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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

DAVID HIRSCH, Trustee of OII Eighth Partial Consent Decree Work Escrow Account Trust,

Plaintiff,

v.

A. H. and S. Construction Corporation, et al

Defendants.

Case No. CV11-9007-DSF (Ex)

Judge Assigned:
Hon. Dale S. Fischer

NOTICE OF JOINT MOTION AND MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS OF DAVID GIANNOTTI AND ALBERT M. COHEN

Date: March 19, 2012

Time: 1:30 p.m.

Court: Room 830 / 840

Filed Concurrently With:

1. [Proposed] Order

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 19, 2012, at 1:30 p.m., or as soon thereafter as the matter may be heard in the courtroom of the Honorable Dale S. Fischer, District Court Judge for the United States District Court, Central District of California – Western Division, plaintiff DAVID HIRSCH, Trustee of OII Eighth Partial Consent Decree Work Escrow Account Trust (the "Trust" or "Plaintiff") and Defendants ("OII De Minimis Group") will move the Court for a determination that a settlement between Plaintiff and the Defendants is made in good faith, and an order barring any and all claims against the Settling members of the OII De Minimis Group for liabilities associated with the Operating Industries, Inc. Superfund Site ("OII Site") under federal and state law.

This motion is made and based on this Notice, the attached Memorandum of Points and Authorities, the attached Declarations of David A. Giannotti and Albert M. Cohen, the record in the above-captioned action, all papers filed in this matter, and any oral or documentary evidence that may be presented before or at the time of hearing of this Motion. Specifically, the Joint Motion for Determination of Good Faith Settlement, heard by this Court on March 19, 2012 ("Joint Motion"), and the Memorandum of Points and Authorities in Support Thereof are incorporated herein.

February 16, 2012

DAVID A. GIANNOTTI, A PROFESSIONAL CORPORATION

By: */s/ David A. Giannotti*
David A. Giannotti
Attorney for Plaintiff

LOEB & LOEB

By: */s/ Albert M. Cohen*
Albert M. Cohen
Attorney for Defendants

TABLE OF CONTENTS

Page(s)

MEMORANDUM OF POINTS AND AUTHORITIES.....1

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

III. THE SETTLEMENTS.....6

A. Agreement.....6

B. Condition Precedent.....6

IV. THE SETTLEMENTS BETWEEN PLAINTIFF AND THE DE MINIMIS DEFENDANTS ARE IN GOOD FAITH.....6

A. These Settlements Meet the Standards under Which the Court Determines Good Faith.....6

1. The Negotiating Process Was Conducted In Good Faith.....7

2. The Defendants Are Paying Their Fair Share Of Liability.....8

3. The Settlement Is Consistent with CERCLA and Adequately Protects the Public.....12

A. Further Adjudication Is Not Necessary.....12

B. The Settlements Are in Good Faith under State Law....12

V. AN ORDER BARRING CONTRIBUTION AND INDEMNITY IS PROPER UNDER STATE AND FEDERAL LAW.....14

VI. CONCLUSION.....16

TABLE OF AUTHORITIES

Page(s)

Cases

A *United States v. Montrose*, 50 F.3d 741, 743 (9th Cir. 1995)) 7

United States v. Cannons Eng'g Corp., 899 F.2d 79, 87 (1st Cir.1990); see *Montrose*, 50 F.3d at 746." 7, 12

U.S. v. Aerojet General Corp. 606 F.3d 1142, 1152 (C.A.9 (Cal.), 2010) 7

United States v. Westinghouse Electric Corporation, 50 F.2d 74, 743 (9th Cir. 1995) 12

United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990) 7

Tech-Bilt, Inc. v. Woodward-Clyde & Associates, 38 Cal.3d 488, 499, 213 Cal. Rptr. 256 (1985) 12, 13

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982) 13

Linney v. Alaska Cellular P'ship, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998) 13

Ellis v. Naval Air Rework Facility, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.3d 939 (9th Cir. 1981) 13

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989) 14

City of Emeryville v. Robinson 621 F.3d 1251, 1265 (9th Cir. 2010) 14

Franklin v. Kaypro Corp. 884 F.2d 1222, 1232 (9th Cir. 1989) (Approving contribution bar in securities class action case) 14, 15

Tyco Thermal Controls LLC v. Redwood Indus. 2010 WL 3211926, 5 (N.D.Cal., 2010) 14

AmeriPride Services Inc. v. Valley Indus., Nos. CIV. S-00-113-LKK JFM, S-04-1494-LKK/JFM., 2007 WL 1946635, at *2 (E.D.Cal. July 2, 2007) 15

United States v. Western Processing Co., Inc. 756 F.Supp. 1424, 1432-33……..15

Foamseal, Inc. v. Dow Chemical, 991 F.Supp 883, 886 (E.D.Mich.1998)……15

Patterson Environmental Response Trust v. Autocare 200, Inc., No. Civ-F -01-6606 (E.D.Cal.July8, 2002) 15

Federal Savings and Loan Ins. Corp. v. Butler, 904 F.2d 505, 511 (9th Cir.1990) 15

Statutes

42 U.S.C. § 9601(14) 1, 2
42 U.S.C. § 9605(a)(8) 2
42 U.S.C. § 9606 4
42 U.S.C. § 9607(a) 10
California Health & Safety Code § § 25316 and 25317 2

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This action involves the Operating Industries, Inc. Superfund Site in Monterey Park, California. It is brought pursuant to 42 U.S.C. § 9607 (CERCLA cost recovery), and 42 U.S.C. § 9613 (CERCLA contribution) to recover response costs at the site by Plaintiff. This memorandum is in support of a Motion (hereinafter "Motion") to find settlements with the Defendants to be in good faith under federal and state law.

This action was brought by DAVID HIRSCH, Trustee of OII Eighth Partial Consent Decree Work Escrow Account Trust (the "Trust" or "Plaintiff"), against the Defendants who are allegedly responsible for hazardous substances disposed at the Operating Industries, Inc. Superfund Site ("Site")[1] which hazardous substances have allegedly contaminated the soil and ground water on and around the Site. Each of the Defendants was previously notified by the United States Environmental Protection Agency ("EPA") that they were considered de minimis parties at the Site and offered an opportunity to settle with EPA. The Defendants chose instead to settle directly Plaintiff which is responsible for implementing the final remedy at the Site.

II. FACTS.

The Operating Industries, Inc. (OII) landfill ("OII Site") is a 190-acre facility, located at 900 Potrero Grande Drive in Monterey Park, California.[2] The

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[1] "Site" is used in this Motion as it is defined in the Settlement Agreement: the Operating Industries, Inc. Superfund Site listed on the National Priorities List in May 1986. Plaintiff is Trustee of a grantor trust organized under the laws of the State of California; grantors are the parties named as defendants in the Eighth Partial Consent Decree.

[2] A history of the Site is set out at pages 15 – 19 of the Eighth Partial Consent Decree which is attached as an exhibit to the First Amended Complaint.

OII Site operated from 1948 through 1984. Over the course of its operation, the landfill accepted industrial solid, liquid and hazardous wastes, as well as, municipal substances as defined in Section 101(14) of CERCLA, 42 U.S.C. §9601(14), and California Health and Safety Code §§ 25316 and 25317.

The Site is located on the southwestern flank of the La Merced hills (also called the Montebello hills) and is divided by California Highway 60 (Pomona Freeway) which runs roughly east-west through the Site, dividing it into a 45-acre North Parcel and 145-acre South Parcel. The Site is located at the boundary between the San Gabriel groundwater basin to the north and the Los Angeles Central groundwater basin to the south. The important water-bearing units underlying the Los Angeles and San Gabriel basins, as well as the Site, are from oldest to youngest, upper Pliocene Pico Formation; lower Pleistocene San Pedro Formation; upper Pleistocene older alluvium (including "terrace gravels"); and the Recent Alluvium. The San Pedro Formation contains the five major aquifers of the Los Angeles Central Basin and the San Gabriel Basin: the Jackson, Hollydale, Lynwood, Silverado and Sunnyside aquifers. The lower Pliocene Repetto formation and older formation are found at depths greater than 1500 feet. The Site is approximately one mile west of the Whittier Narrows groundwater recharge area and the Rio Hondo River.

The Site was proposed for inclusion on the National Priorities List ("NPL") in October 1984 and was subsequently placed on the NPL in May of 1986, in accordance with Section 105(a)(8), of CERCLA, 42 U.S.C. 9605(a)(8), as set forth at 40 C.F.R. Part 300, Appendix B.

The contaminants found at the Site include hazardous substances as defined by Section 101(14) of CERCLA, 42 U.S.C. §9601(14), or California Health and Safety Code §§ 25316 and 25317.

There have been alleged releases of hazardous substances from the Site, and the Site allegedly posed threats to human health and the environment. The

population in proximity to the Site includes the nearby residents of the City of Montebello and the City of Monterey Park, those who travel on the section of the Pomona Freeway that transects the Site, and workers in the several businesses located on or near the Site.

In response to the alleged release or substantial threat of a release of hazardous substances at or from the Site, EPA completed the Remedial Investigation ("RI"), the Feasibility Study ("FS"), the Proposed Plan, and the Final Record of Decision (the "Final ROD") for the Site, pursuant to 40 C.F.R. § 300.430. EPA has identified three operable units to date: Site Control and Monitoring ("SCM"), Leachate Management ("LM"), and Gas Migration Control and Landfill Cover ("Gas Control and Cover"). The first two operable units (SCM and LM) were the subject of two interim Records of Decision ("ROD"). The work required by those interim RODs was the subject of two prior settlements, memorialized in two partial consent decrees. The first settlement is captioned United States et al v. Chevron Chemical Company, et al. No. CV 88-7196-MRP (Kx), and was entered by the Court on May 11, 1989 (the "First Decree"). The second settlement is captioned United States, et al v. American Petrofina Exploration Co., et al, No., CV 88-7196-MRP (Kx), and was entered into on September 17, 1991 (the "Second Decree").

A third partial consent decree, captioned United States, et al v. Chevron Chemical Company, et al, No. CV 91-6520-MRP (Kx), was entered by the court on March 30, 1992 (the "Third Decree"). The Third Decree addresses a portion of the work required by the Record of Decision for the Gas Control and Cover Operable Unit (the "Gas Control and Cover ROD"). The Gas Control and Cover ROD, unlike the previous two interim RODs, is a remedy for the Site. Parties to the Third Decree are performing a major portion of the Gas Control and Cover ROD and some operation and maintenance as provided in that ROD. At the

termination of the Third Decree, additional operation and maintenance provided in that ROD will be performed under the Eighth Partial Consent Decree.

On December 21, 1992, EPA, the State and the United States Department of the Navy ("Navy") entered into an Administrative Settlement (EPA CERCLA Docket No. 92-19) under which the Navy resolved its liability for matters addressed in the First Decree and the Third Decree.

On November 2, 1993, EPA issued a unilateral administrative order ("UAO 94-01") pursuant to Section 106 of CERCLA, 42 U.S.C. §9606, requiring certain response activities at the Site in cooperation with EPA and the other persons performing work at the Site.

A fourth partial consent decree, resolving the alleged liability of certain municipalities and transporters and the California Department of Transportation for arranging for disposal or for transport for disposal of municipal solid waste, was entered on April 4, 1995, captioned United States, et al v. City of Monterey Park, et al, No. CV 94-8685 WMB (GHKx) (the "Fourth Decree").

A fifth partial consent decree, addressing the same subject matter as the First Decree and the Third Decree, incorporating new defendants, including the recipients of UAO 94-01, was entered on July 10, 1996, captioned United States, et al v. IT Corporation, et al, No. CV 96-1959 WMB (JRx) (the "Fifth Decree").

On March 7, 1997, EPA issued a unilateral administrative order ("USO 97-02") pursuant to Section 106 of CERCLA, 42 U.S.C. §9606, requiring certain response activities at the Site in cooperation with EPA and the other persons performing work at the Site.

A sixth partial consent decree, captioned United States, et al v. Air Products and Chemicals, Inc. et al, Action No. CV 97-5440 MRP, resolving the liability of certain operator defendants, was entered on September 23, 1997 (the "Sixth Decree").

A seventh partial consent decree, captioned United States, et al v. Operating Industries, Inc., Action No. CV00-08794 SVW, resolving the liability of certain owner/operator defendants and incorporating provisions for redevelopment of a portion of the Site, was entered on October 10, 2000 (the "Seventh Decree").

The Eighth Partial Consent Decree, captioned United States, et al v. Chevron Environmental Management Company, et al., No. CV 01-11162 MMM (JWJx), was entered May 28, 2002. The Eighth Partial Consent Decree addresses, among other things, the remedial actions selected by the Final ROD and the long-term operation and maintenance of facilities constructed under the Gas Control and Cover ROD, to the extent those activities are not addressed under the Third Decree and the Seventh Decree. Pursuant to the Eighth Partial Consent Decree, the defendants identified as Work Defendants ("OII Group") agreed to implement the Final ROD as well as long-term operation and maintenance. The OII Group are the Grantors of the Trust, which is the Plaintiff in this Action.

In addition to the above settlements, EPA has entered into a variety of other settlements, including settlements with other de minimis parties at the Site, resolving most or all of their potential liability (Declaration of David A. Giannotti ("Giannotti Decl.") at ¶ 3). In addition, the parties to this Settlement provided notice to EPA, the State of California, various federal, state, and local government agencies, as well as the Work Defendants under the Eighth Partial Consent Decree, which are the only parties that have any potential claims against the Settling Defendants. There are still some parties that may be potentially responsible parties for costs at the Site, but those parties have not incurred any response costs, and it is not clear that EPA will ever pursue these remaining parties. Nevertheless, by the date this motion is heard, notification will also have been published in local newspapers.

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III. THE SETTLEMENTS

A. Agreement.

Plaintiff and the OII De Minimis Group entered into arm's length settlement negotiations which culminated in the execution of the Settlement Agreement attached hereto as Exhibit 1. Giannotti Decl. at ¶ 5; Cohen Decl. at ¶ 3.

The relevant terms of Settlement Agreement are as follows.

(a) Pursuant to the terms and conditions set forth below, and after the Effective Date, the Plaintiff shall release the Defendants for all claims for environmental response costs, as set forth in the agreement, and indemnify Defendants and specifically identified related parties, for environmental response costs, up to the amount paid pursuant to the Settlement Agreement. Giannotti Decl. at ¶ 6; Cohen Decl. at ¶ 4.

(b) Defendants agree to pay in settlement of their liabilities the amounts listed in Exhibit B to the Settlement Agreement. For most Defendants, this amounts to $1.37 per gallon of wastes listed in Exhibit B. The amounts paid by certain other Defendants are lesser amounts and were based on specific facts applicable to those Defendants. Giannotti Decl. at ¶ 7; Cohen Decl. at ¶ 5.

B. Condition Precedent.

The effectiveness of the Settlement Agreement is conditioned on a good faith order barring claims against the Settling OII De Minimis Group for liabilities associated with the Site, except to the extent that certain limited claims are preserved by the settlements. Giannotti Decl. at ¶ 8; Cohen Decl. at ¶ 6.

IV. THE SETTLEMENTS BETWEEN PLAINTIFF AND THE *DE MINIMIS* DEFENDANTS ARE IN GOOD FAITH.

A. These Settlements Meet the Standards Under Which the Court Determines Good Faith.

When a settlement is submitted for judicial approval, a court is required to evaluate whether a proposed consent decree is "fair, reasonable and consistent with the objectives of CERCLA." *United States v. Montrose*, 50 F.3d 741, 743 (9th Cir. 1995). "'A court must consider the substantive fairness of the consent decree to non-settling PRPs by assessing whether liability has been roughly apportioned based upon "some acceptable measure of comparative fault.' *United States v. Cannons Eng'g Corp*., 899 F.2d 79, 87 (1st Cir.1990); see *Montrose*, 50 F.3d at 746." *U.S. v. Aerojet General Corp*. 606 F.3d 1142, 1152 (C.A.9 (Cal.),2010). See also *United States v. Westinghouse Electric Corporation*,50 F.2d 74, 743 (9th Cir. 1995)(holding that in evaluating a settlement under CERCLA, the Court must evaluate whether the settlement was reasonable, fair and consistent with the purposes that CERCLA is intended to serve, citing *United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990).* In *Cannons*, the Court set out a three pronged analysis for determining whether a settlement meets this standard: (1) is the settlement procedurally fair, i.e. was the negotiation process open, at arms length and conducted in good faith; (2) is the settlement substantively fair, i.e. will the settling party pay a share commensurate with the amount of its legal responsibility, and (3) is the settlement reasonable, i.e. does it adequately protect the public and reasonably take into account the litigation risks.

1. The Negotiating Process Was Conducted in Good Faith.

Plaintiff and Defendants negotiated over the amount of the settlement and the settlement terms for over a year. There has been no collusion between the Defendants. The settlements were reached after numerous conferences conducted by experienced counsel and are the result of extensive, adversarial negotiations conducted at arm's length, without any aim or intent to injure the interest of any other party. Giannotti Decl. at ¶ 9; Cohen Decl. at ¶ 7.

2. The Defendants Are Paying Their Fair Share of Liability.

Here, the settlement is fair and reasonable under the circumstances. First, many of the site costs were incurred in the 1980s and 1990s. It is Defendants' position that the statute of limitations for costs incurred before the Eighth Partial Consent Decree ("CD-8") are barred by the Statute of Limitations and, therefore, cannot be recovered.[3] Based on EPA and their own calculations, the OII Group estimates that the total cost of implementing CD-8, which includes implementation of the final remedy and long term operation and maintenance of the site is about $300 million (Cohen Decl. 8) . The Defendants believe that the actual figure will be less than $300 million (Cohen Decl. 8). EPA estimates that a total of about 265 million gallons of wastes were sent to the Site (Cohen Decl. ¶9). Thus, based on these EPA and OII Group estimates, the average recoverable cost per gallon for implementation of the final remedy is approximately $1.14 per gallon. Under the Settlement, most Defendants are paying $1.37/gallon which represents a premium of approximately 20% above the estimated cost for the final remedy. Plaintiff and Defendants believe that Defendants are paying their fair share of liability at the Site.

Plaintiff notes that the calculation of the maximum per gallon settlement amount ($1.37) is based on an estimate of costs for remedial actions that will stretch long into the future. The OII Group is required to perform remedial actions until standards set forth in the Eighth Partial Consent Decree are met, estimated to take 60-150 years. Plaintiff contends that the cost estimate used for negotiating this settlement does not include or reflect all of the costs and risks that can arise during this long period. For example, the cost estimate does not include a risk value for

[3]The statute of limitations for contribution claims by the OII Group is three years from the date of any judicially approved settlement. Most of the settlements were prior to 2002 and, therefore claims to recover costs under those settlements are arguably barred. After Plaintiff entered into the Eighth Partial Consent Decree in 2002, it entered into tolling agreements with the Defendants. Therefore, claims for costs under that Consent Decree arguably are not barred.

the remedy failing during this period to no longer meet standards, nor does it include any estimate for costs to repair damages from a major earthquake, and the OII Site is in an area known to have faults. Giannotti Decl. at ¶ 10. Defendants, on the other hand, contend that the remedy is fully adequate and designed to take into account future risks and that the estimate is inflated (Cohen Decl. ¶ 8).

It is not unusual in settlements of this kind to include a premium to account for unknown risks. According to EPA guidelines,[4] these risks include (a) the risk that the actual remedy costs will be higher or lower than anticipated; (b) risks that the remedy will, or will not be implemented by other potentially responsible parties, (c) the strength of the evidence that parties sent "hazardous substances" to the Site, and (d) the admissibility of the evidence against the Defendants. Thus, while in some cases, premiums in the range of 50% to 100% have been used, as a general matter, lower premiums are appropriate where the site investigation has been completed, the remedy selected, other parties have agreed to implement the remedy, significant portions of the remedy have been implemented and there are litigation risks associated with pursuing the claims against the de minimis parties. The parties believe that the 20% premium in this case is appropriate for the following reasons.

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[4] See e.g. EPA Memorandum entitled "Standardizing the De Minimis Premium" dated "July 7, 1995 "the presumptive figures are 100% for a settlement without a cost reopener and 50 percent for a settlement with a reopener. However, site specific circumstances may warrant a departure from the presumptive premium (either an increase or decrease)." That memo specifically notes that adjustment factors include the degree of certainty regarding the remedy costs. See also "Superfund Program: Early De Minimis Waste Contributor Settlements" July 1, 1992, noting that "a lower premium may also be appropriate where PRP investigatory work is complete, financially viable non-de minimis parties are identified, or there is an agreement with the non-de minimis parties to perform the RD/RA at the time of the early de minimis settlement." Here not only have the parties been identified and agreed to perform the RD/RA, but virtually all of the remedy has been implemented. Other factors to be considered in settlements include the "strength of evidence tracing the wastes at the site to the settling parties" and "litigative risks in proceeding to trial" including the admissibility and adequacy of the evidence. See "Interim CERCLA Settlement Policy" dated December 5, 1984. OSWER Directove #9835.0.

First, as already noted, while the parties believe that the base payment of $1.14/gallon accounts for the estimated future costs, they also acknowledge that as the remedy is estimated to take 60 to 150 years, future risks cannot be completely identified or quantified. Hence the premium is intended to account for these future long term risks.

Second, as noted above, the parties recognize that there are significant statute of limitations problems recovering costs incurred pursuant to the Consent Decrees prior to the Eighth Consent Decree.

Third, the investigation has been completed, the remedy submitted and Plaintiff has agreed to implement the final remedy. In addition, most of the remedy has been implemented. Therefore, there is no risk that the remedy will not be implemented and the Plaintiff is the party that bears all of the risk that the settlement amount is too low.

Fourth, in order to prevail on their CERCLA claim at trial, Plaintiff would have to demonstrate that each Defendant sent hazardous substances to the Site (42 U.S.C. §9607(a)). Plaintiff's primary evidence of such disposals are the hazardous waste manifests. However, the manifests are over 25 years old and most do not specifically identify any hazardous substances, they merely refer to "mud and water." Thus, in order to prove that the "mud and water" contained hazardous substances, Plaintiff would likely need to conduct discovery regarding activities that occurred many years ago and obtain expert testimony regarding waste streams that may no longer exist. In addition many of the manifests are illegible and it will be difficult, if not impossible to identify, let alone locate the people that filled out and signed the manifests. Therefore, Plaintiff may have a difficult time getting the manifests into evidence. Therefore, if the Plaintiff was to litigate, rather than enter into this settlement, it would face substantial litigation risk (Cohen Decl.¶10).

While Plaintiff believes that these do not present substantial obstacles to ultimately proving liability, both Plaintiff and Defendants recognize that risks exist, that proceeding to trial would require them to incur litigation costs, and that, given that many of the Defendants only sent small amounts of wastes to the site, the costs of proving that they sent "hazardous substances" would reduce the amount that they could recover from those parties even if they prevailed on all of their claims against them (Cohen Decl. ¶10).

Overall, Plaintiff acknowledges litigation risks and costs, but entered into this settlement in the good faith effort to avoid prolonged litigation (Giannotti Decl. ¶11). The parties believe that the payment of $1.37/gallon by most of the settling parties, which represents a 20% premium over the estimated costs, is fair and accounts for these various risks.[5]

Given the fact that (a) the settlement requires most Defendants to pay more than their volumetric share of future response costs at the Site; (b) Plaintiff faces significant statute of limitations problems recovering costs incurred pursuant to the prior Consent Decrees; (c) Plaintiff faces substantial difficulties proving that Defendants sent hazardous substances to the Site; (d) Defendants believe that the future cost estimate is inflated and (e) Plaintiff believes that it faces unknown and potentially expansive risks in the future that are not included in the current cost estimate, justifying a settlement amount is more than a simple mathematical exercise of dividing estimated costs by estimated volumes. This settlement accounts for these risks and concerns and is unquestionably fair to all persons, including any non-settling defendants that remain. Thus, taking into consideration the estimated

[5] It should be noted that some Defendants are paying less than $1.37/gallon. These payment amounts are intended to take into account particular issues associated with those parties including ability to pay, whether the wastes contained hazardous substances, and proof issues. The lower figures also reflect the intentions of Plaintiff to resolve the claims as quickly as possible, taking into consideration litigation costs and risks. (Cohen Decl. ¶12; Giannotti Decl. ¶11).

cost of the remedial action, the increased costs from future risks in implementing the remedial actions, the estimated liability of the Defendants and the risks and costs of litigation, these settlements reflect the Settling OII De Minimis Group's fair share of liability.

3. The Settlement Is Consistent with CERCLA and Adequately Protects the Public

As discussed above, the OII Group has agreed to implement the remedy selected by EPA and to be responsible for the long term operation and maintenance of the Site. The funds collected from the Defendants will be used to fund the remedy and long term operation and maintenance. Therefore, the settlement is consistent with CERCLA because it requires the Defendants, who allegedly sent wastes to the Site to participate in the settlement, and, at the same time provides funding for the cleanup of the Site, thereby protecting the public.

A. Further Adjudication Is Not Necessary.

Moreover, to delve into full discovery to adduce further evidence for trial would be counter-productive, considering the high cost of discovery and trial. Unlike the circumstances in *Westinghouse, supra,* and *Montrose*, there are facts before the court by which it can compare the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them.

Accordingly, given the Defendants' minimal involvement in this case, and the evidence showing that this settlement is reasonable, Plaintiff and the Defendants request that this Court determine that the settlement is made in good faith, and bar all claims against the Defendants for liabilities associated with the Site, except to the extent that such claims are specifically preserved by the settlements.

B. The Settlements Are in Good Faith Under State Law.

Where the settlement involves the resolution of state law claims, the federal courts will apply the criteria set forth by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488, 499, 213 Cal. Rptr. 256

(1985), to determine whether a particular settlement is made in good faith and thus extinguishes any equitable right of contribution from non-settling entities. *Tech-Bilt* sets forth guidelines to aid courts in determining whether a settlement has been reached in good faith. Among the factors to be taken into consideration are: a rough approximation of plaintiff's total recovery and the settlers' proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, a recognition that a settler should pay less in a settlement than he would if he were found liable after a trial, the financial conditions and insurance policy limits of settling defendants, and the existence of collusion, fraud or tortious conduct aimed to injure the interest of non-settling defendants. *Id.*, 38 Cal.3d at 499. The *Tech-Bilt* court noted that, "practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement." *Id.*, at 499. The court said that settlements found *not* to be in good faith are "quite rare." Finally, any entity who challenges the settlement bears the burden of proof "to demonstrate, if he can, that the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute." *Id.*, at 499. -500.

This analysis for a good faith determination under state law is nearly identical to that under federal law. Thus, the conclusion here is the same under state and federal law – the settlements were made in good faith.

When evaluating a settlement, the court does not conduct a trial on the merits, nor should the proposed settlement "be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Instead, "a presumption of fairness arises where: (1) counsel is experienced in similar litigation; (2) settlement was reached through arm's length negotiations; (3) investigation and discovery are sufficient to allow counsel and the court to act intelligently. *Linney v. Alaska Cellular P'ship*, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff'd*,

151 F.3d 1234 (9th Cir. 1998); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.3d 939 (9th Cir. 1981).

The proposed settlement more than complies with the general guidelines of what constitutes a good faith settlement. A presumption of fairness arises because counsel is experienced in this type of environmental litigation, settlement was reached through arm's length negotiations, and through the course of the settlement discussions counsel were able to conduct sufficient investigation to act intelligently. The amounts being paid by the parties here are reasonable in order to avoid significant litigation costs and avoid potential liability which might be substantially greater. The length of time which was required in order to finalize a settlement that was acceptable to all parties is further indication that the negotiated settlement is a good faith, arms-length resolution. Therefore, the settlement is fair and reasonable and should be approved by this Court as in good faith.

V. AN ORDER BARRING CONTRIBUTION AND INDEMNITY IS PROPER UNDER STATE AND FEDERAL LAW.

Upon a finding of good faith, the Defendants are entitled to an order barring claims for contribution and indemnity under state and federal law. This is so because the policy in both federal and state courts is to encourage settlement and a settlement bar order is necessary to promote that policy. *In Re Atlantic Fin. Mgt. Inc. Securities Lit.*, 718 F.Supp. 1012, 1015 (D. Mass 1988); § 4 UCATA, comment at 100. "Since it obviously eases crowded Court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of litigation as possible." Fed.R.Civ.P. 16(c), Advisory Committee Note. "Denial of a settlement bar would interfere with policies favoring settlement." *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989). See also *City of Emeryville v. Robinson* 621 F.3d 1251, 1265 (9th Cir. 2010)(Noting that numerous courts have imposed or enforced CERCLA contribution bars against other site related potentially responsible parties in private-party settlements); *Franklin v. Kaypro*

Corp. 884 F.2d 1222, 1232 (9th Cir. 1989)(Approving contribution bar in securities class action case). *Tyco Thermal Controls LLC v. Redwood Indus*. 2010 WL 3211926, 5 (N.D.Cal., 2010) ("Under federal law, particularly in CERCLA cases such as this, district courts have approved settlements and entered bar orders." *AmeriPride Services Inc. v. Valley Indus.*, Nos. CIV. S-00-113-LKK JFM, S-04-1494-LKK/JFM., 2007 WL 1946635, at *2 (E.D.Cal. July 2, 2007), citing United *States v. Western Processing Co., Inc.*, 756 F.Supp. 1424, 1432-33 (W.D.Wash.1990). 'Such an order is appropriate to facilitate settlement, particularly in a CERCLA case.' Id., citing *Foamseal, Inc. v. Dow Chemical*, 991 F.Supp. 883, 886 (E.D.Mich.1998). 'Within the Ninth Circuit, a court's authority to review and approve settlements and to enter bar orders has been expressly recognized.' Id., citing *Franklin v. Kaypro Corp*., 884 F.2d 1222 (9th Cir.1989) (approving settlement of claims and entering bar orders in the context of federal securities laws). The same is true for settlement of state law claims in a federal action. See Id., citing *Patterson Environmental Response Trust v. Autocare 2000, Inc.*, No. Civ-F 01-6606 (E.D.Cal. July 8, 2002); see also *Federal Savings and Loan Ins. Corp. v. Butler*, 904 F.2d 505, 511 (9th Cir.1990)."

In this instance, the Defendants have agreed to pay their fair share of their alleged liability at the Site, or more, and Plaintiff has demonstrated that the settlement was reached in good faith and is fair to any non-settling parties. Thus, an order barring claims against the Defendants for liabilities associated with the Site, except to the extent that such claims are preserved by the Settlements, under federal and state law is most appropriate here.[6]

[6] Given that, as discussed above, Defendants will have already contributed their fair share of response costs for the Site pursuant to the Settlement, there should be no basis for future claims against them in any event. Thus, for example, while they could, absent a bar, be sued for contribution pursuant to §113(f) of CERCLA, 42 U.S.C. §9613(f), they should not be liable because they will have already paid their fair share. And, while they could be sued for cost recovery under §107 of CERCLA, they would be entitled to file counterclaims for contribution under §113(f) of CERCLA and liability would then be equitably apportioned.

VI. CONCLUSION.

Based on the foregoing, the Defendants and Plaintiff respectfully request that this Court issue an Order providing that the settlements are in good faith under federal and state law, that claims against the Defendants for liabilities associated with the Site are barred under state and federal law, except to the extent that such claims are preserved by the settlements.

DATED: February 16, 2012

DAVID A. GIANNOTTI, A PROFESSIONAL CORPORATION

By: */s/ David A. Giannotti*
David A. Giannotti
Attorney for Plaintiff

LOEB & LOEB

By: */s/ Albert M. Cohen*
Albert M. Cohen
Attorney for Defendants

DECLARATION OF DAVID A. GIANNOTTI

I, David A. Giannotti, declare that:

1. The name of my law firm is David A. Giannotti, A Professional Corporation. My office address is 2340 Bella Vista Drive, Montecito, California 93108. I am the attorney principally responsible for representing plaintiff, David Hirsch, Trustee of OII Eighth Partial Consent Decree Work Escrow Account Trust ("Plaintiff") in the *DAVID HIRSCH, TRUSTEE OF OII EIGHT PARTIAL CONSENT DECREE WORK ESCROW ACCOUNT TRUST v. A.H. AND S. CONSTRUCTION, ET AL*, *Case No.* CV11-9007 DSF (Ex). This declaration is submitted in support of the Motion for Determination of Good Faith Settlement ("Motion"), filed concurrently herewith.

2. I have personal knowledge of the matters set forth herein, and if called as a witness could and would competently testify thereto.

3. In addition to the various settlements described in the Eighth Partial Consent Decree, EPA has entered into a variety of other settlements, including settlements with other de minimis parties at the site, resolving most or all of their potential liability.

4. The parties to this settlement provided notice to EPA, the state of California, various federal, state, and local government agencies, and others, including the Water Replenishment District of Southern California, the California Department of Justice, the South Coast Air Quality Management District Compliance Division/Public Facilities Branch, the California Regional Water Quality Control Board, the California Department of Transportation, the United States Army Corps of Engineers, the California Integrated Waste Management Board, the State of California Public Utilities Commission Energy Division/Analysis Branch, the Department of Toxic Substance Control, the City of Montebello and Monterey Park City Hall, as well as the work defendants under the Eighth Partial Consent Decree that have any potential claims.

5. Plaintiff and a group of forty-nine (49) defendants (collectively referred to as the "OII De Minimis Group") entered into arm's length settlement negotiations which culminated in the execution of the Settlement Agreement attached to the Motion as Exhibit 1.

6. Pursuant to the terms and conditions set forth below, and after the Effective Date, the Plaintiff shall release the Defendants for all claims for environmental response costs, as set forth in the agreement, and indemnify Defendants and specifically identified related parties, for environmental response costs, up to the amount paid pursuant to the Settlement Agreement.

7. Defendants agree to pay in settlement of their liabilities the amounts listed in Exhibit B to the Settlement Agreement. For most Defendants, this amounts to $1.37 per gallon of wastes listed in Exhibit B. The amounts paid by certain other Defendants are lesser amounts and were based on specific facts applicable to those Defendants.

8. The effectiveness of the Settlement Agreement is conditioned on a good faith order barring claims against the Settling OII De Minimis Group for liabilities associated with the Site, except to the extent that certain limited claims are preserved by the settlements.

9. The Negotiating Process Was Conducted in Good Faith.

Plaintiff and Defendants negotiated over the amount of the settlement and the settlement terms for over a year. There has been no collusion between the Defendants and the Plaintiff and there has certainly been no attempt to injure any other party. The settlements were reached at a series of settlement conferences conducted by experienced counsel and are the result of extensive, adversarial negotiations conducted at arm's length, without any aim or intent to injure the interest of any other party.

10. The OII Group is required to perform remedial actions until standards set forth in the Eighth Partial Consent Decree are met, estimated to take 60-150 years. Plaintiff contends that the cost estimate used for negotiating this settlement does not include or reflect all of the costs and risks that can arise during this long period. For example, the cost estimate does not include a risk value for the remedy failing during this period to no longer meet standards, nor does it include any estimate for costs to repair damages from a major earthquake, and the OII Site is in an area known to have faults.

11. Plaintiff acknowledges that there are litigation risks in proceeding to trial against the Defendants. Plaintiff believes that the base settlement figure of $1.37/gallon accounts for those risks. In addition, Plaintiff believes that the lower settlement figures for certain Defendants accounts for the unusual situations and litigation risks associated with those defendants.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 16 day of February, 2012, at Montecito, California.

/s/ David A. Giannotti
David A. Giannotti

DECLARATION OF ALBERT M. COHEN

I, Albert M. Cohen, declare that:

1. I am a member of the firm of Loeb & Loeb LLP and, as such, am the attorney principally responsible for representing a group of forty-nine (49) defendants in *DAVID HIRSCH, TRUSTEE OF OII EIGHT PARTIAL CONSENT DECREE WORK ESCROW ACCOUNT TRUST v. A.H. AND S. CONSTRUCTION, ET AL*, *Case No.* CV11-9007 DSF (Ex). This declaration is submitted in support of defendants' Motion for Determination of Good Faith Settlement ("Motion"), filed concurrently herewith.

2. I have personal knowledge of the matters set forth herein, and if called as a witness could and would competently testify thereto.

3. A group of forty-nine (49) defendants (collectively referred to as the "OII De Minimis Group," and numerous other parties were originally notified by the United States Environmental Protection Agency ("EPA") that they were considered "de minimis" parties at the Operating Industries Inc. Superfund Site (the "Site") in Monterey Park, California. After being unable to reach a satisfactory settlement with EPA, the OII De Minimis Group entered into arm's length settlement negotiations with DAVID HIRSCH, Trustee of OII Eighth Partial Consent Decree Work Escrow Account Trust (the "Trust" or "Plaintiff"), which has agreed to implement the final remedy for the Site. These negotiations culminated in the execution of the Settlement Agreement attached to the Motion as Exhibit 1.

4. Pursuant to the terms and conditions set forth below, and after the Effective Date, the Plaintiffs shall release the Defendants for all claims for environmental response costs, as set forth in the agreement, and indemnify Defendants and specifically identified related parties, for environmental response costs, up to the amount paid pursuant to the Settlement Agreement.

5. Defendants agree to pay in settlement of their liabilities the amounts listed in Exhibit B to the Settlement Agreement. For most Defendants,

this amounts to $1.37 per gallon of wastes listed in Exhibit B. The amounts paid by certain other Defendants are lesser amounts and were based on specific facts applicable to those Defendants.

6. The effectiveness of the Settlement Agreement is conditioned on a good faith order barring claims against the Settling OII De Minimis Group for liabilities associated with the Site, except to the extent that certain limited claims are preserved by the settlements.

7. The Negotiating Process Was Conducted in Good Faith. Plaintiff and Defendants negotiated over the amount of the settlement and the settlement terms for over a year. There has been no collusion between the Defendants and the Plaintiff and there has certainly been no attempt to injure any other party. The settlements were reached at a series of settlement discussions conducted by experienced counsel and are the result of extensive, adversarial negotiations conducted at arm's length, without any aim or intent to injure the interest of any other party.

8. Attached hereto as Exhibit 1 is a true and correct copy of a exhibit prepared by the United States Environmental Protection Agency ("EPA") entitled ""Prepared for the United States Environmental Protection Agency Re: OII Superfund Site – Total Site Remediation Cost Analysis OII Total Site Remediation Costs as of 9/30/2008 which estimates that future costs will be $300,468,688. The Defendants believe that the estimate is high because, among other things, it uses a lower than appropriate discount rate to calculate the net present value of the remedy and assumes that monitoring and operation and maintenance costs will remain the same over the lifespan of the remedy while the Defendants believe that these costs should go down over time. The Defendants believe that the net present value of future costs are more likely in the range of $200 to $225 million. In addition, Defendants believe that this cost takes into account all appropriate risks including the risks of earthquakes and remedy failure.

9. EPA has estimated that 265 million gallons of liquid wastes were disposed of at the OII Site and has used that figure as a basis for calculating the volumetric shares for de minimis and other parties.

10. Plaintiff's primary evidence of disposals are the hazardous waste manifests. However, the manifests are over 25 years old and most do not specifically identify any hazardous substances, they merely refer to "mud and water." Thus, in order to prove that the "mud and water" contained hazardous substances, Plaintiff would likely need to conduct discovery regarding activities that occurred many years ago and obtain expert testimony regarding waste streams that may no longer exist. In addition many of the manifests are illegible and it will be difficult, if not impossible to identify, let alone locate the people that filled out and signed the manifests. Therefore, Plaintiff may have a difficult time getting the manifests into evidence. Therefore, if the Plaintiff was to litigate, rather than enter into this settlement, it would face substantial litigation risk. At minimum, proceeding to trial would require Plaintiff and Defendants to incur litigation costs. Given that many of the Defendants only sent small amounts of wastes to the site, the costs of proving that they sent "hazardous substances" would reduce the amount that Plainitff could recover from those parties even if Plaintiff prevailed on all of its claims against Defendants.

11. Attached hereto as Exhibit 2 are true and correct copies of EPA Memorandum entitled "Standardizing the De Minimis Premium" dated "July 7, 1995; "Superfund Program: Early De Minimis Waste Contributor Settlements" July 1, 1992, and EPA's "Interim CERCLA Settlement Policy" dated December 5, 1984. OSWER Directive #9835.0.

12. Several parties settled for less than the $1.37/gallon figure because of special circumstances.

a. Alhambra Car Wash, Citrus Car Wash, Glen Rock Car Wash, Temple City Car Wash, and Valley Center Car Wash had ability to pay claims and

various other claims regarding whether the volumes attributed to them were correct and whether Plaintiff would be able to prove that they sent the alleged volumes to the Site. They agreed to collectively pay $15,000 to resolve this matter and the Plaintiff agreed that this was a reasonable amount given the circumstances and the desire to bring this matter to a conclusion.

b. Carson Car Wash and Beverly A. Swearinger. This car wash was owned by Mrs. Swearinger's husband who recently passed away. Plaintiff agreed that a payment of $5,000 was reasonable considering the costs that would be otherwise incurred to litigate against the estate.

c. Century West Car Wash, Inc., Gordon R. Solomon, and Harvey Solomon presented evidence that Century West Car Wash was not the proper entity and that, in any event, it was unable to contribute a significant amount to a settlement. Plaintiff agreed that a payment of $500 was reasonable given these issues.

d. Crescenta Valley Water District presented evidence that the wastes sent to the site consisted of mud from a mudslide and, therefore, did not include any hazardous substances. Plaintiff agreed that a payment of $2,500 to resolve this claim was reasonable given the evidence presented by the Water District.

e. Gorham/Textron, Inc. presented evidence that the clay waste it sent to the site was not a hazardous substance. Plaintiff agreed that a payment of $7,500 was reasonable in light of this evidence.

f. Long Beach Shavings Company Incorporated presented evidence that the volume of waste it sent to the Site was significantly less than indicated on the manifests. Plaintiff agreed that a payment of $500 was reasonable in light of this evidence.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 16 day of February 2012, at Los Angeles, California.

/s/ Albert M. Cohen
Albert M. Cohen