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

GARRISON SOUTHFIELD PARK LLC, Plaintiff, vs. CLOSED LOOP REFINING AND RECOVERY, INC., et al., Defendant.	Case No. 2:17-cv-783-EAS EPD CHIEF JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Elizabeth Preston Deavers

OLYMBEC USA LLC, Plaintiff, vs. CLOSED LOOP REFINING AND RECOVERY, INC., et al., Defendant.	Case No. 2:19-cv-1041-EAS EPD CHIEF JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Elizabeth Preston Deavers

KUUSAKOSKI DEFENDANTS'
MEMORANDUM IN RESPONSE TO PLAINTIFFS'
MOTION FOR SETTLEMENT APPROVAL, AND REQUEST FOR
CLARIFICATION OF PROCESS FOR APPROVAL OF FUTURE SETTLEMENTS

This memorandum is in response to Plaintiffs' Motions for Settlement Approval [Garrison Doc. 308; Olymbec Doc. 236], and follows up on the Court's Order of July 16, 2019 [Garrison Doc. 312; Olymbec Doc. 239] approving the settlements of twelve defendants. The nonsettling Kuusakoski Defendants specifically request that the Court establish a process for the procedural and substantive fairness evaluation of any future settlements. Such a process should

provide due process to nonsettling parties and assist settlors by assuring that any approved settlements can withstand judicial challenges.

Plaintiffs Garrison and Olymbec filed motions for approval of settlements with a subgroup of defendants on Sunday and Monday, July 14 and 15, 2019. [Garrison Doc. 308; Olymbec Doc. 236]. Those twelve settling defendants are alleged to be arrangers who sent materials to be recycled to the sites in question, which materials Plaintiffs allege are hazardous substances. Plaintiffs' motions sought several things from this Court: (1) approval of the settlements as "fair;" (2) a contribution bar prohibiting other potentially responsible parties ("PRPs"), including but not limited to the nonsettling defendants, from ever bringing claims against settlors under CERCLA; and (3) a determination that these settlements (and potentially all future settlements) should be credited on a *pro tanto* rather than a *pro rata* basis. This Court granted Plaintiffs' motions approving the settlements as fair and cut off the thirty-seven nonsettling defendants' contribution rights while also potentially shifting additional liability to the remaining defendants less than 48 hours after Plaintiffs filed their motions, without an opportunity for the nonsettling defendants to comment on the pending motions.

Given that these and most CERCLA settlements cut off nonsettlors' contribution rights, and given that such a settlement may, as a result of potential joint and several liability, shift remaining liability to nonsettlors, court decisions have established a process for fairness evaluations of CERCLA settlements. That settlement approval process requires an independent evaluation of a settlement's fairness by the reviewing court, including an opportunity for nonsettling defendants to comment on such proposed settlements.

As Plaintiffs note in their motion for approval of the settlements, "The Sixth Circuit has stated that the 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 Envtl. Solutions Alliance v. Waste Mgmt., Inc.*, 2011 WL 382617, No. 3:04-cv-013, *2 (S.D. Ohio, Feb. 3, 2011)." [Garrison Doc. 308 at 5; Olymbec Doc. 236 at 5].

Given the effect these partial settlements have on nonsettling parties' liability, "the court must do more than mechanically rubberstamp the proposed settlements" and the court "must perform a searching review of the evidence and determine if the settlements represent a reasonable compromise." *U.S. v. Cantrell*, 92 F. Supp. 2d 718, 723 (S.D. Ohio 2000). An example of such a "searching review of the evidence" and appropriate consideration of the nonsettling defendants' position was performed by Judge Rice in the *Responsible Environmental Solutions* case. In that matter, the court initially refused to approve a private settlement as fair where "the moving parties had failed to present evidentiary support for their assertion that the settlement is fair, reasonable and adequate." *Responsible Envtl. Sols. All.*, 2011 WL 382617, at *2.

In fact, district court decisions that fail "to independently scrutinize the parties' [settlement] agreements" can lead to appellate courts reversing district court findings of fairness. *See, e.g. Arizona v. City of Tucson*, 761 F.3d 1005, 1015 (9th Cir. 2014), (reversing district court approval of settlement and sending the case back down for a more thorough fairness hearing). Even where a state or the EPA is one of the parties to a settlement, a court cannot just defer to the government as to the fairness of the settlement in question. *Id*. When as here the settlement is purely private, a higher level of review for fairness is appropriate.

Plaintiffs motions for settlement approval repeatedly cite the pending *Hobart* litigation as an example of how the settlements here should be evaluated and approved. *Hobart Corp. v.*

Dayton Power & Light Co., No. 3:13-cv-115 (S.D. Ohio 2014). However, Plaintiffs fail to point out that settlements in the *Hobart* case were approved only after three years of litigation, after "significant discovery [had] taken place" and after "non-settling defendants [] had an opportunity to file memorandum in opposition." In fact, Judge Rice in the *Hobart* case noted that "some discovery is obviously needed before the fairness of any settlement can be assessed." *Hobart Corp. v. Dayton Power & Light Co.*, 3:13-cv-00115-WHR Doc #: 377, at *9-*10 (S.D. Ohio Apr. 18, 2016). In this case, there has been neither discovery nor opposition briefing.

Notably, Plaintiffs here sought, and this Court approved a *pro tanto* (as opposed to *pro rata*) credit of the settling Plaintiffs' payments. The *pro tanto* method places the risk of underpayment by settling defendants on the nonsettling defendants rather than on Plaintiffs. *Id.* at *5. Judge Rice in *Hobart,* found that both approaches (*pro rata* versus *pro tanto*) have been applied in particular cases, but that the "*pro tanto* approach [was] superior in [that] particular case, because of the difficulties inherent in determining the precise proportionate share of liability of each PRP." *Id.* at *12 (emphasis added). To the contrary, other decisions within the Sixth Circuit have ruled that *pro rata* is the appropriate way to credit particular partial settlements. "While the Sixth Circuit has not ruled on this issue, given the nationwide and intra-circuit trend of doing so, the Court will apply the UCFA [i.e., *pro rata*] to this action." LW*D PRP Group v. ACF Industries LLC,* 512CV00127GNSHBB, 2015 WL 6755314, at *4 (W. D. Ky. Nov. 4, 2015). Given the very early stage of this litigation, given the posture of these motions, and given Plaintiffs' argument here that they can determine the precise volumes from each defendant, it is at best premature to make a blanket decision on *pro rata* versus *pro tanto* in this case. The Kuusakoski defendants specifically reserve the right to challenge the application of *pro tanto* or *pro rata* in any later settlements.

As Plaintiffs note in their motion, the settlements must be both substantively and procedurally fair. [Garrison Doc. 308 at 6; Olymbec Doc. 236 at 6]. Procedural fairness requires at a minimum that nonsettling defendants, whose rights will be affected by the settlement, should have an opportunity to respond to motions for settlement approval.

To reiterate, this memorandum seeks to assure that future settlements, which this Court may be presented with, are considered for approval though a process which allows nonsettling defendants to comment on such proposed settlements, and which process will result in settlements that may withstand judicial scrutiny on appeal. We reserve all rights as to future settlements and a brief explanation about our concerns is warranted.

There has been no formal discovery, and the parties have limited information about the facts of these cases. Judge Rice found in the currently pending Hobart case that "*some* discovery is obviously needed before the fairness of any proposed settlement can be assessed." *Hobart*, 3:13-cv-00115-WHR Doc #: 377, at *9. However, even assuming arguendo the Plaintiffs' Complaints' allegations about defendants' volumetric contribution toward the sites are true, the settlements at issue are only a very small proportion of the total volume to the sites. These relatively small settlements should not set a precedent for later settlements or a fair allocation of site liability. More specifically, the settling party with the largest proposed volume is alleged to be less than one percent of the total site volume, and all proposed settling parties combined are alleged to be less than 5% of total site volume. More than 95% of the total volume allegedly sent to the sites is not represented in these settlements, and some of the nonsettling defendants are alleged to have sent as much as fifty times the volume of the largest volume settling party.

The Plaintiffs' proposed "fair" settlement methodology simply takes the Plaintiffs' alleged percentage of volume sent by each settling defendant and multiplies it against the

Plaintiffs' alleged cost to clean up the sites. The simplicity of this methodology assumes unproved allegations and leaves out several important factors in assessing CERCLA liability which will need to be considered in later fairness evaluations.

For example, there are four categories of liable parties under CERCLA, and Plaintiffs' settlement methodology discusses only one of those categories. Plaintiffs' methodology assigns 100% of the liability for the sites to those parties who allegedly arranged for disposal at the sites. This settlement methodology omits any consideration of liability to the other three categories of CERCLA liable parties: owners of the properties (i.e., the Plaintiffs here), operators of the properties (i.e., Closed Loop), and transporters choosing the property. 42 U.S.C.A § 9607(a)(1)-(4). Each of these categories of PRPs has liability under CERCLA, and there is little to no apparent consideration of those parties' liability in the proposed settlements.

In a very similar litigation concerning a different abandoned warehouse of recyclable electronics, that plaintiff owner of the property was assigned 60% by the Court, and the arranger defendants split the remaining 40% based on their volumetric shares. *Carolina Pines I, LLC v. City of Abbeville Pub. Works, et al.*, No. 142-3:16-cv-01124-TLW (D.S.C., Nov. 14, 2018). It will likely be appropriate in any later settlement fairness evaluations to consider the liability of the Plaintiff owners, as well as the other categories of liable parties.

Without limitation, other aspects of these settlements which may be a fairness concern in future settlements include: the accuracy of the volumetric and monetary allegations by Plaintiffs; the settlement agreements' "reopener" provisions; whether the *pro tanto* or *pro rata* rule should be applied; the failure to distinguish where, as between the Garrison and Olymbec sites, a particular defendant's material was sent; the failure to distinguish between types of materials and condition of materials sent to the sites; whether the Superfund Recycling Equity Act (SREA)

defenses apply to some or all of the volumes; the time periods that materials were sent to the sites; and, the scope of release offered by the State of Ohio (i.e., "covenant not to sue provisions") in any settlement. Each of these considerations will be issues in the litigation, and thus may be issues in an evaluation of the fairness of any particular settlement.

Therefore, the Kuusakoski Defendants reserve all rights to challenge future settlements and to the extent necessary object to blanket application of the current settlement terms to future settlements. In order to assure an appropriate evaluation of the procedural and substantive fairness of future settlements, the Kuusakoski Defendants request that for any future motions for settlement approval the Court allow nonsettling defendants at least twenty-one days to respond to the motions as allowed under Local Rule 7.2(a)(2).

Date: July 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 19, 2019, a copy of the foregoing Kuusakoski Defendants' Memorandum in Response to Plaintiffs' Motion for Settlement Approval, and Request for Clarification of Process for Approval of Future Settlements 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.

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