Solutions*, 2011 WL 382617, at *5 (approving settlement with contribution bar because “the imposition of such a bar rests on equitable considerations, and, further, since contribution bars will foster the voluntary settlement of complex CERCLA lawsuits, a goal which is worthy of being furthered”).

The federal courts, including the Southern District of Ohio, have routinely issued orders under CERCLA Section 113(f)(1) approving settlement agreements containing contribution bars prohibiting non-settling PRPs from filing claims against settling PRPs. The following language of CERCLA Section 113(f)(1) provides for court-approved settlements that can cut off contribution claims by non-settling PRPs:

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1) (emphasis added).

The courts have used the principles in model laws such as the 1977 Uniform Comparative Fault Act (“UFCA”) and the Uniform Contribution Among Tortfeasors Act (“UCATA”) to equitably allocate cleanup costs among PRPs. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 724 (2d Cir. 1993); *Responsible Envntl. Solutions*, 2011 WL 382617, at *4. These model acts shield settling parties from claims of non-settlers on the premise that the settlers have paid their fair share. *Alcan*, 990 F.2d at 725. The courts have found that these equitable principles implement congressional intent underlying CERCLA, and have adopted these principles as federal common law. *Id.* at 724-25; *Responsible Envntl. Solutions*, 2011 WL 382617, at *4.

A decision by the Southern District of Ohio explains how the courts use Section 113(f)(1) to impose a contribution bar against non-settling PRPs:

Nevertheless, a number of courts have held that it is permissible to bar contribution claims against the settling parties in a CERCLA contribution action, in accordance with the federal common law as exemplified by § 6 of the Uniform Comparative Fault Act or § 4 of the Uniform Contribution Among Tortfeasors Act.

In its Decision of March 27, 2008, this Court indicated that it was inclined to follow the decisions adopting a contribution bar as part of the federal common law, even though such a bar is not authorized by § 113(f)(2), because such a holding is in accordance with § 113(f)(1) of CERCLA, which provides that, “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate” (42 U.S.C. § 9613(f)(1)), given that the imposition of such a bar rests on equitable considerations, and, further, since contribution bars will foster the voluntary settlement of complex CERCLA lawsuits, a goal which is worthy of being furthered. . . . Quite simply, there has been no intervening authority, nor has CWM presented any argument causing this Court to decline to follow its earlier inclination. Therefore, this Court adopts a bar, preventing CWM and every other PRP from seeking contribution from the Settling Defendants and TLC.

Id. This rationale resulted in an order that barred all PRPs from bringing contribution claims against the settling defendants. *Id.* at *5. This approach has also been productive for fostering

CERCLA settlements in *Hobart Corp. v. Dayton Power & Light Co.*, No. 3:13-cv-115 (S.D. Ohio 2014). See Exhibit E hereto, providing a sample of the orders in that case approving settlement agreements and barring all claims against the settlors in Paragraph 3 of each order. This Court also has applied the contribution bar in the instant case for each of the previous settlements approved by the Court. Doc. # 312, PageId ## 3656-3657, ¶ 3; Doc. # 400, PageId # 4506, ¶ 3; Doc. # 536, PageId ## 6035-6036, ¶ 3.

Examples of other cases that have used Section 113(f)(1) to bar contribution claims against settling PRPs in private cases include the following: *Evansville Greenway & Remediation Tr. v. S. Ind. Gas & Elec. Co.*, No. 3:07-CV-66-SEB-WGH, 2010 WL 3781565, at *4, n. 3 (S.D. Ind. Sept. 20, 2010); *Foamseal, Inc. v. Dow Chem. Co.*, 991 F. Supp. 883, 886 (E.D. Mich. 1998); *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 813 (D.N.J. 1996); *Mavigliano v. McDowell*, No. 93 C 7216, 1995 WL 704391, at *2 (N.D. Ill. Nov. 28, 1995); *Hillsborough Cnty. v. A & E Rd. Oiling Serv., Inc.*, 853 F. Supp. 1402, 1408 (M.D. Fla. 1994); *United States v. SCA Servs. of Indiana, Inc.*, 827 F. Supp. 526, 532 (N.D. Ind. 1993); *Am. Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 215, 217-19 (D.R.I. 1993); *Barton Solvents, Inc. v. Sw. Petro-Chem, Inc.*, 834 F. Supp. 342, 345-46 (D. Kan. 1993); and *Allied Corp. v. ACME Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 222 (N.D. Ill. 1990). Additional cases in support of contribution bars are cited in the next two paragraphs below.

Because a non-settling defendant could circumvent a contribution bar against CERCLA claims by suing a settling defendant under a different cause of action, the courts have used CERCLA Section 113(f)(1) to bar claims for all potential causes of action. The Southern District of Ohio followed this approach in *Hobart Corp.* See Paragraph 3 of the orders in Exhibit E hereto, barring “[a]ll claims ... under Sections 106, 107 or 113 of CERCLA and/or any other

federal, state or local statute, regulation, rule, ordinance, law or common law.” *See also San Diego Unified Port Dist. v. Gen. Dynamics Corp.*, No. 07-CV-01955-BAS-WVG, 2017 WL 2655285, at *8-10 (S.D. Cal. June 20, 2017) (barring all claims “pursuant to any federal or state statute, common laws, or any other theory”); *City of San Diego v. Nat’l Steel & Shipbuilding Corp.*, No. 09CV2275 WQH BGS, 2015 WL 1808527, at *11-13 (S.D. Cal. Apr. 21, 2015) (barring state law claims); *AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.*, No. CIVS 00-113 LKK JFM, 2007 WL 1946635, at *2-5 (E.D. Cal. July 2, 2007) (barring claims under state law and common law). In accordance with this principle, this settlement is contingent on and Plaintiffs and Settlor request that the Court bar all claims against Settlor under all legal theories, as it has done in all of its past approvals of settlements in this case.

Some decisions have applied the contribution bar against every PRP, including PRPs who were not parties to the lawsuits in which the settlements were approved. *San Diego Unified Port Dist.*, 2017 WL 2655285, at *10 (barring all claims “regardless of when such claims are asserted or by whom”); *Lewis v. Russell*, No. CIV 2.03-2646 WBS, 2012 WL 671670, at *6 (E.D. Cal. Nov. 9, 2012). This is the approach followed by the Southern District of Ohio in *Hobart Corporation*. *See* Paragraph 3 of the orders included in Exhibit E. This Court has also followed this approach for the previous settlements in the instant case. Doc. # 312, PageId ## 3656-3657, ¶ 3; Doc. # 400, PageId # 4506, ¶ 3; Doc. # 536, PageId # 6035-6036, ¶ 3. This settlement is contingent on and Plaintiffs and Settlor request that the Court follow the same approach for the attached settlement.

Plaintiffs have served a copy of the Motion for Approval of Settlement Agreement on all defendants and will soon send it to all other currently known PRPs. Heisler Decl., ¶ 14; Womack Decl., ¶ 14. This settlement is contingent on and Plaintiffs and Settlor request that the

contribution bar apply to all claims that could be asserted against Settlor as the Court has done in all of its prior settlement approvals.

C. Settlor's Payment Should Be Credited *Pro Tanto*, and Not *Pro Rata*, in Determining Other Defendants' Equitable Shares at Trial.¹

The Court's order approving this Settlement Agreement should credit Settlor's settlement payment *pro tanto* and not *pro rata* in determining other defendants' equitable shares of response costs, just as the Court has done for the previous settlements in the instant case. Doc. # 312, PageId # 3657, ¶ 4; Doc. # 400, PageId # 4506, ¶ 4; Doc. # 536, PageId # 6036, ¶ 4. As explained below, *pro tanto* crediting encourages early settlements, encourages voluntary site cleanups, promotes faster site remediation, and reduces trial time.

The *pro tanto* and *pro rata* methods are derived from the UCATA and the UCFA, respectively, which advocate competing methods of accounting for a settling party's share when determining the amount of a nonsettling defendant's liability. *Ameripride Servs. Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474, 483 (9th Cir. 2015). When a litigant has settled with one party, the UCFA would reduce the shares of other liable persons by the percentage of the settlor's fault (UCFA § 2). *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 308 (7th Cir. 1999). This allocation method is known as the *pro rata*, or proportionate share, method. "Courts adopting the UCFA proportionate share approach 'must therefore determine the responsibility of all firms that have settled, as well as those still involved in the litigation.'" *Ameripride*, 782 F.3d at 483-84 (quoting *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 20 (1st Cir. 2004)). The consequence of this approach is that tortfeasors who have not settled "will be responsible only for their

¹ Settlor takes no position in this brief on the *pro tanto* versus *pro rata* allocation of settlement proceeds.

proportionate share of the costs, even if the settling tortfeasor settles for less than its fair share of the injury.” *Ameripride*, 782 F.3d at 484.

The UCATA’s *pro tanto* method, by contrast, reduces non-settlers’ liability only by the dollar amount of the settlements (UCATA § 4). *Id.* CERCLA Section 113(f)(2) (42 U.S.C. § 9613(f)(2)) applies the *pro tanto* method to PRP settlements with the United States or a State. *Id.* (noting that Section 113(f)(2) provides that a settlement with the United States or a State “reduces the potential liability of the others by the amount of the settlement”). CERCLA does not prescribe the accounting method to be used in private settlements.

The Seventh Circuit has mandated the use of *pro tanto* as the only acceptable allocation method in CERCLA cases, observing that any other method would undermine the congressional preference for *pro tanto* revealed in CERCLA Section 113(f)(2)). *Akzo*, 197 F.3d at 307-08. Other circuits have ruled that the district courts have the discretion to use whichever of the two methods is most suited to the facts of the case. *Ameripride Servs. Inc.*, 782 F.3d at 487 (district courts may use either method, whichever is “the most equitable method of accounting for settling parties’ in private-party contribution actions”); *Am. Cyanamid*, 381 F.3d at 21 (stating that “CERCLA provides the district court with the discretion to allocate response costs among liable parties” and affirming the district court’s use of *pro tanto* allocation).

“These competing approaches can produce substantial differences in incentives to settle and in the complexity of litigation.” *Akzo*, 197 F.3d at 307. *Pro rata* is sometimes employed on the premise that it ensures, “in theory, that damages are apportioned equitably among the liable parties.” *Am. Cyanamid*, 381 F.3d at 20. *Pro tanto*, however, has several important advantages in the context of this case.

First, the *pro tanto* method is better at furthering CERCLA's goals than *pro rata*, because it encourages PRPs to negotiate and leads to earlier settlements:

In general, the *pro tanto* approach, by placing the risk of lenient settlements on PRP hold-outs ..., facilitates CERCLA's goal of encouraging early settlement and private remediation. In a *pro rata* regime, PRPs ... who assume responsibility for cleanup ... will have no flexibility to negotiate in settlements. If they accept anything less from a PRP than what a court later determines to have been that PRP's proportionate share, they will have to pay for the difference out of their own pockets. Further, the defendant PRPs will have no incentive to settle early on, because the early settlements of other PRPs will have no effect on the potential liability of remaining PRPs. In such a regime, it would be more difficult to settle with contribution defendants. As a result, contribution plaintiffs would be forced to litigate against more PRPs, spending non-recoverable attorneys fees. Such a prospect would make it less likely that PRPs would be willing to sign consent decrees ... and voluntarily undertake remediation of polluted sites.

In contrast, under a *pro tanto* regime, contribution plaintiffs will have more flexibility in settling with defendant PRPs, because any potential shortfalls of early settlements can be shared by the contribution plaintiffs and non-settling PRPs in an equitable allocation at trial.... If it is easier for PRP groups to recover costs by settling early with other PRPs, they are more likely to come forward to settle ... and take on the task of remediating contaminated sites, furthering CERCLA's goals of private party remediation and early settlement.

Action Mfg. Co. v. Simon Wrecking Co., 428 F. Supp. 2d 288, 326 (E.D. Pa. 2006), *aff'd*, 287 Fed. App'x 171 (3d Cir. 2008) (citing Joseph A. Fischer, "All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the UCATA," 30 Hous. L. Rev. 1979 (1994)).

Another court has noted that *pro tanto* accounting, unlike the *pro rata* method, encourages a plaintiff to voluntarily clean up hazardous substances:

The *pro tanto* approach best furthers CERCLA's primary goal of promoting prompt and effective cleanups by assuring that the private-party § 9607 plaintiff will not be shortchanged in their attempt to recover cleanup costs. Because the plaintiff knows the precise amount their settlement will be worth and the rest of the response costs will be recoverable from other PRP's held strictly liable under the statute, the plaintiff can be virtually assured of complete recovery. By contrast, under the proportionate approach, the private party who conducted cleanup is likely to be left holding the proverbial bag if they inaccurately forecast the relative culpability of a settling defendant.... Since a non-PRP private party who conducts CERCLA related cleanup already faces the hurdle

and expense of pursuing litigation to receive compensation for its response costs, the prospect of less than full recovery would add an additional disincentive to private party cleanups and would therefore be contrary to CERCLA's principle goals.

Veolia Es Special Servs., Inc. v. Hiltop Invs., Inc., No. CIV.A. 3:07-0153, 2010 WL 898097, at *7 (S.D. W.Va. Mar. 12, 2010). The Southern District of Ohio has expressed the same sentiments as reasons for approving *pro tanto* accounting in CERCLA settlements. *See Hobart Corp.*, Order of Apr. 18, 2016 (Exhibit F), pp. 5-6. The Court in the instant case has concurred in this rationale as well with respect to the previous settlements. This Court has found the *pro tanto* approach to be appropriate for the previous settlements in the instant case. Doc. # 312, PageId # 3657, ¶ 4; Doc. # 400, PageId ## 4503-4505; Doc. # 536, PageId # 6035, ¶ 4. In cases with multiple defendants, like this case, the *pro rata* approach “encourages defendants to hold out until a fault-based allocation can be made, requiring the plaintiff to continuing litigating and thereby reduce its net recovery.” *Veolia*, 2010 WL 898097, at *7.

The second advantage of using the *pro tanto* method in this case is that it will serve judicial economy. Under both methods, a court must determine the settlement’s fairness. *Id.* at *8. For the *pro rata* method, “a court must determine the relative culpability of all parties - including settling parties - and their equitable share at trial.” *Id.* In CERCLA cases, “the assignment of liability to missing parties at trial will often be more time consuming and costly.” *Id.* (citing *Am. Cyanamid*, 381 F.3d at 20 (noting that “[s]uch a process can lead to a “complex and unproductive inquiry”)); *Akzo Nobel Coating*, 197 F.3d at 308; *Action Mfg.*, 428 F. Supp. 2d at 326 (*pro tanto* is easier to administer).

A court using the *pro tanto* approach evaluates fairness at the time of settlement, not trial. *Action Mfg.*, 428 F. Supp. 2d at 326 (recognizing that the *pro tanto* approach places the risk of lenient settlements on PRP hold-outs subject to pending litigation). *Pro tanto* allocation is

especially appropriate for good faith settlements, like this one, that are based on the volumetric shares of the settling PRPs and the overall costs of cleanup calculated at the time of settlement. *Action Mfg.*, 428 F. Supp. 2d at 327. Settlement amounts calculated in this manner are approvable, because they “presumably will not grossly underestimate the settling PRPs’ liability.” *Id.* Because such a formula for calculating settlement amounts is obviously fair, no evidentiary fairness hearing is necessary prior to their approval. *Cannons Eng’g*, 899 F.2d at 94 (stating that “[i]n general, we believe that evidentiary hearings are not required under CERCLA when a court is merely deciding whether monetary settlements comprise fair and reasonable vehicles for disposition of Superfund claims”). The Southern District of Ohio, in declining to hold a fairness hearing in another CERCLA case employing *pro tanto* accounting, has found that evidentiary hearings for CERCLA settlements are rarely granted, are unnecessary in the absence of any evidence of collusion or unfairness, and would be the “functional equivalent of a full-blown trial” that would discourage settlement by PRPs who want to settle to avoid litigation costs. *Hobart Corp.*, Order of Apr. 18, 2016 (Exhibit F), pp. 9-12. Based on this principle, settlements in the instant case are appropriate for *pro tanto* accounting, which will serve the purpose of judicial economy.

Thus, the “[a]doption of the *pro tanto* rule in CERCLA cases encourages early settlement, the allocation of private resources towards the hazardous waste disposal problem, and ultimately the expeditious cleanup of hazardous waste sites.” *Veolia*, 2010 WL 898097, at *7. This accounting method also efficiently conserves the resources of the court and the parties. The same principles apply here. The Court should approve the Settlement Agreement and direct that Settlor’s settlement be credited *pro tanto*, just as the Southern District of Ohio has done in the instant case and other cases. *See* Doc. # 312, PageId # 3657, ¶ 4; Doc. # 400, PageId # 4506, ¶ 4;

Doc. # 536, PageId # 6036, ¶ 4. *Hobart Corp.*, No. 3:13-cv-115 (S.D. Ohio 2014, Apr. 4, 2016) (Exhibit E); *Responsible Env'tl. Solutions*, 2011 WL 382617 at *2-5 (approving motion for approval of settlement agreement with request for *pro tanto* allocation). *See also* Paragraph 4 in the orders in *Hobart Corporation* included in Exhibit E.

D. The Court Should Enter the Settlement Agreement as a Final Judgment.

For the reasons that follow, the Parties jointly request that the Court make explicit its determination of finality with respect to the Settlement Agreement by directing the entry of final judgment and by finding that there is no just reason to delay an appeal pursuant to Federal Rules of Civil Procedure 54(b) and 58.

1. Entry of the Settlement Agreement as a Final Judgment Is Warranted.

Based on recent developments and the current litigation posture, the Court's order approving this Settlement Agreement merits entry as a final judgment pursuant to Rules 54(b) and 58.

First, with respect to recent developments, Garrison commenced onsite removal activities at 1655 and 1675 Watkins Road on September 21, 2020. These activities are being, and will be, paid for with settlement proceeds from this litigation in furtherance of a hazardous waste closure plan and CERCLA engineering evaluation/cost analysis ("EE/CA") approved by the Ohio Environmental Protection Agency ("Ohio EPA") on September 3, 2020. Olymbec likewise anticipates commencement of onsite removal activities at 2200 Fairwood Avenue in early 2021 pursuant to a closure plan and EE/CA approved by Ohio EPA on November 3, 2020, and intends to fund such activities with settlement proceeds from this litigation.² Without the additional layer

² Garrison and Olymbec voluntarily submitted the closure plans and EE/CAs to demonstrate compliance with, among other things, the U.S. Environmental Protection Agency National

of finality in judgment provided by the entry of an order pursuant to Rules 54(b) and 58, Plaintiffs cannot commit the settlement proceeds from Settlor to these cleanup efforts without risking substantial financial exposure, as Plaintiffs would otherwise retain the risk of having to return the settlement proceeds to Settlor until a court approval of the settlement agreement is final and non-appealable. The settling parties are entitled to know if they will obtain the benefits of the settlement before Plaintiffs incur these cleanup costs.

Second, with respect to the litigation posture, Plaintiffs amended their respective complaints in August 2020 to add the new class of original equipment manufacturer (“OEM”) Defendants. Garrison Doc. # 539; Olymbec Doc. # 425. Plaintiffs amended their complaints to add these Defendants following discovery that was expressly designed to identify potential new Defendants in keeping with the Court’s Preliminary Pretrial Order, dated January 22, 2020. Doc. # 502; PageId # 5655, n. 1. Any additional amendments to add new parties will require leave from the Court with good cause shown. Based on Closed Loop’s records as well as these recent discovery responses, the addition of the OEM Defendants completes the classes of defendants to the litigation and, therefore, all classes of defendants are now accounted for. Accordingly, it is appropriate to render finality in judgment.³

Contingency Plan at 40 C.F.R. Part 300. See <https://www.ensafe.com/closedloop/> (providing the full administrative records, including responses to public comments, for Watkins Road and Fairwood Avenue).

³ Another consideration regarding the litigation posture is a related state court declaratory judgment action filed by Settlor’s insurance carrier against the Settlor and Plaintiffs dealing with insurance coverage that would provide funding for settlement of this case. *Navigators Specialty Ins. Co. v. Kuusakoski, Inc., et al.*, Case No. 19 CV 005132 (Franklin County, Ohio Court of Common Pleas). Resolution of this state court action, which is necessary to allow settlement funds to flow to the environmental cleanup, is expressly contingent on the dismissal of the Kuusakoski Defendants in this action, with prejudice. See Exhibit A (Section 14(j) of the Settlement Agreement).

For all the reasons set forth above and below, the Parties jointly request that the Court make explicit its determination of finality to this Settlement Agreement by directing the entry of final judgment and by finding that there is no just reason to delay an appeal.

2. Fed. R. Civ P. 54(b)

As this Court has recently explained, achieving finality pursuant to Rule 54(b) involves a two-step analysis: “the district court must expressly direct the entry of final judgment as to one or more but fewer than’ all of the claims in the case and then the court must expressly find that there is no just reason to delay an appeal.” *Ball v. Kasich*, No. 2:16-cv-282, 2020 WL 4528822, at *3 (S.D. Ohio Aug. 6, 2020) (Sargus, J.), *appeal docketed*, No. 20-3927 (6th Cir. Sept. 3, 2020) (citing *Gen. Acquisition, Inc. v. GenCorp., Inc.*, 23 F.3d 1022, 1027 (6th Cir. 1994)). For the reasons that follow, the Settlement Agreement meets the legal test provided by Rule 54(b).

a. Step 1: Final Judgment

Rule 54(b) authorizes the Court “to direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.” This first step is implicated in the ultimate disposition of one or more but fewer than all claims or parties in a multi-claim/multi-party action, like this CERCLA litigation. The rule “relaxes the traditional finality requirement for appellate review,” and is specifically “designed to facilitate the entry of judgment on one or more claims, or as to one or more parties, in a multi-claim/multiparty action.” *Gen. Acquisition*, 23 F.3d at 1026 (citing *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 60 (6th Cir. 1986)).

To satisfy this first step: “A district court must first determine that it is dealing with a ‘final judgment.’ It must be a ‘judgment’ in the sense that it is a decision upon a cognizable

claim for relief, and it must be ‘final’ in the sense that it is ‘an ultimate disposition of an individual claim entered in the course of a multiple claims action.’” *Id.* at 1027 (quoting *Curtis-Wright Corp. v. Gen. Elec. Corp.*, 446 U.S. 1, 7 (1980)). *See also United States v. Cannons Eng’g Corp.*, 720 F. Supp. 1027, 1053 (D. Mass. 1989), *aff’d*, *United States v. Cannons Eng’g Corp.*, 899 F.2d 79 (1st Cir. 1990) (internal citations omitted) (finding that, for purposes of Fed. R. Civ. P. 54(b), (1) CERCLA “Consent Decrees constitute ‘judgments’ because they resolve all liability of the settling defendants on ‘cognizable claim[s] for relief’ brought by plaintiffs under CERCLA” and (2) the “judgment is ‘final’ because the Consent Decrees constitute an ‘ultimate disposition of an individual claim entered in the course of a multiple claims action.’”). *See also* U.S. ENVTL. PROTECTION AGENCY, “Model Remedial Design /Remedial Action Consent Decree,” at https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81 (providing: “The Court [if this CD is a partial judgment, i.e., it resolves fewer than all claims alleged in the complaint and/or fewer than all parties named in the complaint, insert: finds that there is no just reason for delay and therefore] enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58”).

As a threshold matter, the Court has already implicitly entered judgment on 23 of the settlements and the consent decree previously submitted for judicial approval. Judgment was entered in connection with all claims “asserted, to be asserted, or which could be asserted against the[se] Settling Defendants” arising from E-Waste at the Facility, with such claims “discharged, barred, permanently enjoined, dismissed with prejudice, satisfied, and [] otherwise enforceable in this case or in any other proceeding.” Doc. # 312, PageId ## 3656-3657, ¶ 3; Doc. # 400, PageId # 4506, ¶ 3; Doc # 536, PageId ## 6035-6036, ¶ 3. These terms are decisive, absolute and were intended to resolve all liability of the Settlers for those specific and cognizable claims raised by

Plaintiffs in the instant actions. This Court applied similar logic in *Ball v. Kasich*, finding that, under the circumstances presented in that case, Rule 54(b) certification was supported by the fact that the Court had previously “implicitly entered judgement on all claims between the Plaintiffs, the Plaintiff Class, the Defendants and the County Board-Intervenors when it resolved those claims.” 2020 WL 4528822, at *3. The same is true here.

By the same reasoning, the Court’s judgments approving the prior settlement agreements and consent decree were also intended to confer some measure of finality on the Settlers. Indeed, the contribution protection in CERCLA, which the Court granted for all settlements approved thus far in this litigation, “was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle.” *Cannons Eng’g*, 899 F.2d at 92. Further, implicit in the Court’s limited retention of jurisdiction “after entry of final judgment” to enforce the terms and conditions of these settlement agreements and the consent decree is the fact that the Court’s orders were otherwise intended to be “final.” Doc. # 312, PageId # 3657, ¶ 6; Doc. # 400, PageId # 4507, ¶ 6; Doc. # 536; PageId # 6036, ¶ 6. The Court thereupon dismissed the Settlers from the litigation, expressly directing the Clerk in its most recent two orders to remove the dismissed Settlers from the litigation. Doc. # 312, PageId # 3657; ¶ 5; Doc. # 400, PageId # 4507; Doc. # 536; PageId ## 6036-6037. The dockets in the cases similarly reflect that the settling parties are “TERMINATED” from the litigation. It stands to reason that no one intended for litigation against any of these dismissed Settlers to be resurrected years from now, long after Plaintiffs have used those settlement payments to fund the cleanup at the Facility.

To satisfy step one, and to make explicit what might otherwise be implicit, the Court should direct the Clerk to enter an order approving this Settlement Agreement as having the full force and effect of a final judgment under Federal Rule of Civil Procedure 54(b).

b. Step 2: Delay

Rule 54(b) authorizes the Court “to direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.” This second step is “required to determine if there is no just reason for delay of an immediate appeal.” *Ball*, 2020 WL 4528822, at *3. The opinion accompanying the judgment entry must also provide a reasoned analysis of the grounds for such a determination.

Corrosioneering, Inc. v. Thyssen Env'tl. Sys., Inc., 807 F.2d 1279, 1284-85 (6th Cir. 1986). This analysis involves, among other things, “striking a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants.” *Gen. Acquisition*, 23 F.3d at 1027 (quoting WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2655 (1983 & Supp. 1993)).

Citing to the Sixth Circuit’s decision in *Corrosioneering, Inc. v. Thyssen Env'tl. Sys., Inc.*, this Court has articulated the following non-exhaustive factors to consider in making a determination that “there is no just reason for delay” for purposes of the second step of the Rule 54(b) analysis:

(1) the relationship between the adjudicated and non-adjudicated claims; (2) the possibility that the need for appellate review might become moot due to future developments in the district court; (3) the possibility that the appellate court might be required to hear the same issue twice; (4) the presence or absence of a claim or counterclaim that might result in a set-off against the final judgment; and (5) other miscellaneous factors, including “delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.”

Ball, 2020 WL 4528822, at *3 (quoting *U.S. Citizens Ass’n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013) and citing 807 F.2d at 1283). Each is addressed below.

First, with respect to any relationship between adjudicated and non-adjudicated claims, the proposed order dismisses only those claims asserted, to be asserted, or which could be asserted against Settlor, including, by incorporation of the Settlement Agreement, the “Claims brought in *Garrison Southfield Park LLC v. Closed Loop Refining and Recovery, Inc., et al.*, Case No. 2:17-cv-00783-EAS-EPD (S.D. Ohio), and *Olymbec USA LLC v. Closed Loop Refining and Recovery, Inc., et al.*, Case No. 2:19-cv-01041-EAS-EPD (S.D. Ohio), against SETTLOR.” Although these non-adjudicated claims “relate to” the claims being adjudicated and to be adjudicated by and against other Defendants given that they all collectively arise out of CERCLA liability for the same Facility, that is not to say that the claims involving these other Defendants cannot be “fully and fairly adjudicated independently.” *See Ball*, 2020 WL 4528822, at *4. Moreover, CERCLA clearly authorizes a court to immunize PRPs like Settlor “for claims for contribution regarding matters addressed in the settlement,” despite the existence of claims left to be adjudicated, given that the settlement “reduces the potential liability of the others by the amount of the settlement.” 42 U.S.C. § 9613(f)(2). The same concept applies in private cost recovery actions where contribution protection is provided via CERCLA § 113(f)(1). Any construction to the contrary would constitute an end run around CERCLA’s statutory scheme to immunize settling parties from liability despite the “corresponding detriment to their more recalcitrant counterparts.” *Cannons Eng’g*, 899 F.2d at 91. *See also United States v. Pretty Prods., Inc.*, 780 F. Supp. 1488, 1496 n. 7 (S.D. Ohio 1991) (barring contractual indemnification claim by non-settling party against settling party pursuant to CERCLA § 113(f)(2), and noting “this Court would be skeptical of any attempt to make an end run around CERCLA’s contribution immunity”).

Second, there is no possibility that the need for appellate review might become moot due to future developments in the district court, assuming the Court grants this motion and accompanying proposed order. The issues that would be presented for appellate review are limited to whether the Settlement Agreement with Settlor is fair and reasonable, and whether the terms of the proposed order extending contribution protections to Settlor are consistent with CERCLA and applicable law. These issues are specific to Settlor, which would be dismissed from the case with prejudice. There will accordingly be no future rulings in this Court involving Settlor that would moot any need for appellate review of these issues.

Third, there is little possibility that the appellate court might be required to hear the same issue twice for all of the reasons noted immediately above: the appellate review would be specific to Settlor, which would be dismissed from the case with prejudice, assuming the Court grants this motion and accompanying proposed order. Any concern with piecemeal appeals involving future settlement agreements with Defendants based on similar grounds is mitigated by the fact that approval of settlements is “committed to the discretion of the district court,” with such “discretion to be exercised in light of the strong policy in favor of voluntary settlement of litigation.” *Cannons Eng’g Corp.*, 720 F. Supp. at 1053 (granting a motion for entry of the “Major PRP Consent Decree” as a final judgment pursuant to Fed. R. Civ. P. 54(b)).

Fourth, with respect to claims or counterclaims that might result in a “set-off” against the final judgment, set-offs are not only contemplated, but commanded, in CERCLA litigation. This Court has found on multiple occasions that payments by the Settling Defendants to Plaintiffs should be credited *pro tanto*, thus reducing the liability of the remaining liable parties by the dollar amount of Settling Defendants’ settlement payments. For all of the reasons set forth above and in prior motions to approve settlement agreements, Plaintiffs and Settlor similarly request a

pro tanto approach because it “will best serve the purposes of CERCLA at this time given that the approach is known to facilitate settlement among holdout defendants. . . .” Doc. #536, PageId # 6034.

Fifth, there are several other miscellaneous factors that weigh in favor of a finding that there is no just reason for delay. Perhaps most notably, Garrison commenced onsite removal activities at 1655 and 1675 Watkins Road on September 21, 2020, and Olymbec anticipates that it will begin of onsite removal activities at 2200 Fairwood Avenue in early 2021. Because Plaintiffs have begun expending settlement funds on cleanup activities, the prospect of an appeal of this Settlement Agreement that could take place years from now would undermine the primary policy of CERCLA to remediate hazardous substances in a “prompt and efficient” manner, given the import of this settlement to the ongoing effort and the challenges the parties overcame to reach agreement. *Akzo Coatings*, 949 F.2d at 1417. It would “disserve a principal end of [CERCLA] – achievement of prompt settlement and a concomitant head start on response activities – to leave matters in limbo until more precise information was amassed.” *Cannons Eng’g*, 899 F.2d at 88. *See also Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 576 (9th Cir. 2018) (finding that the appellate court had jurisdiction under Fed. R. Civ. P. 54(b) to hear the appeal because “[t]his is a complex case that has been ongoing for fourteen years, and the entry of partial judgment against Teck would help ensure that a responsible party promptly pays for the contamination of the Upper Columbia River, advancing CERCLA’s goals and easing the Tribes’ burden of financing the litigation effort”).

In this case, Plaintiffs’ burden of financing this litigation has been compounded with the burden of financing ancillary litigations, including litigation with insurance carriers for Defendant Closed Loop and Settlor. Separate and apart from these litigations, Plaintiffs have

further suffered severe financial losses in connection with Closed Loop's abandonment of the Facility, including lost rent and attorneys' fees, much of which is not recoverable under CERCLA. Doc. # 539; PageId # 6025, n. 6. Plaintiffs believe that these losses and the prospect of future financial risk, including potential refunding of the settlement proceeds, argue for entering this Settlement Agreement as a final judgment.

Finally, equitable factors specific to CERCLA cost recovery actions likewise warrant a finding that there is no just reason for delay. As discussed by the lower court (and as affirmed on appeal) in *United States v. Cannons Engineering Corp.*:

Moreover, in view of the complexity of this litigation, the public interest in prompt cleanup, and the statutory goal of providing finality to settling defendants, the court finds that there is no just reason to delay the entry of final judgment. The settling defendants who have negotiated a settlement of their claims in good faith should not have to wait until the resolution of plaintiffs' claims against non-settling defendants to learn whether the settlements are final, particularly because CERCLA expressly authorizes the United States to enter into settlements which do not involve all potential defendants. *See* 42 U.S.C. § 9622. The settling defendants are, under the Consent Decrees, obligated to make payments and/or perform work. They are entitled to know if they will obtain the benefit of their bargains before incurring these substantial costs.

720 F. Supp. at 1053. *See also Evansville Greenway & Remediation Tr. v. S. Ind. Gas & Elec. Co.*, No. 3:07-CV-66-SEB-WGH (filed May 21, 2007) (routinely approving joint motions to approve CERCLA settlement agreements as final, appealable judgments pursuant to Rule 54(b) (*e.g.*, Doc. ## 873, 874, 882, 893, 898)).

3. Fed. R. Civ. P. 58

Rule 58 requires that “[e]very judgment . . . must be set out in a separate document” subject to certain delineated exceptions, none of which apply. The Court should accordingly enter an order approving this Settlement Agreement as a document separate and apart from the Court's opinion in order to satisfy Rule 58.

III. Conclusion

For all the foregoing reasons, Plaintiffs and Settlor request that the Court grant the Order approving the Settlement Agreement as a final judgment under Rules 54(b) and 58.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 22, 2020, a copy of the foregoing Motion to Approve Settlement Agreement was filed electronically with the Court's CM/ECF system, which will send notification to all attorneys registered to receive such service. Parties may access this filing through the Court's electronic filing system.

/s Jack A. Van Kley
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