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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ADOBE LUMBER, INC.,
a California corporation,

Plaintiff,

NO. CIV. 05-1510 WBS EFB

MEMORANDUM AND ORDER RE:
MOTION FOR SETTLEMENT APPROVAL

v.

F. WARREN HELLMAN and WELLS FARGO
BANK, N.A., as Trustees of Trust A
created by the Estate of Marco
Hellman; F. WARREN HELLMAN as
Trustee of Trust B created by the
Estate of Marco Hellman; THE
ESTATE OF MARCO HELLMAN, DECEASED;
WOODLAND SHOPPING CENTER, a
limited partnership; JOSEPH
MONTALVO, an individual; HAROLD
TAECKER, an individual; GERALDINE
TAECKER, an individual; HOYT
CORPORATION, a Massachusetts
corporation; PPG INDUSTRIES, INC.,
a Pennsylvania corporation;
OCCIDENTAL CHEMICAL CORPORATION, a
New York corporation; CITY OF
WOODLAND; and ECHCO SALES &
EQUIPMENT CO.,

Defendants,

_____ /

AND RELATED COUNTERCLAIMS,
CROSSCLAIMS, AND THIRD
PARTY COMPLAINTS.

_____ /

1 Plaintiff Adobe Lumber Inc. filed this cost recovery
2 action under the Comprehensive Environmental Response,
3 Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675;
4 the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§
5 6901-6992k; and California state law in response to its discovery
6 of contamination in the subsurface soil and groundwater of a
7 retail property it owns in Woodland, California. Plaintiff now
8 requests that the court approve a settlement it has reached with
9 two of the defendants, Harold and Geraldine Taecker ("Taeckers"),
10 who operated a dry-cleaning facility on the property.

11 I. Factual and Procedural Background

12 Plaintiff is the owner of a shopping center located in
13 downtown Woodland, California ("Site"). (Pl.'s Mem. Supp.
14 Settlement Approval 3:5-6.) When plaintiff purchased the Site in
15 1998, the Taeckers operated a dry cleaning business in Suite K, a
16 location they had leased for that purpose since 1974. (Id. at
17 3:6-8.) From 1974 until plaintiff purchased the Site, various
18 defendants and third-party defendants in this action held
19 ownership interests in the Site. (Id. at 3:14-4:4.)

20 Between 1974 and 1991, the Taeckers allegedly disposed
21 of wastewater contaminated with the dry cleaning solvent
22 perchloroethylene (PCE) through the sanitary sewer system and
23 otherwise into the environment at the Site. (Id. at 4:20-21.)
24 Plaintiff states that defendants Hoyt Corporation ("Hoyt"),
25 Occidental Chemical Corporation ("Occidental"), PPG Industries
26 ("PPG"), and Echco Sales Co. Inc. manufactured and/or delivered
27 dry cleaning equipment and PCE that, when used as directed,
28 resulted in the disposal of PCE into the sewer system and

1 environment. (Id. at 24:5-11.) In addition to the Taeckers'
2 disposal of PCE, sudden and accidental discharges also allegedly
3 occurred between approximately 1974 and 1994. (Id. at 5:8-6:2.)

4 In 2001, plaintiff learned of the presence of PCE and
5 other contaminants in the soil and groundwater beneath the Site.
6 (Id. at 6:4-9.) Estimates of the cost to clean up the Site,
7 though disputed by the parties, range from \$2 million to \$4.3
8 million. (Id. at 7:10-12; Pl.'s Reply 27:19-20.) Plaintiff
9 informed state authorities of the results of its investigation
10 and eventually brought suit in 2002 against the Taeckers,
11 captioned Adobe Lumber, Inc. v. Taecker, et al., Case No. CV S-
12 02-0186-GEB-GGH ("Adobe I"), to recover response costs and
13 declare liability for future cleanup expenses. (See Pl.'s Mem.
14 Supp. Settlement Approval 6:9-25.) Other parties were added to
15 that action as third-party defendants. (Id. at 7:1-3.) During
16 that litigation, the parties engaged in extensive settlement
17 discussions and ultimately executed a settlement agreement in
18 July 2005 that was later amended in October 2005. (Id. at 8:5-
19 7.) The agreement called for a stipulated dismissal of Adobe I
20 without prejudice and a release of the Taeckers from liability to
21 all parties. (Id. at 8:11-20.) The parties agreed to move for
22 settlement approval in the subsequent litigation. (Id.)

23 After Adobe I was dismissed without prejudice,
24 plaintiff filed the instant action, adding new defendants and
25 asserting claims under CERCLA and RCRA and eight state law
26 claims. Proceedings in the instant action were stayed in 2006
27 after the court certified an interlocutory appeal on the issue of
28 whether plaintiff, as a potentially responsible party (PRP) under

1 CERCLA who had voluntarily incurred response costs, could pursue
2 a cost recovery action for contribution against other PRPs under
3 42 U.S.C. § 9613 (CERCLA section 113). Because of the stay, the
4 court denied without prejudice plaintiff's then-pending motion to
5 approve the settlement with the Taeckers. (Feb. 15, 2006 Order
6 2:22-24.) On appeal, the Ninth Circuit held that plaintiff must
7 pursue an action for cost recovery under 42 U.S.C. § 9607 (CERCLA
8 section 107) in light of the Supreme Court's ruling in United
9 States v. Atlantic Research, 127 S. Ct. 2331 (2007). Kotrous v.
10 Goss-Jewett Co. of N. Cal., 523 F.3d 924 (9th Cir. 2008). This
11 case was then reopened on May 15, 2008, and plaintiff renewed its
12 motion to approve the settlement on October 28, 2008.

13 Under the terms of plaintiff's settlement agreement
14 with the Taeckers, the Taeckers' insurer, Truck Insurance
15 Exchange ("Farmers"), agreed to pay \$500,000 to plaintiff in
16 exchange for a release of liability for the Taeckers. (Pl.'s
17 Mem. Supp. Settlement Approval 8:11-20.) Plaintiff asserts that
18 the settlement amount, well below the estimates of total cleanup
19 costs, is fair in light of evidence that the Taeckers have no
20 significant personal assets and their policies with Farmers may
21 not cover all of the relevant incidents of PCE disposal and
22 discharge. (Id. at 14:22-17:9.)

23 Under the terms of the settlement agreement,
24 plaintiff's receipt of the \$500,000 is conditioned on this court
25 issuing an order that 1) finds the parties have entered into a
26 good faith settlement, 2) discharges the Taeckers from all
27 liability to plaintiff and to any third party for contribution,
28 and 3) reduces plaintiff's claims against all nonsettling

1 defendants by the amount of the settlement. (Id. at 8:12-20.)

2 II. Discussion

3 To facilitate settlement in multi-party litigation, a
4 court may review settlements and issue bar orders that discharge
5 all claims of contribution by nonsettling defendants against
6 settling defendants. See In re Heritage Bond Litig., 546 F.3d
7 667, 677 (9th Cir. 2008); Franklin v. Kaypro Corp., 884 F.2d
8 1222, 1225 (9th Cir. 1989). In addition to a bar order,
9 plaintiff has specifically requested that the court adopt a "pro
10 tanto" settlement credit method-- i.e., a dollar-for-dollar
11 reduction of the amount of the settlement from plaintiff's
12 ultimate recovery. (Pl.'s Mem. Supp. Settlement Approval 1:5,
13 31:13-14.) Because this issue affects the court's review of the
14 settlement more generally, see McDermott v. AmClyde, 511 U.S.
15 202, 216-17 (1994) (noting the different approval procedures
16 typically involved with the different settlement credit methods),
17 and may itself be dispositive, the court must first address the
18 issue of settlement credit.

19 In general, when a plaintiff settles with one of
20 multiple joint tortfeasors, the remaining defendants are entitled
21 to a credit for that partial settlement against their total
22 liability. McDermott, 511 U.S. at 208. In CERCLA cost recovery
23 actions, a court must consider such partial settlements in
24 allocating response costs among PRPs. See K.C. 1986 Ltd. P'ship
25 v. Reade Mfg., 472 F.3d 1009, 1018 (8th Cir. 2007) ("CERCLA
26 plainly requires that the district court take these settlements
27 into its equitable consideration in the allocation process.").
28 When applying a settlement credit against a plaintiff's eventual

1 recovery, courts have adopted two main alternative methods:
2 proportionate share and pro tanto (dollar-for-dollar). See
3 McDermott, 511 U.S. at 209, 211.

4 The proportionate share approach, embodied in the
5 Uniform Comparative Fault Act (UCFA), calls for the reduction of
6 the nonsettling defendants' liability by the equitable share of
7 the settling party's obligation. See Am. Cyanamid Co. v.
8 Capuano, 381 F.3d 6, 20 (1st Cir. 2004); UCFA § 6, 12 U.L.A. 126
9 (1996).¹ In contrast, under the pro tanto approach contained in
10 the Uniform Contribution Among Tortfeasors Act (UCATA), the
11 liability of the nonsettling defendants is reduced by the dollar
12 amount of the settlement. See Capuano, 381 F.3d at 20; UCATA §
13 4, 12 U.L.A. 194 (1996). These two approaches, therefore, assign
14 the risk of an inadequate partial settlement--i.e., a settlement
15 below the amount allocated to the settling defendant at trial--to
16 different parties. Under the proportionate share approach, the
17 plaintiff bears the risk, while under the pro tanto approach, the
18 nonsettling defendants bear the risk. See In re Jiffy Lube Sec.
19 Litig., 927 F.2d 155, 161 (4th Cir. 1991).

20 In the twenty-eight years that CERCLA has been
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22 ¹ The UCFA provides for equitable allocation of liability
23 based on relative fault. See UCFA § 2, 12 U.L.A. 126 (1996). In
24 the context of CERCLA, a PRP's equitable share consists of the
25 portion of response costs a court allocates to that PRP "using
26 such equitable factors as the court determines are appropriate."
27 42 U.S.C. § 9613(f)(1). In this analysis, fault is only one
28 possible consideration. See Waste Mgmt. of Alameda County, Inc.
v. E. Bay Reg'l Park Dist., 135 F. Supp. 2d 1071, 1090 (N.D. Cal.
2001) (listing a variety of potential considerations, including
relative fault, the care exercised by parties, the degree of
cooperation with government agencies, the benefits received by
the parties from the contamination, and the financial resources
of the parties, among others).

1 existence, the Ninth Circuit has never addressed the question of
2 the proper credit method for settlements between private PRPs
3 under CERCLA. But cf. In re Exxon Valdez, 229 F.3d 790, 796 (9th
4 Cir. 2000) (stating generally in a non-CERCLA case that “[t]he
5 proportionate share approach is the law in the Ninth Circuit”).
6 Nor has a consensus developed among the courts of appeals that
7 have considered the issue. Compare Azko Nobel Coatings, Inc. v.
8 Aigner Corp., 197 F.3d 302, 308 (7th Cir. 1999) (adopting the pro
9 tanto approach), with Capuano, 381 F.3d at 20 (interpreting
10 CERCLA to “give the district court discretion regarding the most
11 equitable method of accounting for settling parties”).

12 Nevertheless, district judges in the Ninth Circuit,
13 particularly in this District, appear to uniformly employ the
14 proportionate share approach for settlements between private
15 PRPs. See, e.g., Ameripride Serv. Inc. v. Valley Indus. Serv.,
16 Inc., No. 00-113, 2007 WL 1946635, at *4 (E.D. Cal. July 2, 2007)
17 (Karlton, J.); Patterson Env'tl. Response Trust v. Autocare 2000,
18 Inc., No. 01-6606, 2002 U.S. Dist. LEXIS 28323, at *21 (E.D. Cal.
19 July 8, 2002) (Wanger, J.); West County Landfill, Inc. v. Raychem
20 Int'l Corp., No. 93-3170, 1997 U.S. Dist. LEXIS 1791, at *2-3
21 (N.D. Cal. Feb. 14, 1997); Acme Fill Corp. v. Althin CD Med.,
22 Inc., No. 91-4268, 1995 WL 822663, at *1 (N.D. Cal. Nov. 8,
23 1995); United States v. W. Processing Co., 756 F. Supp. 1424,
24 1432 (W.D. Wash. 1990). District courts nationally have also
25 widely adopted the proportionate share credit method. See Tosco
26 Corp. v. Koch Indus., Inc., 216 F.3d 886, 897 (10th Cir. 2000)
27 (stating that a majority of courts deciding CERCLA section
28 113(f)(1) contribution claims have adopted the UCFA (citing

1 Lynnette Boomgaarden & Charles Breer, Surveying the Superfund
2 Settlement Dilemma, 27 Land & Water L. Rev. 83, 109-12, 111 n.189
3 (1992))).

4 The text of CERCLA does not identify the appropriate
5 settlement credit method for settlements between private PRPs.
6 CERCLA section 113(f), which governs contribution claims,
7 explicitly addresses only settlements reached with the United
8 States or a state and provides that such settlements "reduce the
9 potential liability of the [nonsettling defendants] by the amount
10 of the settlement." 42 U.S.C. § 9613(f)(2); see 42 U.S.C. §
11 9622(g)(5) (providing the same approach for de minimis
12 settlements with the government). The statute does not mention
13 settlements between private PRPs.

14 CERCLA section 113(f)(1), though, generally instructs
15 courts to "allocate response costs among liable parties using
16 such equitable factors as the court determines are appropriate."
17 42 U.S.C. § 9613(f)(1).² This provision promotes fairness and
18 prevents relatively innocent PRPs from being forced to bear a
19 disproportionate burden of the liability. See Carson Harbor

21 ² The court recognizes that plaintiff has asserted a
22 claim for cost recovery under CERCLA section 107, not CERCLA
23 section 113, and liability under that provision may be joint and
24 several. See Atl. Research, 127 S. Ct. at 2339 n.7 (assuming
25 without deciding that CERCLA section 107(a) provides for joint
26 and several liability). Defendants and third-party defendants,
27 however, have filed numerous crossclaims, counterclaims, and
28 third-party claims for contribution. Therefore, to resolve the
instant litigation, the court must ultimately allocate response
costs among all PRPs. Id. at 2339 ("Resolution of a [CERCLA
section] 113(f)] counter-claim would necessitate the equitable
apportionment of costs among the liable parties, including the
PRP that filed the [CERCLA section] 107(a) action." (citing 42
U.S.C. § 9613(f))). CERCLA section 113(f) and the case law
interpreting it thus remain relevant to this case.

1 Village, Ltd. v. Unocal Corp., 270 F.3d 863, 871 (9th Cir. 2001)
2 (en banc) ("The contribution provision aims to avoid a variety of
3 scenarios by which a comparatively innocent PRP might be on the
4 hook for the entirety of a large cleanup bill."); SmithKline
5 Beecham Corp. v. Rohm & Haas Co., 89 F.3d 154, 163, 163 n.7 (3d
6 Cir. 1996) (noting that CERCLA policy disfavors the apportionment
7 of liability "in disregard of the equities affecting the parties"
8 (citing Smith Land & Imp. Co. v. Celotex Corp., 851 F.2d 86, 90
9 (3d Cir. 1988))); In re Hemingway Transp., Inc., 993 F.2d 915,
10 922 (1st Cir. 1993) (explaining that "CERCLA section [113(f)] is
11 aimed at promoting equitable allocations of financial
12 responsibility").

13 Of the two alternative approaches, the pro tanto method
14 clearly produces a greater risk of inequitable allocation of
15 liability. McDermott, 511 U.S. at 214; cf. Capuano, 381 F.3d at
16 20 ("The [proportionate share] approach has the benefit [] of
17 ensuring, in theory, that damages are apportioned equitably among
18 the liable parties."). Under the pro tanto approach, nonsettling
19 defendants must pay more than their fair share whenever a
20 plaintiff settles with a defendant for less than that defendant's
21 equitable share. See Kaypro, 884 F.2d at 1230.³ Plaintiffs
22 commonly accept such settlements because of the benefits of
23 reduced uncertainty and lower litigation costs. McDermott, 511

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25 ³ Despite this, California has codified the pro tanto
26 approach. See Federal Sav. & Loan Ins. Corp. v. Butler, 904 F.2d
27 505, 511 (9th Cir. 1990) (noting that California Civil Procedure
28 Code section 877 adopts the UCATA "almost word for word"). This
statutory provision, however, does not apply when defendants are
only responsible for their equitable share of liability. See
Ehret v. Congoleum Corp., 73 Cal. App. 4th 1308, 1319 (1999);
Hoch v. Allied-Signal, Inc., 24 Cal. App. 4th 48, 63 (1994).

1 U.S. at 212-13; Kaypro, 884 F.2d at 1230. Furthermore, when the
2 parties know that the court will employ a pro tanto credit,
3 plaintiffs may be tempted to settle first with defendants of
4 lesser resources for low settlement amounts. These settlements
5 then enable plaintiffs to fund continued litigation against the
6 remaining, wealthier defendants without reducing their ultimate
7 recovery.⁴ See Kaypro, 884 F.2d at 1230.

8 The proportionate share approach can also, of course,
9 produce an inequitable result when a settling defendant pays less
10 than its equitable share. In that scenario, the plaintiff can no
11 longer recover its full damages since its total recovery is
12 reduced by the equitable share of the settling defendant.
13 However, the plaintiff, as the party that decides whether to
14 settle with any of the defendants, is in the best position to
15 mitigate that risk by settling only when the proposed amount
16 approximates the settling defendant's equitable share of
17 liability. See Comerica Bank-Detroit v. Allen Indus., Inc., 769
18 F. Supp. 1408, 1414 (E.D. Mich. 1991). Under the pro tanto
19 approach, in contrast, the parties injured by a low settlement--
20 the nonsettling defendants--have no ability to prevent or affect
21 the settlement amount. Thus, the proportionate share approach
22 makes it more likely that pre-trial settlements and the overall
23 litigation will achieve an equitable allocation of liability

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25 ⁴ Without suggesting any impropriety, the court notes
26 that some of these risks are present in this case. Plaintiff
27 seeks to settle with the Taeckers, defendants who plaintiff
28 argues have few resources and doubtful insurance coverage.
(Pl.'s Mem. Supp. Settlement Approval 14:22-17:9.) The
nonsettling defendants, in contrast, include parties likely to
have greater resources, including "three large, national
corporations." (Id. at 24:21.)

1 among all responsible parties.

2 The Supreme Court adopted the proportionate share
3 approach for maritime actions specifically because of this
4 tendency to achieve a fairer allocation of costs. The Court
5 concluded that the two settlement credit methods were "closely
6 matched" with regard to the promotion of settlement and judicial
7 economy, but adopted the proportionate share approach because it
8 was more consistent with the Court's holding in United States v.
9 Reliable Transfer Co., Inc., 421 U.S. 397 (1975), which required
10 that damages in maritime cases be equitably allocated in
11 accordance with the parties' comparative fault. McDermott, 511
12 U.S. at 217; see Kaypro, 884 F.2d at 1231 (adopting the
13 proportionate share method for securities class actions in part
14 because it "comports with the equitable purpose of contribution"
15 (citing Smith v. Mulvaney, 827 F.2d 558, 561 (9th Cir. 1987))).⁵

16 In this case, the court will similarly employ the

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18 ⁵ On this point, the court's analysis of McDermott
19 differs from that of the Seventh Circuit. The Seventh Circuit
20 reasoned that the McDermott Court had declared the choice between
21 the two approaches a "toss up" and that the Court instead based
22 its adoption of the proportionate share rule in maritime actions
23 on "the way related issues in admiralty have been handled." Azko
24 Nobel Coatings, Inc. v. Aigner Corp., 197 F.3d 302, 308 (7th Cir.
25 1999). It concluded that the pro tanto method should thus govern
26 settlements between PRPs, as that approach is specified in CERCLA
27 section 113(f)(2), "the most closely related rule of law." Id.

28 The McDermott Court, however, did not consider the
choice of settlement credit methods a "toss up" in all respects;
it specifically concluded that the pro tanto approach was less
consistent with the equitable apportionment of liability. See
McDermott, 511 U.S. at 214 ("[T]he pro tanto approach is likely
to lead to inequitable apportionments of liability . . .").
The Court's adoption of the proportionate share approach was
expressly based on its greater tendency to promote equitable
allocation in compliance with the instruction of Reliable
Transfer to allocate liability fairly. See id. at 217 ("[T]he
proportionate share approach is superior, especially in its
consistency with Reliable Transfer.").

1 proportionate share approach to determine the effect of
2 settlements, as that method better facilitates the equitable
3 allocation of liability in accordance with the statutory guidance
4 of CERCLA section 113(f)(1). See also New York v. Solvent Chem.
5 Co., Inc., 984 F. Supp. 160, 168 (W.D.N.Y 1997) (concluding that
6 the UCFA "is consistent with the purposes behind [CERCLA]
7 sections 113(f)(1) and 113(f)(2)"); Hillsborough County v. A&E
8 Road Oiling Serv., Inc., 853 F. Supp. 1402, 1410 (M.D. Fla. 1994)
9 (explaining that the purposes of CERCLA include prompt clean up
10 and the fair allocation of costs and declaring that the "UCFA
11 effectively embraces both"); United States v. SCA Serv. of Ind.,
12 Inc., 827 F. Supp. 526, 535 (N.D. Ind. 1993) ("The UCFA will
13 better promote CERCLA's policy of encouraging settlements, while
14 securing equitable apportionment of liability for
15 [n]on-settlors.").

16 The proposed settlement agreement here is expressly
17 conditioned upon the court entering an order that only reduces
18 the liability of nonsettling defendants by the dollar amount of
19 the settlement--i.e., a pro tanto credit. Accordingly, because
20 the court concludes that the proportionate share approach governs
21 the effect of settlements in this case, the court must deny
22 plaintiff's motion to approve the settlement on those terms.

23 IT IS THEREFORE ORDERED that plaintiff's motion for
24 settlement approval conditioned on the reduction of the liability

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1 of nonsettling parties by the dollar amount of the settlement be,
2 and the same hereby is, DENIED.

3 DATED: February 2, 2009

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6 WILLIAM B. SHUBB
7 UNITED STATES DISTRICT JUDGE
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