Executive Officer's Report
March 2014
Item B-4
Status Report – San Diego Shipyard Sediment Site Remediation Project

California Regional Water Quality Control Board

San Diego Region

David Gibson, Executive Officer

Executive Officer's Report

March 19, 2014

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4. Status Report – San Diego Shipyard Sediment Site Remediation Project (*Attachment B-4*)

Staff Contacts: David Barker and Kelly Dorsey

This report summarizes the status of remediation activities at the Shipyard Sediment Site (Site) under Cleanup and Abatement Order (CAO) No. R9-2012-002 and Waste Discharge Requirements Order No. R9-2013-0093. BAE Systems San Diego Ship Repair (BAE Systems),

[1] Regulation of Agricultural Lands Program web page:
http://www.waterboards.ca.gov/sandiego/water_issues/programs/irrigated_lands/irrigated_ag_na.shtml

[2] Agenda and staff presentations for stakeholder meetings available on line at:
http://www.waterboards.ca.gov/sandiego/water_issues/programs/irrigated_lands/irrigated_ag_mw.shtml

Campbell Industries, the City of San Diego, National Steel and Shipbuilding Company (NASSCO), San Diego Gas & Electric, the San Diego Unified Port District (Port District), and the United States Navy are named as Responsible Parties to comply with the requirements of the CAO for the remediation of accumulated waste pollutants in marine sediments at the Site in San Diego Bay waters. The Site encompasses approximately 60 acres of tidelands property along the eastern shore of central San Diego Bay, and has been used for various industrial activities since at least the early 1900s. The CAO requires the Responsible Parties to dredge contaminated marine sediments at the Site in an area of approximately 656,100 square feet to attain target cleanup levels for various pollutant constituents and to place a clean sand cover over contaminated sediments in existing pier, piling and other infrastructure areas where dredging is not feasible. The CAO requires that these dredge and fill cleanup activities be competed over a period of approximately 2.5 years between September 17, 2013 and March 30, 2016.

San Diego Water Board Order No. R9-2013-0093 (Order) grants with conditions water quality certification for the Site cleanup project under Clean Water Act Section 401 and establishes waste discharge requirements for the dredge and fill activities necessary to comply with the sediment remediation requirements of the CAO. The Order identifies the following five entities as "Dischargers" with responsibility for directly implementing the dredge and fill activities to remediate the sediments at the Site in compliance with the Order: BAE Systems, NASSCO, the San Diego Unified Port District, and R. Thomas Dorsey, De Maximis, Inc. (Trustee acting on behalf of the north and south San Diego Bay Environmental Restoration Funds).

For purposes of investigation and cleanup, the Site has been divided into two distinct areas: the "North Sediment Remediation Area" comprised of the BAE Systems' leasehold, and the "South Sediment Remediation Area" comprised of the NASSCO leasehold.

South Sediment Remediation Area Status
Under the terms of the CAO and the Order, dredging was required to occur within approximately 5.0 acres of the 46-acre offshore South Sediment Remediation Area. NASSCO reports that the dredging activities were commenced in the South Sediment Remediation Area on September 30, 2013 and were completed on January 24, 2014. The total dredged volume of contaminated sediment removed during this period was approximately 29,000 cubic yards. All of the dredged material was transported to an appropriate landfill for disposal in accordance with the CAO and Order. NASSCO also reports that placement of the sand cover required by the CAO and Order in sediment areas where dredging was not feasible has commenced and is scheduled to be completed on approximately March 24, 2013.

North Sediment Remediation Area Status
Under the terms of the CAO and the Order, up to 105,800 cubic yards of dredging is projected to occur within approximately 10.2 acres of the 16.6-acre offshore North Sediment Remediation Area. BAE Systems has proposed various modifications to the cleanup project for the North Sediment Remediation Area including the installation of a permanent, vertical sheet pile bulkhead along the BAE Systems leasehold shoreline; removal of submerged sheet pile wall and marine railway debris; removal of the Pier 2 structure; and the elimination of on-site dredge handling by transferring sediment from barge or scow directly to trucks. By letter dated February 25, 2014 BAE Systems submitted a lengthy analysis prepared for the purposes of evaluating the proposed project modifications to ensure consistency with the existing

Programmatic Environmental Impact Report (PEIR) and the above referenced CAO and Order. The analysis is now under review by the San Diego Water Board to determine if the project modifications trigger the requirement of preparing a Subsequent EIR under California Environmental Quality Act (CEQA) requirements. Until the analysis of these Project changes is complete, dredging activities cannot begin in the North Sediment Remediation Area. Dredging and marine construction work is typically restricted in San Diego Bay to the months of September through March to avoid critical California least tern nesting periods (except as may be authorized by the resource agencies). Because of this additional restriction, commencement of dredging activities in the North Sediment Remediation Area may not occur until September 2014 at the earliest. BAE Systems has completed other necessary actions including selecting a dredging contractor, conducting the pre-construction eelgrass survey and obtaining the Individual 404/Section 10 Permit from the U. S. Army Corps of Engineers. BAE Systems is also continuing the Sediment Management Area (SMA) site access and use agreement negotiations with other tenants and the Port District.

City of San Diego Participation in Cleanup Activities

A lawsuit is currently underway in federal court (*City of San Diego v. National Steel & Shipbuilding Co., et al., United States District Court Case No. 09-CV-02275-AJB (BGS)*) dealing with allocation of liability and costs for the cleanup among the Responsible Parties under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and similar state laws. The San Diego City Council issued a Resolution at its September 24, 2013 meeting authorizing payment of $6.451 million towards cleanup costs at the Site, subject to certain conditions, including that it continues to contest its responsibility and allocated share of cleanup costs in the on-going federal lawsuit. By letter dated February 12, 2014 to former San Diego Water Board Chair Morales, Latham and Watkins LLP (L&W), on behalf of NASSCO, reported that the City of San Diego still has not reached settlement in the federal lawsuit. (A copy of this letter with enclosures is attached.) L&W reports that the City is actively opposing the settlements reached by other parties, which could keep these parties from fulfilling their commitments to fund their shares of the cleanup costs. L&W also maintains that the City's actions threaten to derail the remediation before it is completed, particularly for the remaining work to be performed across the entire Site and may delay the cleanup project beyond the schedule set forth in the CAO.

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File No. 048876-0002

February 12, 2014

VIA HAND-DELIVERY

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Re: Cleanup and Abatement Order R9-2012-0024

Dear Chairman Morales, Regional Board Members, and Mr. Gibson:

This letter concerns the remediation of the "South Yard" of the Shipyard Sediment Site under Cleanup and Abatement Order No. R9-2012-0024 ("Order"). We are pleased to report that the remediation commenced on schedule in September 2013 and is on track to be completed by April 2014. We also are pleased to report that NASSCO has entered into settlement agreements

with the United States Navy and the San Diego Unified Port District that will facilitate payment of their respective fair shares of the South Yard remediation costs, and resolve all claims between these parties in the pending federal litigation. These settlements (and the United States' and Port District's payment of remediation costs) are contingent upon Court approval of pending motions for a determination that the settlements were made in good faith.

As reported to you during the Board meeting on November 13, 2013, the City of San Diego still has not reached settlement in the federal lawsuit. Even worse, the City is actively opposing the settlements reached by the other South parties, and is thereby impeding the ability of these parties to fulfill their good faith commitments to fund their mediated shares of the cleanup costs. This threatens to derail the remediation before it is completed on the schedule set forth in the Order, particularly for the remaining work to be performed across the joint NASSCO-BAE site. The City's oppositions to these motions for good faith settlement determinations, and replies filed by NASSCO, the Port District and the United States, are attached to this letter. As demonstrated in the attached, the City's oppositions are loaded with caustic rhetoric but short on substance, and fail to explain any basis for the City's opposition, particularly since the Court's approval of the settlements would not prejudice the City's present effort (however unfortunate) to pay less than its mediated share through continued litigation.

Because of the City's refusal to settle—and its active efforts to obstruct settlements between the other South parties—the timely completion of the remediation required by the Order is in jeopardy. We therefore renew our request that the Regional Board take any available steps to urge the City to reconsider its position, and at a minimum, withdraw its oppositions to the settlements between the parties that have agreed to fund their share of the cleanup costs and are working cooperatively to ensure compliance with the Order.

Very truly yours,

Kelly E. Richardson
of LATHAM & WATKINS LLP

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Enclosures

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ATTORNEYS FOR
UNITED STATES NAVY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO,

Plaintiff,

v.

NATIONAL STEEL & SHIPBUILDING COMPANY, *et al.*,

Defendants.

AND ALL RELATED COUNTER AND CROSS CLAIMS

Case No. 09-cv-02275-WQH (BGS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES NAVY'S MOTION FOR ORDER DETERMINING GOOD FAITH SETTLEMENT AND BARRING CLAIMS

Judge: Honorable William Q. Hayes
Hearing Date: Monday, December 2, 2013
Time: 11 a.m.
Courtroom: 14B (Annex)

[NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT]

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

After extensive arms' length negotiations over the course of several years and with the assistance and oversight of the Court-appointed mediator, the United States Department of the Navy ("Navy"), BAE Systems San Diego Ship Repair, Inc. ("BAE Systems"), and National Steel and Shipbuilding Company ("NASSCO") (collectively NASSCO and BAE Systems are referred to as the "Shipyards" and collectively the Navy and the Shipyards are referred to as the "Settling Parties"), entered into a settlement agreement ("Settlement Agreement") resolving the Navy's responsibility for the environmental cleanup required under the California Regional Water Quality Control Board, San Diego Region's ("Regional Board") Cleanup and Abatement Order, No. R9-2012-0024 ("CAO"). As described below, the Settlement Agreement represents a fair, adequate, and reasonable resolution of the Navy's potential responsibility related to all of the claims asserted against it in this litigation, which claims are derived solely and exclusively from the parties' respective responsibility to clean up or contribute funds towards the cleanup of the San Diego Shipyard Sediment Site pursuant to the requirements of the CAO.

In its Motion for Order Determining Good Faith Settlement and Barring Claims ("Motion"), the Navy seeks approval of the Settlement Agreement by this Court and a determination that the Settlement Agreement represents a "good faith settlement."[1] The Settling Parties' obligations under the Settlement Agreement commence on the Effective Date of the agreement, which date is defined as the date the agreement "is approved by the Court." Settlement Agreement § 1.7. The Navy further seeks an order dismissing and barring all claims asserted against it by

[1] The Settlement Agreement is attached as Exhibit A to the November 4, 2013 Declaration of C. Scott Spear, Counsel for the Navy.

the parties to this litigation, except for the claims excluded under the Settlement Agreement (defined in Section 1.8).

All claims asserted against the Navy by the non-settling parties are in the form of contribution and stem from a single joint harm – the contamination of the San Diego Shipyard Sediment Site and the obligation to clean up the site under the CAO – for which each party to this litigation may be found responsible. As there can be no valid dispute that the claims against the Navy are solely in the form of contribution under federal and state law, such claims should be barred under applicable federal common law, including Section 6 of the Uniform Comparative Fault Act ("UCFA"), 12 U.L.A. 147 (1996), and the California Code of Civil Procedure sections 877 and 877.6.

II. BACKGROUND

A. Litigation and Mediation

"On October 14, 2009, Plaintiff City of San Diego initiated this action by filing the Complaint . . . alleging that [Defendants] are 'Dischargers' or 'Persons Responsible' for alleged environmental contamination at the property known as the 'Shipyard Sediment Site' by the California Regional Water Quality Control Board, San Diego Region . . . in Tentative Clean Up & Abatement Order No. R9-2005-0126." (ECF No. 222 at 2). Plaintiff acknowledged in its initial disclosure statement dated August 23, 2013 that "it has brought this action as a **contribution action** against the other parties to **achieve a judicial resolution of the allocation of cleanup cost responsibility** for remedial work to be performed at the Shipyard Sediment Site." [2] Plaintiff City of San Diego's Initial Disclosures Pursuant to Rule

[2] Although Plaintiff's Complaint includes a claim for cost recovery under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, to date Plaintiff has not produced any evidence that it incurred recoverable response costs prior to initiating this

26(a)(1) dated August 23, 2013 at 37:15-18 (emphasis added), attached as Exhibit B to November 4, 2013 Declaration of C. Scott Spear, Counsel for the Navy, ("Spear Decl.") ¶ 2.

On July 15, 2010, the Magistrate Judge issued an Order granting the Parties' joint motion for the adoption of a discovery plan and setting the Phase I discovery schedule. Phase I Order, ECF No. 125. At the request of the Parties, Phase I discovery focused on "liability, allocation and contribution." *Id*. at 2 of 17. The Order also provided for the appointment of a mediator and "court-ordered mediation solely on the issues of liability, allocation and contribution." *Id*. at 6 of 17.

The Phase I Order also recognized that "[i]n light of the lengthy mediation and the **voluminous administrative record developed in the administrative proceedings** before the [California Regional Water Quality Control Board, San Diego Region], the parties have gained substantial knowledge regarding, *inter alia*, conditions at the Site and historical operations at the Site that may have caused or contributed to the alleged sediment contamination at issue in this litigation." *Id*. at 2 (emphasis added). The parties then conducted Phase I discovery as a means to supplement the voluminous administrative record and further develop issues regarding "liability, allocation and contribution."

After completing extensive Phase I written discovery, "[o]n May 10, 2011 the parties entered into mediation and agreed to stay all further discovery." (ECF No. 222 at 2). The parties then "engaged in mediation, as set forth in Phase I(c) of the Discovery Order, on the issues of liability, allocation and contribution." (ECF

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action on October 14, 2009. *See In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991) (Section 107(a)(4)(B)) and the declaratory judgment provisions found in Section 113(g)(2) "envision that, before suing, CERCLA plaintiffs will spend some money responding to an environmental hazard.").

No. 157 at 2). "In March 2012, the Court required the assigned Mediator and all parties to file Status Reports regarding the progress of settlement talks." (ECF No. 191).

In the Court-ordered status report dated June 15, 2012, the Mediator informed the Court that "[t]he Parties have agreed upon an allocation of remedial costs, subject to resolving certain funding issues and disagreements regarding the estimated cost of the remediation." June 15, 2012 Status Report of Mediator (ECF No. 215 at 3). The Mediator further informed the Court that "BAE and NASSCO . . . and the Navy have been negotiating the terms of a settlement agreement that could ultimately be executed by all parties." *Id.* at 3-4.

In a Court-ordered status report dated December 17, 2012, the Mediator stated that he was "pleased to report that Parties with a significant majority of the allocated liabilities in both the North and the South sites have tentatively agreed on the terms of a written settlement agreement." December 17, 2012 Status Report of Mediator (ECF No. 243 at 3). In the subsequent April 2, 2013 status report, the Mediator reiterated that "[w]hile the parties have not formally executed a tentative written settlement agreement, as I indicated in my prior report, certain parties with a significant majority of the allocated liabilities in both the North and the South sites have tentatively agreed on the terms of a written settlement agreement." April 2, 2013 Status Report of Mediator (ECF No. 265 at 4).

After more than two years of mediation, the parties to the litigation were unable to reach a global settlement agreement. From June 24, 2013 to June 26, 2013, the parties participated in a mandatory settlement conference before Magistrate Judge Skomal. (ECF No. 279). Again, a global settlement was not reached, and after a Phase II Case Management Conference on July 19, 2013, the parties were ordered to commence Phase II discovery. (ECF No. 290).

As global settlement was not achievable, the Navy and the Shipyards separately finalized the terms of the Settlement Agreement. On September 26, 2013, counsel for the Settling Parties informed Magistrate Judge Skomal's Chambers that an agreement was reached among the three parties subject only to final approval by the United States Department of Justice. (ECF No. 333). After that approval was obtained, the Settling Parties executed the Settlement Agreement.

B. Terms of the Settlement Agreement

Under the Settlement Agreement, the United States, on behalf of the Navy, will pay a minimum of $21,189,454.33 to resolve its responsibility at the North Yard and the South Yard. In return, the Shipyards have agreed to perform the cleanups required under the CAO. (Settlement Agreement, Ex. A to Spear Decl.).

1. Payments by the United States

The United States, on behalf of the Navy, will pay $991,024.78 directly to NASSCO and $833,429.55 directly to BAE Systems in full and final resolution of the Shipyards' claims against the United States for Past Response Costs (as defined in the Settlement Agreement § 1.13). Settlement Agreement §§ 2.3(a), (b). The United States further agrees to make single lump-sum payments into each of the two Trusts to cover Future Response Costs (as defined in the Settlement Agreement § 1.10). Specifically, the United States will pay $12,600,000 into the North Trust and $6,765,000 into the South Trust. Settlement Agreement § 2.3(d).

In the event that the North Yard cleanup ends up costing more than $45,000,000 or the South Yard cleanup more than $20,500,000, the United States is obligated to make additional payments. Specifically, if the cost of remediating the North Yard exceeds $45,000,000, and if the Trustee for the North Trust certifies that $45,000,000 has been paid from the North Trust toward Future Response Costs, then the United States is obligated to reimburse 28% of those

costs incurred in excess of $45,000,000 on a quarterly basis. Settlement Agreement § 2.3(e). Similarly, if the cost of remediating the South Yard exceeds $20,500,000, and if the Trustee for the South Trust certifies that $20,500,000 has been paid from the South Trust toward Future Response Costs, then the United States must reimburse 33% of the costs incurred in excess of $20,500,000 on a quarterly basis. Settlement Agreement § 2.3(f).

2. Performance of the Work Required Under the CAO

Under the Settlement Agreement, the Shipyards agree to accept complete and sole responsibility for performance of the work required by the CAO in their respective leaseholds until notification by the Regional Board that no further remedial work is required. Settlement Agreement §§ 2.1(a), 2.2(a). Additionally, BAE Systems and NASSCO are required to create (and have in fact already created) a North Trust and a South Trust, respectively, which will hold all of the funds committed towards the remediation. Settlement Agreement § 3.3.

3. Releases and Covenants Not to Sue

Under the Settlement Agreement, the Settling Parties release and covenant not to sue each other with respect to "any and all claims, causes of action, suits or demands of any kind whatsoever, in law or in equity, that they, or their subsidiaries, parents, affiliates, assigns, consultants, insurers, or any other related entities, may have had, or hereafter has" relating to Covered Matters. Settlement Agreement § 4.1. The term "Covered Matters" is defined as:

> (1) any and all claims that were, that could have been, that could now be, or that could hereafter be asserted by any of the Settling Parties against any of the Settling Parties, as of the Effective Date of this Agreement, that arise out of or in connection with the Action; (2) any and all costs incurred by the Settling Parties that have arisen out of, or that arise out of, or in connection with, the investigation and remediation required to comply with all legally enforceable requirements imposed by the [Regional Water Quality Control Board]

> in connection with the implementation of the CAO, including all reasonably necessary measures required to satisfy the requirements of the CAO or any amendments thereto; and 3) Past State Oversight Costs owed by the United States, but, excluding any Excluded Matters (as defined in Section 1.8).

Settlement Agreement § 1.5. Excluded Matters are "any claims and liabilities associated with (i) future regulation of the Site that is not part of the CAO … (ii) other ongoing and future enforcement actions at the Site that are not part of the CAO … (iii) acts or omissions of third parties; (iv) any claims involving natural resource damages or any claims brought by or on behalf of the United States [EPA] or a natural resource trustee; and (v) any amendment to the CAO relating to [a defined area outside of the remedial footprint]…" Settlement Agreement § 1.8.

The Settlement Agreement further includes a provision that the Settling Parties' claims against each other will be dismissed with prejudice immediately upon the Effective Date of the Settlement Agreement. Settlement Agreement § 6.3. The Effective Date is the date the Court approves the Settlement Agreement. Settlement Agreement § 1.7.

The Shipyards agree that the United States' payments under the Settlement Agreement represent the United States' fair and equitable shares of responsibility for the Covered Matters, and once made will have resolved any responsibility that the United States may have for the Covered Matters. The Settlement Agreement is intended to provide protection from any known or unknown claims for Covered Matters to the fullest extent permitted by law. The Shipyards expressly assume and bear the risk that it is ultimately determined that the amounts paid by the Navy are less than its equitable share of responsibility. Settlement Agreement § 4.2 (c). BAE Systems and NASSCO also bear the risk that they will not be successful in recovering additional costs from non-settling parties.

III. LEGAL ARGUMENT

A. The Court Should Approve the Settlement Agreement

The Court should approve the Settlement Agreement, as its terms are fundamentally fair, adequate and reasonable. The Settlement Agreement obligates the United States, on behalf of the Navy, to make initial payments totaling $21,189,454.33 towards the cleanup of the San Diego Shipyard Sediment Site. Even after the initial payments, the United States remains obligated to make additional payments towards the cleanup in the event that costs exceed certain thresholds in either Yard. Overall, the United States will pay 28 percent of the total cost of cleaning up the North Yard and 33 percent of the total cost of cleaning up the South Yard on behalf of the Navy. The Shipyards commit to complete the cleanups required in the North Yard and South Yard until notice by the Regional Board that no further cleanup is required, and thereby obligate themselves to fund fully those cleanup efforts less any payments received through settlement with other parties or litigation. The Settlement Agreement is fundamentally fair, promotes the resolution of this complex CERCLA litigation, and allows limited resources to be used towards environmental cleanup rather than wasteful and unnecessary litigation.

"A settlement should be approved if it is fundamentally fair, adequate and reasonable." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (citations omitted). When evaluating a settlement, a court should not conduct a trial on the merits, nor should a 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) (citations omitted). "[A] presumption of fairness arises where: (1) counsel is experienced in similar litigation; (2) settlement was reached through arm's length negotiations; [and] (3) investigation and discovery are sufficient to allow counsel

and the court to act intelligently." *In re Heritage Bond Litig.*, NO. 02-ML-1475-DT, 2005 WL 1594403 *2 (C.D. Cal. June 10, 2005); *see also Linney v. Alaska Cellular P'ship*, No. C-96-3008 DLJ, 1997 WL 450064 at *5 (N.D.Cal. July 18, 1997) ("The involvement of experienced . . . counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair.").

There further exists a strong federal interest in promoting the settlement of complex CERCLA actions, such as the one before this Court. *See Acme Fill Corp. v. Althin CD Med. Inc.*, No. C91-4268 MMC, 1995 WL 822664, *2 (N.D. Cal. Nov. 2, 1995). "CERCLA was designed to 'protect and preserve public health and the environment.' That Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation." *United States v. Acorn Eng'g Co.*, 221 F.R.D. 530, 537 (C.D. Cal. 2004) (citing *In re Acushnet River & New Bedsford Harbor*, 712 F. Supp. 1019, 1028-29 (C.D. Cal. 2004)). "Indeed, settlement is a favored outcome under CERCLA." *Lewis v. Russell*, No. Civ. 2:03-2646 WBS CKD, 2012 WL 5471824, *3 (E.D. Cal. Nov. 9, 2012), *citing City of Emeryville v. Robinson*, 621 F.3d 1251, 1264 (9th Cir. 2010).

Particularly in this action, there exists a strong presumption that the proposed settlement is fair. The Settlement Agreement was forged through the mediation process ordered by the Court -- a process that lasted more than two years and in which all parties actively participated and were represented by experienced environmental counsel. Mediation commenced after the completion of targeted fact discovery agreed to by the parties and specifically designed to supplement the voluminous administrative record developed in the CAO proceedings before the Regional Board. Acknowledging that this action is one for contribution designed to allocate shares of responsibility among the parties, by agreement of all of the

parties, Phase I discovery allowed for discovery focused on "liability, allocation and contribution." (Phase I Order at 2 of 17, ECF No. 125).

The administrative record and extensive written discovery conducted during Phase I discovery provided abundant information about the "conditions and historical operations at the Site," (*Id*.) allowing the parties, the Mediator, and the Court to intelligently evaluate the fairness and adequacy of the Settlement Agreement. Moreover, this wealth of information about the Site and the parties' potential responsibility for environmental contamination informed a mediation process that lasted for more than two years. Under the circumstances, the Court should approve the Settlement Agreement as fundamentally fair and made in good faith.

B. The Court Has Authority to Issue an Order Barring and Dismissing Claims under Federal Common Law and the California Code of Civil Procedure

"In order to facilitate settlement in multi-party litigation, a court may review settlements and issue bar orders that discharge all claims of contribution by non-settling [parties] against settling [parties]." *Lewis*, 2012 WL 5471824 at *4 (approving settlement in CERCLA action and issuing a bar order). "Such an order is appropriate to facilitate settlement, particularly in a CERCLA case." *AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.*, No. Civ. 5-00-113-LKK JFM, 2007 WL 1946635, *2 (E.D. Cal. Jul 2, 2007).

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1. All Claims Against the Navy Should Be Barred Under Federal Common Law and the UCFA

Federal courts in California have adopted Section 6 of the Uniform Comparative Fault Act ("UCFA") as federal common law when approving settlements involving CERCLA.[3] *See Lewis*, 2012 WL 5471824, *4 ("The overwhelming majority of courts in the Ninth Circuit that have addressed the issue have applied the UCFA in CERCLA cases."); *Adobe Lumber, Inc. v. Hellman*, No. Civ. 05-1510 WBS EFB, 2009 WL 256553 (E.D. Cal. Feb. 3, 2009) (concluding district judges in the Ninth Circuit uniformly apply the proportionate share rule to private CERCLA settlements); *AmeriPride*, 2007 WL 1946635 at *6, *citing T.H. Agric. & Nutrition Co. v. Aceto Chem. Co.*, 884 F. Supp. 357 (E.D. Cal. 1995); *see also New York v. Solvent Chem. Co.*, 984 F. Supp. 160, 168 (W.D.N.Y. 1997) (concluding that the UCFA "is consistent with the purposes behind [CERCLA] sections 113(f)(1) and 113(f)(2)"*; Hillsborough County v. A & E Road Oiling Serv., Inc.*, 853 F. Supp. 1402, 1410 (M.D. Fla. 1994) (explaining that the purposes of CERCLA include prompt clean up and the fair allocation of costs and declaring that the "UCFA effectively embraces both")*; United States v. SCA Serv. of Ind., Inc.*, 827 F. Supp. 526, 535 (N.D. Ind. 1993) ("The UCFA will better promote CERCLA's policy of encouraging settlements, while securing equitable apportionment of liability for [n]on-settlors.").

By protecting settling parties from claims for contribution, the UCFA "advances CERCLA's policy of encouraging settlements." *Comerica Bank-Detroit v. Allen Indus., Inc.*, 769 F. Supp. 1408, 1414 (E.D. Mich. 1991). This

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[3] Section 6 of the UCFA provides "[a] release . . . entered into by a claimant and a person liable discharges that person from all liability from contribution, but it does not discharge any other persons liable upon the same claim unless it so provides." 12 U.L.A. 147.

same interest in promoting settlement is particularly strong in complex matters such as CERCLA claims, in which the evidence necessary for assessing liability is voluminous. *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 223 (N.D. III. 1990). This Court should follow the weight of judicial authority and adopt UCFA section 6 as the federal common law to govern the legal effect of the Settlement Agreement in this action.

As all of the claims asserted against the Navy in this action stem from a common responsibility to clean up or fund the cleanup required under the CAO, and as the Settlement Agreement will fully and finally resolve Navy's responsibility for claims at the Site, the Court should bar all claims against the Navy by non-settling parties.

2. California Code of Civil Procedure Sections 877 and 877.6 Bar All State Law Claims Against the Navy

Sections 877 and 877.6 of the California Code of Civil Procedure provide an additional basis for barring all state law claims asserted against the Navy by non-settling parties. *See AmeriPride*, 2007 WL 1946635 at *2 (citations omitted). In determining that a settlement is made in good faith, federal courts in California apply a number of the factors set forth in the leading case of *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 499, 698 P.2d 159 (1985). *See Tyco Thermal Controls LLC v. Redwood Indus.*, No. C 06-07164 JF, 2010 WL 3211926, *13 (N.D. Cal. Aug. 12, 2010); *Cal. Dep't of Toxic Substances Control v. Kester*, No. 2:02-cv-00018-GEB-GGH, 2011 U.S. Dist. LEXIS 82470, *14 (E.D. Cal. Jul. 20, 2011) (applying California Code of Civil Procedure § 877.6 and *Tech-Bilt* in a cost recovery action brought under CERCLA).

The factors to consider are "(1) A rough approximation of plaintiffs' total recovery and the settlors' proportionate liability; (2) The amount paid in settlement; (3) The allocation of settlement proceeds among plaintiffs; (4) A

recognition that a settlor should pay less in settlement than he would if he were found liable after trial; (5) The financial conditions and insurance policy limits of settling defendants; and (6) The existence of collusion, fraud, or tortious conduct aimed to injure the interest of non-settling defendants." *Yanez v. United States*, 989 F.2d 323, 328 (9th Cir. 1993) (citing *Tech-Bilt*, 38 Cal. 3d at 499). Importantly, it is the non-settling parties that bear the burden of establishing that the Settlement Agreement is "so far out of the ballpark" as to be in bad faith. *Tech-Bilt*, 38 Cal. 3d at 499.

Here, the Shipyards – not Plaintiff City of San Diego – have agreed to perform the work required under the CAO. The Shipyards alone are shouldering the burden of the non-settling parties' responsibility to contribute funds towards the cleanup. And the Shipyards have incurred, are incurring, and will continue to incur the significant costs necessary to clean up the site in compliance with the Regional Board's CAO. Thus, Plaintiff City of San Diego does not have any valid claim for damages from any party to the litigation. Plaintiff certainly does not possess a valid claim against the Navy for cost recovery under CERCLA, and it has conceded that it initiated this litigation "as a contribution action." (Spear Decl., Ex. B at 37:15-18).

To resolve the Navy's responsibility in this "contribution action," the United States will pay $21,189,454.33. It will further be obligated to pay 28% of the costs to clean up the North Yard that exceed $45 million and 33% of the costs to clean up the South Yard that exceed $20.5 million. The Navy's negotiated shares fall squarely in the "ball park" of its proportionate share of potential liability at the Site, and represents a fair and good faith settlement. Further, the Shipyards agree that they will be responsible for any underpayment should there be a determination that the Navy's share should have been greater. Such a willingness of a party to assume the risk that a settlement payment proves to be inadequate was found by

the district court in *Lewis* to be persuasive evidence that the settlement amount was adequate. *Lewis*, 2012 WL 5471824 at * 5; *see also Comerica Bank*, 769 F. Supp. at 1414 ("Since the claimant bears the risk that the settling defendant's proportionate share of the clean-up costs may be greater than the settlement amount, it will be in the best interests of the claimant to obtain a settlement that is closely related to the probable proportionate share for which the settling defendant would have been responsible.").

The Settlement Agreement is not the product of collusion, fraud or tortious conduct aimed to injure the interests of non-settling parties. To the contrary, the Settlement Agreement obligates the United States to continue to contribute to the environmental cleanup after certain threshold cost estimates are exceeded and until the Regional Board determines that the cleanup is concluded. Further, the agreement has been crafted in a way that eliminates any prejudice to the non-settling parties by ensuring that the Shipyards are responsible for any shortfall. Settlement Agreement § 4.2(c).

Under these circumstances, the Court should enter an order barring any and all claims against the Navy, arising out of the facts alleged in the Action (except such claims that are specifically excluded by the terms of the Settlement Agreement, Section 1.8 (defining "Excluded Matters")).[4]

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[4] Excluded Matters are "any claims and liabilities associated with (i) future regulation of the Site that is not part of the CAO . . . (ii) other ongoing and future enforcement actions at the Site that are not part of the CAO . . . (iii) acts or omissions of third parties; (iv) any claims involving natural resource damages or any claims brought by or on behalf of the United States [EPA] or a natural resource trustee; and (v) any amendment to the CAO relating to [a defined area outside of the remedial footprint] . . ." Settlement Agreement § 1.8.

IV. CONCLUSION

For the foregoing reasons, the United States Department of the Navy respectfully requests the Court to grant the relief requested in the Motion for Order Determining Good Faith Settlement and Barring Claims.

Respectfully submitted,

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Dated: November 4, 2013

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO,

Plaintiff,

v.

NATIONAL STEEL AND SHIPBUILDING COMPANY; et al.,

Defendants.

AND RELATED CROSS-ACTIONS AND COUNTERCLAIMS

CASE NO. 09-CV-2275 WQH (BGS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NATIONAL STEEL AND SHIPBUILDING COMPANY'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT BETWEEN NATIONAL STEEL AND SHIPBUILDING COMPANY AND UNITED STATES OF AMERICA

Date: December 9, 2013
Time: 11:00 a.m.
Courtroom 14B (Annex)

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Action Filed: October 14, 2009
Judge: Hon. William Q. Hayes

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I. INTRODUCTION

National Steel and Shipbuilding Company ("NASSCO") respectfully submits this Memorandum in Support of its Motion for Good Faith Settlement. NASSCO is seeking approval of a Settlement Agreement that provides for the cleanup of the South Yard portion of the Shipyard Sediment Site ("Site"), as ordered by the San Diego Regional Water Quality Control Board ("Regional Board") in Cleanup and Abatement Order No. R9-2012-0024 ("Order"), and resolves all claims between NASSCO and the United States in this lawsuit. Through this Settlement Agreement, reached after extensive arms-length negotiations and submitted to Magistrate Judge Bernard Skomal *in camera* on September 26, 2013, NASSCO will agree to perform the work required at the South Yard[1] pursuant to the Order. In return, the United States will agree to pay $991,024.78 in full and final settlement of NASSCO's claims for past response costs against the United States, and will contribute $6,765,000 cash towards the cleanup. In the event of a South Yard Re-Opening Event, the United States also will agree to pay 33% of future response costs in the South Yard that exceed the sum of $20,500,000.

The proposed settlement promotes the goals of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 U.S.C. § 9601, *et seq.* ("CERCLA") by facilitating the largest sediment cleanup in San Diego Bay history. NASSCO therefore respectfully requests that the Court grant this motion and enter the accompanying proposed order finding the Settlement Agreement to be in good faith, fair, reasonable, and consistent with the intent of CERCLA and California law, and barring all federal and state law claims

[1] For purposes of investigation and cleanup, the Site, as defined in the Order, has been divided into two distinct areas: the "North Yard" comprised of the BAE Systems' leasehold, and the "South Yard" comprised of the NASSCO leasehold. This Motion and Settlement Agreement concern only the South Yard portion of the Site.

against NASSCO and the United States (collectively, the "Settling South Parties") for contribution, indemnity, or other relief arising from the matters covered under the Settlement Agreement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

1. The Administrative Proceedings

This case involves the allocation of costs for the cleanup of allegedly contaminated sediments at the Site pursuant to the Order. The Site encompasses approximately 60 acres of tidelands property along the eastern shore of central San Diego Bay, and has been used for various industrial activities since at least the early 1900s. Beginning in 1991, the Regional Board began working with various private and governmental agencies to address historical discharges of metals and other contaminants into the Site, including Tributyltin ("TBT"), Copper, Mercury, Polychlorinated biphenyls ("PCBs"), and High Molecular Weight Polynuclear Aromatic Hydrocarbons ("HPAHs"). Request for Judicial Notice ("RJN") at Ex. 2, at 1-4, 29-1 – 29-2.

On March 14, 2012, after decades of investigation and deliberation,[2] the Regional Board concluded that the sediments at the Site posed a risk to aquatic and human receptors, and ordered an extensive cleanup, estimated to cost approximately $24 million for the South Yard, alone. Declaration of Kelly E. Richardson ("Richardson Decl."), at ¶ 6. The Order requires the Parties[3] to dredge an area of

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[2] The Site has been the subject of several remedial investigations, beginning in the early-1990s. NASSCO began investigating the South Yard at the request of the Regional Board circa October 1994, and on February 14, 1997, the Regional Board issued a Water Code section 13267 Order to NASSCO requiring additional studies. Richardson Decl., at ¶ 3. In 2001, under the Regional Board's direction, NASSCO and BAE Systems funded the largest sediment investigation in San Diego Bay history, at a cost of approximately $2 million. *Id.*, at ¶ 4. Additional site sampling was conducted in 2009. *Id.*

[3] The Regional Board's Order named seven parties responsible for cleanup based on their alleged discharges to the Site. Of those Parties, the United States Navy ("Navy"), the City of San Diego ("City"), the Port District, and NASSCO

approximately 656,100 square feet, including 217,800 square feet within the South Yard, and to place clean sand cover in areas where dredging is not feasible. RJN, at Ex. 2, at Table 33-7. The remedy also includes detailed monitoring and post-remedial monitoring requirements to confirm that the Regional Board's cleanup goals are achieved. RJN, at Ex. 1, at ¶ 34. The Regional Board adopted the Order, after considering an extensive administrative record consisting of over 400,000 pages of documents, including written discovery, deposition testimony, expert reports, and pre-hearing briefing, and after holding a multi-day trial-like administrative hearing. Richardson Decl., at ¶ 7. All of the South Parties participated in the administrative proceedings before the Regional Board. *Id.*

2. The Contribution Litigation

The City filed the instant lawsuit on October 14, 2009. Dkt. No. 1 at ¶¶ 20-23. The defendants filed various counter and cross-claims, essentially seeking to allocate financial contribution for the Site cleanup under CERCLA and similar state laws. Dkt. Nos. 11, 13-14, 16-18, 20-21, 29, 49, 63, 87, 90, 91, 210, 223, 299, 300, 308. Since these initial filings, this case has been vigorously contested, and the parties have engaged in substantial additional investigation and written discovery, including responding to extensive document requests, interrogatories and requests for admissions about their respective activities at the Site. Richardson Decl., at ¶ 10.

3. The Mediation Process

Throughout this litigation and for a significant portion of the proceedings before the Regional Board, the parties also have been working with an experienced environmental litigation mediator, Timothy V.P. Gallagher. Dkt. Nos. 125, 149, 167, 199, 215, 243, 259, 265. On June 9, 2008, the South Parties entered into mediation on both cleanup and allocation issues, and have engaged in numerous mediation sessions with Mr. Gallagher in an effort to resolve liability, allocation,

(collectively, the "South Parties") were implicated based on their activities relating to the South Yard.

and contribution issues. As part of that mediation, NASSCO and the San Diego Unified Port District reached a good faith settlement, lodged with Magistrate Judge Skomal on October 12, 2013. NASSCO, BAE, and the United States also reached the good faith settlement that is the subject of the instant motion as part of the mediation process. Richardson Decl., ¶ 13, Ex. A. In reliance on these settlements, and on the Court's Case Management Order, dated September 27, 2013, staying discovery as to settling parties subject to hearing on their respective good faith settlement motions, NASSCO recently began cleanup at the Site. The City is the only South Party that has not agreed to settle, although NASSCO and the City continue to negotiate settlement with assistance from Mr. Gallagher.

4. Prior Discovery In This Lawsuit

During the mediation, the parties agreed to pursue "phased" discovery in this case, which initially allowed discovery on certain categories of information designed to facilitate settlement of the case. On July 15, 2010, the Court entered an "Order (1) Granting Joint Motion For Adoption Of Discovery Plan; (2) Setting Phase I Discovery Schedule" in response to the parties' joint motion. "Phase I" discovery under the order consisted of approximately 2,672 written discovery requests, on over 100 topics related to liability and allocation, including various operations and discharges to the Site during the past 100+ years. Richardson Decl., at ¶ 10. The burden of this effort on the South Parties was substantial: over 315,000 pages of documents were exchanged among the parties, and NASSCO, alone, produced 39,718 documents, totaling 168,084 pages, and responded to 163 interrogatories, 162 document requests, and 11 requests for admission. *Id.* Following Phase I discovery, allocation issues were extensively briefed to the mediator, who subsequently recommended an allocation. *Id.*, at ¶ 11.

The parties also have met with Magistrate Judge Skomal to discuss settlement. Dkt. No. 279. Shortly before the close of mediation under the phased discovery plan, the South Parties participated in a multi-day Master Settlement Conference

held on June 24 through 26, 2013. Richardson Decl., at ¶ 8. Following the Master Settlement Conference and the close of the formal mediation process on June 27, 2013, the Settling South Parties continued to engage in settlement negotiations, and ultimately reached agreement on this proposed settlement.

B. Parties and Claims

Pursuant to the Regional Board's findings, each of the South Parties is liable for contributing to the alleged contamination of the South Yard. The Regional Board determined that the South Yard was contaminated by discharges from 50+ years of industrial activity by former tenants of the City from the early 1900s through 1963, 50+ years of shipyard operations by NASSCO from 1960 to the present, and 90+ years of naval activities from the 1920s to the present. The Regional Board further determined that the South Yard was polluted by 100+ years of storm sewer discharges by the Navy, City, and Port District, and 50+ years of sewage discharges by the City. As a result of these activities and prevailing industry-wide standards employed prior to the 1970s, the Regional Board found that the South Parties' historic activities contaminated the South Yard sediments. RJN, at Ex. 1, at ¶ 10. The basis for each South Party's liability, as determined by the Regional Board, is described below.[4]

1. The City of San Diego

The tidelands comprising the majority of the South Yard were originally owned by the City, as trustee, and leased to various industrial dischargers from the early 1900s until 1963. Many of these industrial dischargers conducted polluting operations, and are now defunct. RJN, at Ex. 1, at ¶ 4. In addition, the City has owned and operated a municipal separate storm sewer system ("MS4") that discharges directly to, and in the vicinity of, the South Yard. The Regional Board found that direct and indirect discharges to the South Yard from MS4 sewer

[4] Although this motion relates only to the settlement between NASSCO and the United States, the basis of liability for each South Party is provided for context.

systems owned and operated by the City from the early 1900s to present contributed significant pollution to the South Yard. *Id.*, at Ex. 1, at ¶ 4. Specifically, the Regional Board concluded that the City:

> [H]as discharged urban storm water containing waste directly to San Diego Bay at the Shipyard Sediment Site. The waste includes metals (arsenic, cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc), total suspended solids, sediment (due to anthropogenic activities), petroleum products, and synthetic organics (pesticides, herbicides, and PCBs) through its SW4 (located on the BAE Systems leasehold) and SW9 (located on the NASSCO leasehold) MS4 conduit pipes.
>
> …[T]he City of San Diego has also discharged urban storm water containing waste through its MS4 to Chollas Creek resulting in the exceedances of chronic and acute California Toxics Rule copper, lead, and zinc criteria for the protection of aquatic life. Studies indicate that during storm events, storm water plumes toxic to marine life emanate from Chollas Creek up to 1.2 kilometers into San Diego Bay, and contribute to pollutant levels at the Shipyard Sediment Site. The urban storm water containing waste that has discharged from the on-site and off-site MS4 has contributed to the accumulation of pollutants in the marine sediments at the Shipyard Sediment Site. . . .

Id. In addition, the Regional Board found that the City discharged untreated sewage to the South Yard directly to the Bay prior to 1943, and from the adjacent Bayside Treatment Plant between 1943 and 1963. *Id.*, at ¶ 4; *Id.*, at Ex. 2, at ¶ 10.4.1.5. According to the Regional Board's Draft Technical Report, these discharges were so extensive that, by 1963, the Bayside Treatment Plant had produced sludge deposits at the Site extending two meters deep, 200 meters wide, and 9000 meters long, causing the Navy to complain that the discharges were corroding the hulls of naval ships docked near the plant. *Id.*, at Ex. 2, at ¶ 10.4.1.5.

2. The United States Navy

From 1921 to the present, the Navy has provided shore support and pier-side berthing services to U.S. Pacific fleet vessels at the Naval Base San Diego ("NBSD") adjacent to the South Yard. *Id.* at Ex. 2, at 10-1. Between 1938 and 1956, the NBSD leasehold included a parcel of land within the present-day South Yard where Navy personnel conducted operations similar in scope to a small boatyard, including solvent cleaning and degreasing of vessel parts and surfaces,

abrasive blasting and scraping for paint removal and surface preparations, metal plating, and surface finishing and painting, which led to discharges of pollutants and accumulation of pollutants in marine sediment in the Bay. *Id.* The Navy also conducted operations at the NASSCO leasehold on its own ships while they were berthed at NASSCO for unrelated repairs, and had preservation and other work conducted on its ships by the various shipyards over the years, subject to detailed contracts and specifications set forth by the Navy. *Id.* Based on the historical information contained in the record and the prevailing industry-wide standards employed prior to the 1970s, the Regional Board concluded that the Navy has caused or permitted waste to be discharged to the Bay as a result of these operations. *Id.* In addition to the Navy's fleet maintenance operations, the Regional Board found that the Navy owns and operates an MS4 at the NBSD through which it discharged wastes commonly found in urban runoff to the Site via Chollas Creek and San Diego Bay. *Id.*, at Ex. 2, at 10-28 – 10-90. The Regional Board found that direct and indirect discharges to the South Yard MS4s owned and operated by the Navy from the early 1900s to the present, contributed pollution to the South Yard. *Id.*

3. National Steel and Shipbuilding Company

In 1960, the City leased the South Yard to NASSCO, which has conducted shipyard and repair operations at the South Yard from approximately 1960 to the present. *Id.*, at Ex. 1, at ¶ 2. Historically, NASSCO's operations have been split between approximately 74% of new construction and repair of Navy vessels, and 26% for commercial vessels. The Regional Board concluded that the full service ship construction and repair operations performed by NASSCO involve a variety of industrial processes including, but not limited to, formation and assembly of steel hulls; application of paint systems; installation and repair of a large variety of mechanical, electrical, and hydraulic systems and equipment; and removal and replacement of expended vessel exterior paint systems. *See Id.*, at Ex. 2, at 2-3 –

2-31. In addition, the Regional Board concluded that Shipyard operations required use of hazardous substances at or near the waterfront, including abrasive grit, paint, oils, lubricants, grease, fuels, weld, detergents, cleaners, rust inhibitors, paint thinners, solvents, degreasers, acids, caustics, resins, adhesives, cements, sealants, and chlorines—which resulted in the generation of wastes, such as abrasive blast waste, paint, bilge and oily wastewater, blast wastewater, oils, sludges, solvents, thinners, scrap metal, welding rods, and other miscellaneous wastes. *See Id*. The Regional Board found that discharges resulting from these activities contributed to the pollution of the South Yard. *Id.*

4. The San Diego Unified Port District

In 1963, the Port District took ownership of the South Yard, as trustee, and continued to lease the South Yard to NASSCO and others. *Id.*, at Ex.1, at ¶ 11. The Port District also has owned and operated an MS4 system, as co-permittee, from 1963 to the present, which contributed pollution to the South Yard. *Id.*, at Ex. 1, at ¶ 11; *Id.*, at Ex. 2, at 11-5. The Regional Board found that

> The Port District also owns and operates a municipal separate storm sewer system (MS4) through which it discharges waste commonly found in urban runoff to San Diego Bay subject to the terms and conditions of an NPDES Storm Water Permit. The San Diego Water Board finds that the Port District has discharged urban storm water containing waste directly or indirectly to San Diego Bay at the Shipyard Sediment Site. The waste includes metals (arsenic, cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc), total suspended solids, sediment (due to anthropogenic activities), petroleum products, and synthetic organics (pesticides, herbicides, and PCBs).
>
> The urban storm water containing waste that has discharged from the on-site and off-site MS4 has contributed to the accumulation of pollutants in the marine sediments at the Shipyard Sediment Site to levels, that cause, and threaten to cause, conditions of pollution, contamination, and nuisance by exceeding applicable water quality objectives for toxic pollutants in San Diego Bay.

Id., at Ex. 1, at ¶ 11

C. The Proposed Settlement Terms

On September 26, 2013, the Settling South Parties reached agreement on the principle terms of this settlement under the oversight of Mr. Gallagher and Magistrate Judge Bernard Skomal. Richardson Decl., at ¶ 12. Pursuant to the proposed settlement and without admitting liability, NASSCO is agreeing to perform the cleanup of the South Yard through to its completion, and the United States is agreeing to pay $991,024.78 in full and final settlement of NASSCO's claims for past response costs against the Navy, and $6,765,000 cash towards the South Yard cleanup.[5] In the event of a South Yard Re-Opening Event, the United States also will agree to pay 33% of future response costs in the South Yard that exceed the sum of $20,500,000. This work will effectuate the selected remedy for the South Yard, and promote the well-recognized CERCLA and judicial goals of promoting settlements with finality. In addition, the Settling South Parties have agreed to mutually release all claims against each other related to the remedial footprint for the South Yard—subject to certain enumerated exclusions—and dismiss, with prejudice, their claims against each other in this litigation.[6]

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[5] Notwithstanding the obligations of NASSCO under the agreement, NASSCO believes that its reasonable allocation of response costs related to the South Yard is no more than 37%, and is likely significantly less, particularly in light of the 100+ years of discharges of hazardous substances to the South Yard by the City. The Settlement Agreement reserves to NASSCO the right to seek the remainder of past and future response costs from others, such as the City, that contributed significant contamination to San Diego Bay.

[6] The exclusions cover claims and liabilities associated with (i) future regulation of the Site that is not part of the CAO, including without limitation the application of the Water Quality Control Plan for Enclosed Bays and Estuaries, Part 1 Sediment Quality, the Phase II Sediment Quality Objectives for Enclosed Bays and Estuaries of California, and any other sediment quality objectives to be developed by the State Water Resources Control Board; (ii) other ongoing and future enforcement actions at the Site that are not part of the CAO, including without limitation enforcement actions involving TMDLs for Chollas Creek, and enforcement actions related to the resuspension of existing contaminants; (iii) acts or omissions of third parties; (iv) any claims involving natural resource damages or any claims or actions regarding the Site brought by or on behalf of the United States Environmental Protection Agency or a natural resource trustee; and (v) any amendment to the CAO relating to the portion of polygon SW29 that is excluded in the CAO.

The proposed settlement takes into consideration the current factual record, the potential litigation risk, and the parties' interests in avoiding the substantial costs of completing fact and expert discovery, preparing for trial, and presenting its defense and prosecution of claims. Richardson Decl., ¶ 14. The proposed settlement is also contingent upon the Court's issuance of an order approving the settlement and barring contribution against the Settling South Parties. *Id*. As discussed below, these terms are fair, reasonable, and consistent with CERCLA.

III. STANDARD OF REVIEW

A. Courts May Approve Settlements and Issue Bar Orders Under CERCLA

CERCLA has two main objectives: (1) to achieve the prompt and effective cleanup of hazardous waste sites, and (2) to allocate the cost of cleanup to those responsible for the contamination. *United States v. Cannons Eng'g Corp.*, 899 F. 2d 79, 90-91 (1st Cir. 1990)). Settlements are favored because they reduce the amount of money spent litigating, and increase the amount of time and money cleaning up environmental hazards. *See, e.g.*, *United States v. Acorn Eng'g Co.*, 221 F.R.D. 530, 537 (C.D. Cal. 2004). Because settlement is consistent with CERCLA's primary goals, courts frequently exercise their authority to dismiss or bar claims against settling parties for contribution or response costs in order to facilitate settlement of multi-party CERCLA litigation. *Adobe Lumber, Inc. v. Hellman*, No. Civ. 05-1510 WBS EFB, 2009 U.S. Dist. LEXIS 10569 at *14 (E.D. Cal. Feb. 2, 2009) (citing *In re Heritage Bond Litig.*, 546 F.3d 667, 677 (9th Cir. 2008)).

To obtain judicial approval, a good faith settlement must be fair, reasonable, and consistent with the purposes of CERCLA. *SEC v. Randolph, 736 F.2d 525, 529* (9th Cir. 1984) ("Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved"); *see also Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 813 (D.N.J. 1996). In exercising discretion to approve good faith settlements, "[i]t is not the Court's function to

determine whether [the proposal] is the best possible settlement that could have been obtained [or one which the court itself might have fashioned,] but rather 'whether the settlement is within the reaches of the public interest.'" *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass 1989), *aff'd*, 899 F. 2d 79 (1st Cir. 1990) (citation omitted).

"To facilitate settlement in multi-party litigation, a court may review settlements and issue bar orders that discharge all claims of contribution by nonsettling [parties] against settling [parties]." *Adobe Lumber*, 2009 U.S. Dist. LEXIS 10569 at *14. CERCLA further provides that any person who has settled with the United States or a state "in an administrative or judicially approved settlement" may receive protection from contribution claims regarding matters addressed in the settlement. 42 U.S.C. § 9613(f)(2). A CERCLA settlement between private parties may also bar future claims by non-settling parties. *Team Enters., LLC v. Western Inv. Real Estate Trust*, No. 1:08-cv-00872-LJO-SMS, 2011 U.S. Dist. LEXIS 147686, *13 (E.D. Cal. Dec. 22, 2011) (barring claims "whether they are brought pursuant to CERCLA or pursuant to any other federal or state law.").

IV. DISCUSSION

The Court should approve the instant Settlement Agreement and issue a contribution bar because the settlement was entered into after extensive mediation and litigation of the facts and law, is procedurally and substantively fair, reasonable, and furthers the intent and goals of CERCLA and California Code of Civil Procedure sections 877 and 877.6.

A. The Settlement Agreement Is Entitled To A Presumption Of Fairness

In the Ninth Circuit, settlements generally are entitled to a presumption of fairness where, as here, (1) counsel is experienced in similar litigation; (2) settlement was reached through arm's length negotiations; and (3) investigation

and discovery are sufficient to allow counsel and the court to act intelligently. *Linney v. Cellular Alaska P'ship*, Nos. C-96-3008 DLJ, C-97-0203 DLJ, C-97-0425 DLJ, C-97-0457 DLJ, 1997 U.S. Dist. LEXIS 24300, at **15 -16 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998). Here, the settlement agreement was entered into in good faith after extensive, arm's length settlement discussions between sophisticated parties represented by counsel experienced in these matters, with the oversight of an experienced mediator. Further, the settlement agreement is the result of years of investigation and litigation in the administrative proceeding, and years of litigation in this federal court, which, collectively, involved depositions, document productions, hearings, discovery responses, compilation of a voluminous administrative record, and extensive settlement discussions. Richardson Decl. at ¶¶ 7, 10. A presumption of fairness is therefore appropriate in this case; however, even absent such a presumption, the Settlement Agreement meets the fairness test under CERCLA.

B. The Settlement Agreement Is Procedurally Fair

Under CERCLA, "fairness" has both procedural and substantive components. To measure procedural fairness, courts typically attempt to gauge the candor, openness, and bargaining balance of the settlement negotiation process. Negotiation of a settlement at arm's length is a primary indicator of procedural fairness. *See Patterson v. Envt'l Response Trust v. Autocare 2000, Inc.*, Civ -F 01-6606 OWW LJO, 2002 U.S. Dist. LEXIS 28323, at *22 (E.D. Cal. June 28, 2002). The Settlement Agreement at issue is the product of lengthy and vigorous settlement discussions between sophisticated parties and counsel, overseen by both an independent mediator and Magistrate Judge Skomal. Richardson Decl., at ¶ 8. The settlement was preceded by over fifteen years of administrative proceedings before the Regional Board, five years of mediation, and four years of litigation—including extensive discovery on liability and allocation issues during the

administrative and federal court proceedings.[7] *Id.*, at ¶¶ 3-12. As part of the administrative proceedings, the Regional Board compiled an administrative record documenting the South Parties' liability at the Site, consisting of over 400,000 pages of documents. *Id.*, at ¶ 7. The South Parties also engaged in numerous mediation sessions, often weekly, spanning more than five years. *Id.*, at 8.

In sum, the Regional Board's liability findings, the lengthy, arms-length negotiations (in which *all* South Parties participated), and the voluminous record supporting the proposed settlement, along with the active involvement of the mediator and the Court, demonstrate that the settlement was negotiated in good faith and is procedurally fair.

1. The Settlement Agreement Is Substantively Fair

Substantive fairness requires that the settlement terms "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*, 899 F. 2d, at 87. Courts will uphold the terms of a settlement so long as "the measure of comparative fault" on which the settlement terms are based is not "arbitrary, capricious, and devoid of a rational basis." *Id.*

a. The Proposed Allocations Are Consistent With The Parties' Alleged Activities And "Time On The Risk"

The Settlement Agreement contemplates that NASSCO will perform the cleanup, and the United States will pay $991,024.78 in full and final settlement of NASSCO's claims against the Navy for past response costs, and will contribute $6,765,000 to be used for the cleanup of the South Yard. In the event that future cleanup costs in the South Yard exceed the sum of $20,500,000, the United States

[7] In the federal litigation alone, this discovery included over 2672 written requests and the exchange of over 315,000 pages of documents, assuring both full disclosure and adversarial negotiation. *Id.*, at ¶ 10.

also will agree to pay 33% of such costs. NASSCO believes that its reasonable allocation for response costs related to the South Yard is no more than 37%, and would likely be significantly less, if this matter were to be litigated. The Regional Board's Order contains detailed findings that support allocating 33% of response costs to the Navy, and a maximum of 37% of response costs to NASSCO. Moreover, these proposed allocations are consistent with the respective parties' activities, time on the risk, and alleged discharges, as set forth in the Order. Liability and allocation issues were also fully briefed as part of the mediation process, and the Settlement Agreement is consistent with CERCLA's equitable allocation principles, and the allocation methodologies approved in *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. 599 (2009). Richardson Decl., at ¶ 11.

b. The Proposed Allocations Are Consistent With The Gore Factors

NASSCO's settlement obligations are also consistent with the "Gore Factors" that courts often consider in exercising their authority to allocate costs under CERCLA section 113, which include: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of hazardous waste involved; (3) the toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste, especially waste driving the remediation; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent harm to the public health or the environment. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 746 F. Supp. 2d 692, 741 (D.S.C. Oct. 13, 2010).

Applying the Gore Factors to the facts of this case confirms that NASSCO's obligations, *i.e.*, performing the entire remediation, and paying no more than 37% of the cleanup costs, constitutes a reasonable estimate of NASSCO's equitable share of liability for the South Yard. NASSCO was the last tenant to come to the South Yard, and the majority of its tenancy occurred during a climate of environmental regulation and heightened sensitivity to such issues. For example, NASSCO was subject to the most significant environmental laws and regulations for the majority of its tenancy: (1) the Clean Water Act in 1972; (2) the Resource Conservation and Recovery Act in 1976; and (3) CERCLA in 1980, after the passage of which industrial operations, including NASSCO's, became subject to heightened regulation and scrutiny. NASSCO has been regulated under Waste Discharge Requirements via a National Pollutant Discharge Elimination System ("NPDES") permit since 1974. RJN at Ex. 2, at 2-11. Pursuant to those NPDES requirements, NASSCO was required to develop and implement Best Management Practices ("BMPs") to limit discharges to the San Diego Bay. NASSCO has also made additional efforts to minimize the impact of its business on the bay, above and beyond its permit requirements. For example, in the early 1990s, NASSCO initiated capture of all first-flush stormwater from high-risk areas, and, by 2000, essentially became a zero discharge facility for stormwater—at a significant cost to the company. *Id.*, at Ex. 2, at 2-3. Because NASSCO largely has operated during a time period of environmental regulation and reduced use of certain contaminants of concern (with, for example, PCBs banned in 1979), the amount and toxicity of hazardous substances used and released by NASSCO is much less than past owners and tenants at the South Yard. *See* USEPA Basic Information – Polycholorinated Biphenyls (PCBs), http://www.epa.gov/wastes/hazard/tsd/pcbs/about.htm (last visited Oct. 10, 2013) (confirming that PCBs were banned by 1979).

By contrast, NASSCO's tenancy followed a long history of industrial operations by previous tenants, including shipbuilding and repair, tire manufacturing, lumbering, and fish-packing—all during time periods characterized by a relative lack of environmental regulation and awareness. Although numerous other parties operated at the South Yard for decades prior to NASSCO's arrival at the South Yard, NASSCO had no connection to any of the contaminating activities engaged in by such entities. Yet, there is ample evidence that indicating that those activities resulted in the deposit of significant contamination at the South Yard. Contaminants associated with historic boat and shipbuilding operations are discussed extensively in the Order and Technical Report, and canneries have been known to discharge fluming and thawing water containing waste oils, grease, fish particles, and in-plant wastes. RJN, at Ex. 1, at ¶ 10; RJN, at Ex. 2, at 10-1, 10-13 – 10-14; RJN, at Ex. 5, at 44-45. Likewise, creosote was typically used in historic lumbering operations and wharf pilings. RJN, at Ex. 2, at 8-9. In addition to industrial discharges, the City of San Diego's sewage treatment plant discharged significant volumes of sewage to the South Yard, eventually resulting in sludge beds—defined as areas of "very soft fine organic or inorganic mud, possessing toxic characteristics which exclude the presence of benthic marine invertebrates" in a portion of the Bay comprising the present-day NASSCO leasehold. RJN, at Ex. 3, at 4-11; RJN, at Ex. 4, at 19, 25 ¶ 2.c. According to agency studies, the sludge was "black in color and gave off an offensive sulfide odor," and lab experiments revealed that it had "a lethal effect on the marine invertebrates tested," such that there were "no living animals." RJN, at Ex. 3, at 1-2, 7, Figure 6; Ex. 4, at pp. 22, 25. Moreover, the area comprising the Shipyard Sediment Site, including the present-day NASSCO leasehold, was designated as a "critical area" due to the large volumes of industrial and domestic sewage discharged in the area by the City and its tenants. In fact, historic pollution of the bay was so widespread that the entire bay was quarantined in 1955. RJN, at Ex. 2, at 10-9.

Despite the existence of significant contamination pre-dating NASSCO's use of the South Yard, the Settlement Agreement nevertheless obligates NASSCO to ensure completion of South Yard remediation to the satisfaction of the Regional Board, which constitutes a significant financial obligation with risks of cost overruns from unforeseen circumstances. Richardson Decl. at ¶ 13. Since NASSCO's true equitable share is, at most, 37%, and certainly is less than the entire cleanup, less the United States' $6,765,000 contribution, assigning a share to NASSCO of not more than 37%, and issuing a contribution bar is reasonable, and consistent with the Gore factors.

2. The Proposed Settlement Is Reasonable And Furthers The Remediation Goals Of CERCLA

Courts have recognized that promoting "early and complete settlements" in CERCLA actions, facilitated by "us[ing] their settlement approval authority together with their ability to impose broad contribution bars to allow settling defendants to free themselves from the litigation," furthers CERCLA's twin goals of remediating contamination and ensuring that the costs are borne by the potentially responsible parties ("PRPs"). *Acme Fill Corp. v. Althin CD Med., Inc.*, No. C 91-4268 MMC, 1995 U.S. Dist. LEXIS 22308, at *7-8 (N.D. Cal. Oct. 31, 1995). In evaluating whether a proposed settlement is reasonable and consistent with CERCLA, courts consider various factors, including the likelihood that the settlement will promote cleanup, the relative strength of the parties' litigating positions, and the transaction costs associated with litigation. *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 910 (E.D. Wis. 2004) (citing *Cannons*, 899 F.2d, at 89-90).

In this case, the funds contributed to the cleanup by the Settling South Parties will be used to remediate the South Yard in accordance with the Order, and, together with the funds anticipated in connection with a good faith settlement between NASSCO and the Port District, is anticipated to cover a significant

percentage of the current estimated remedial costs.[8] In addition to enabling work at the South Yard to proceed, the settlement will also avoid the significant delays and transaction costs associated with protracted multi-party litigation, thereby preserving resources for use in remediating the South Yard. Accordingly, the Court should grant the Settling South Parties' motion.

C. The Settlement Is Consistent With California Code Of Civil Procedure Section 877.6

The proposed settlement also meets the good faith test articulated in California Code of Civil Procedure sections 877 and 877.6. Like CERCLA, California law (and common law generally), bars non-settling tortfeasors from asserting contribution claims against the settling tortfeasors, following a judicially approved settlement. Cal. Code Civ. Proc. § 877.6(c).

Relevant factors in determining the good faith nature of a settlement under section 877 include whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries, a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial, and any evidence of collusion or fraud. *Tech–Bilt, Inc. v. Woodward–Clyde Assocs.*, 38 Cal.3d 488, 499 (1985)). Parties opposing judicial approval of the settlement must demonstrate "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. However, a fairness hearing is not required as long as the non-settling parties are afforded an

[8] Although the City of San Diego has not reimbursed any remedial costs incurred by NASSCO or the South Trust consultants to date, the San Diego City Council issued a resolution in September 2013 authorizing payment of $6.451 million towards cleanup costs, subject to certain conditions, including that it continues to contest its responsibility and allocated share of cleanup costs in the this litigation. Notwithstanding those conditions, if the City pays the amount committed ($6.451 million), and it is combined with payments by the Settling South Parties and anticipated payment from the Port District, the cleanup likely would be fully funded based on current cost estimates.

opportunity to respond to the request for a good faith determination. Cal. Code Civ. Proc. §§ 877, 877.6(a)(2).

As shown herein, the Settlement Agreement was entered into after extensive mediation and discovery of the facts and law, in good faith, and is fair, reasonable, and consistent with CERCLA. As a result, the proposed settlement achieves an equitable sharing of costs, consistent with the intent of both CERCLA and the California Code of Civil Procedure. Under the settlement, the Settling South Parties will pay a substantial amount towards the cleanup; accordingly, there is no reason to believe that the settlement is collusive, or "so far out of the ballpark" of reasonableness as to establish a "lack of good faith." *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488 at 499-500 (1985); Cal. Code Civ. Proc. § 877.6.

D. Settling South Parties Are Entitled To Contribution Protection

CERCLA provides parties settling with the United States or a State with broad protection against contribution and similar indemnity claims asserted by non-settling defendants for matters addressed in the settlement. 42 U.S.C. § 9613(f)(2); *see Comerica Bank-Detroit v. Allen Indus. Inc.*, 769 F. Supp. 1408, 1414 (E.D. Mich. 1991); *United States v. SCA Servs. of Indiana, Inc.*, 827 F. Supp. 526, 532 (N. D. Ind. 1993). Likewise, in private party CERCLA litigation, settlements approved by the court as being fair and adequate will release the settling parties from non-settling parties' contribution claims.

This contribution protection functions "to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." *Cannons*, 899 F. 2d at 92. As courts recognize, "[i]t 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." *Allied Corp. v. ACME Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 222 (N.D. Ill. 1989). In fact, the measure of finality provided by a bar against cross-claims is precisely what makes settlement

desirable. *Id.*; *see also Cannons*, 899 F. 2d at 92 (1st Cir. 1990); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (noting that "[A]nyone foolish enough to settle without barring contribution is courting disaster."); *United States v. Mallinckrodt*, No. 4:02cv01488 ERW, 2006 U.S. Dist. LEXIS 83211, at **19-20 (E.D. Mo. Nov. 15, 2006). Moreover, the degree to which a bar on contribution cross-claims will facilitate settlement outweighs the prejudice of such a bar on non-settling defendants. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, No. 85 C 1142, 1987 U.S. Dist. LEXIS 11961 (N.D. Ill. Dec. 4, 1987).

In keeping with the above considerations and pursuant to the settlement agreement at issue, there will be no settlement between NASSCO and the United States without protection for the Settling South Parties against contribution claims. That is because this case embodies the risks noted by the above cases. It is a complex multi-party environmental dispute with numerous attendant risks. Already, the Parties have spent tens of millions of dollars in litigation before the Regional Board and this Court. With this Court's approval of the settlement agreement and issuance of a bar order, however, the Court can bring some finality to this litigation for the Settling South Parties.

E. This Court Should Bar the Non-Settling Parties' Contribution Claims

The Ninth Circuit has held that courts may dismiss and bar claims asserted against settling parties when approving partial, private party settlements. *Kaypro*, 884 F.2d at 1232 (applying federal common law to bar contribution and indemnity claims in absence of express statutory provision); *see also Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3rd Cir. 1995) (same). The Ninth Circuit has explained that where a statute does not provide for an express bar, federal common law provides the source of law in cases involving substantive rights that are the province of federal courts. *Kaypro*, 884 F.2d at 1228. In addition, CERCLA section 113(f)(1)

explicitly provides that contribution claims "shall be governed by Federal law." 42 U.S.C. § 9613(f)(1).

Accordingly, district courts in the Ninth Circuit almost uniformly enter contribution bars when approving settlements under § 6 of UCFA. *AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.*, No. CIVS 00-113 LKK JFM, 2007 U.S. Dist. LEXIS 51364, at **10-12 (E.D. Cal. July 2, 2007) ("Within the Ninth Circuit, a court's authority to review and approve settlements and to enter bar orders has been expressly recognized."); *Tyco Thermal Controls LLC v. Redwood Indus.*, Nos. C 06-07164 JF PVT, C 10-01606 JF PVT, 2010 U.S. Dist. LEXIS 91842, **16-18 (N.D. Cal. Aug. 11, 2010) (barring claims for contribution and indemnity pursuant to the UCFA); *Adobe Lumber, Inc. v. Hellman*, No. 2:05 Civ. 05-1510 WBS EFB, slip op. at 2 (E.D. Cal. Jan. 13, 2010) (same); *Adobe Lumber*, 2009 U.S. Dist. Lexis 10569, **24-25; *United States v. Aerojet General Corp.*, 606 F.3d 1142, 1153 (9th Cir. 2010); *City of Oakland v. Keep on Trucking*, No. C-95-03721-CRB, 1998 U.S. Dist. LEXIS 20213, at *12 (N.D. Cal. Dec. 21, 1998) (same); *W. County Landfill, Inc. v. RayChem Int'l Corp.*, No. C93 3170 SI, 1997 U.S. Dist. LEXIS 1791, at *2 (N.D. Cal. Feb. 14, 1997) (same).

Here, the Settling South Parties have shown that the settlement is fair and reasonable. Accordingly, this Court should confirm that NASSCO is protected from contribution claims, and dismiss any such claims against it.

F. The Court Should Also Bar the Non-Settling Parties' Cost Recovery Claims As They Are in the Nature of Contribution

All claims asserted or that may be asserted in the future by the non-settling parties, including claims for cost recovery under CERCLA § 107, are in the nature of contribution claims and should be barred. Specifically, to the extent liability might exist to these other parties, that liability would arise from claims for compelled response costs from other jointly and severally liable defendants for which the non-settling parties claim to have paid, or will pay, more than their fair

share. As such, they are quintessential contribution claims. *See United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2338 (U.S. 2007).

A common law contribution claim is a claim by and between joint tortfeasors for the reimbursement of costs when one party has paid more than his or her fair share. *Atlantic Research*, 127 S. Ct. at 2338. Courts have held that such claims, regardless of how pled, are contribution claims and can only be brought pursuant to section 113. *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1044 (E.D. Wis. 2008); *Carolina Power & Light Co. v. 3M Co.*, CV 5:08-460 slip op. at 23 (E.D.N.C. March 24, 2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 08-cv-3843 slip op. at 9 (2d Cir. Feb. 24, 2010). Furthermore, when a party seeks reimbursement for compelled rather than voluntary costs, it is a contribution claim. *New York v. Next Millennium Realty, LLC*, No. CV-03-5985 SJF MLO, 2008 WL 1958002, at *6 (E.D.N.Y. May 2, 2008); *ITT Indus. Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646 (W.D. Mich. 2009); *see also Appleton Papers*, 572 F. Supp. 2d at 1043. In addition, parties who have pled claims under both CERCLA sections 107 and 113 cannot elect between those two claims, but must pursue their section 113 claims. *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, at 1345-46 (N.D. Ala. 2010).

Here, the non-settling parties contributed to the contamination in the South Yard and thus share a common liability with the Settling South Parties, to the extent the Settling South Parties have any liability to the other defendants. Moreover, the non-settling parties allege a common liability among jointly and severally liable parties as they have alleged CERCLA sections 107 and 113 claims among themselves and other defendants. A section 107 claim, coupled with a section 113 counterclaim, amounts to a singular claim to "collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share." *Atlantic Research*, 127 S. Ct. at 2338. In addition, unlike the plaintiff in *Atlantic Research*, which acted wholly voluntarily, the non- settling PRPs incurred or will

incur costs pursuant to Water Board orders. Accordingly, this court should bar the non-settling parties' alleged cost recovery claims as well as their contribution claims because they share the fundamental attributes of a traditional contribution claim which can only be brought pursuant to CERCLA section 113.

G. Contribution Protection Is Also Proper Under California Code Of Civil Procedure Section 877.6

Sections 877 and 877.6 of the California Code of Civil Procedure provide another basis for dismissing and barring all state law contribution claims. *Acme Fill Corp. v. Althin CD Medical Inc.*, No. C 91-4268 MMC, 1995 WL 822664 at *2 (N.D. Cal. Nov. 2,1995). These provisions provide that a court's determination that a settlement was made in good faith bars any other joint-tortfeasor or co-obligator from asserting any further claims against the settling defendant for contribution or indemnity based on theories of comparative negligence or fault. Cal. Code Civ. Proc. §§ 877, 877.6.

Federal courts apply the criteria set forth by the Supreme Court of California in the leading case of *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488 (1985) to determine whether a particular settlement involving the resolution of state law claims is made in good faith. *Tyco Thermal Controls*, 2010 U.S. Dist. LEXIS 91842, at **41-42 (citations omitted); *see also Chevron Envt'l Mgmt. Co. v. BKK Corp*, No. 1:11-cv-1396, 2013 U.S. Dist. LEXIS 31095, at **7-8 (E.D. Cal. Mar. 6, 2013). These factors include: (1) a rough approximation of the claimant's total recovery and the settlor's proportionate liability; (2) the amount paid in settlement; (3) a recognition that a settlor should pay less in settlement than it would if it were found liable after trial; and (4) the potential for the existence of collusion, fraud, or tortious conduct aimed to injure the interest of the non-settling parties. *See Tech-Bilt, Inc.*, 38 Cal. 3d, at 499- 500. Any joint tortfeasor or co-obligor who challenges a determination of good faith settlement bears the burden of proof to determine that the settlement is "so far 'out of the ballpark'" in relation

to the factors expressed by the California Supreme Court in *Tech-Bilt* as to be inconsistent with the equitable objectives of the statute. *N. County Contractor's Ass'n v. Touchstone Ins. Servs.*, 27 Cal.App.4th 1085, 1091 (1994).

California Code of Civil Procedure section 877.6 permits a settling defendant to maintain an action for indemnity and contribution against a non-settling defendant while shielding the settling defendant from liability following a good faith settlement because "section 877.6 was not intended to affect the liability of a nonsettling tortfeasor to a settling defendant." *Tatum v. Armor Elevator Co.*, 203 Cal. App. 3d 1315, 1319 fn. 5 (1988). California courts have consistently endorsed this approach. *See Sears, Roebuck & Co. v. Int'l Harvester Co.*, 82 Cal. App. 3d 492, 497 (1978); *Bolamperti v. Larco Mfg.*, 164 Cal. App. 3d 249, 255 (1985); *Far W. Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 801 (1988).

Here, an analysis of the *Tech-Bilt* factors demonstrates that the settlements are appropriate, fair, and made in good faith. Pursuant to the settlements, NASSCO is responsible for implementing the remediation in the South Yard through the South Trust and for ensuring the completion of the remediation to the satisfaction of the Regional Board. Richardson Decl., at ¶ 13. In doing so, NASSCO shoulders the responsibility for addressing the largest component of the remediation in the South Yard – its implementation and completion. Furthermore, NASSCO anticipates ultimately funding up to 37% of the cleanup costs required to remediate the South Yard. On the other hand, the non-settling parties are responsible for causing a large portion of the contamination that will be addressed by the remediation. Thus, the amount NASSCO is obligated to pay is significant despite the issues remaining as to its overall liability for remediation costs in the South Yard.

Further, there is no collusion, fraud or any other tortious conduct aimed to injure any non-settling parties, and they cannot make any such claim. The settlement was the result of substantial arm's length negotiations between counsel, and the settlements were reached with oversight by an experienced mediator and

Magistrate Judge—including at sessions where the non-settling parties were present, and where the non-settling parties' interests were adequately represented. Dkt. Nos. 273, 278. Therefore, this Court should find that the settlement was reasonable and entered into in good faith in accordance with Code of Civil Procedure § 877.6, and enter an order barring any state law contribution claims against the Settling South Parties by any other party.

V. CONCLUSION

For the reasons set forth above, the proposed settlement between NASSCO, BAE and the United States is fair, reasonable, and promotes the goals of CERCLA. Approval of this settlement will also allow the largest cleanup in San Diego Bay history to continue. Accordingly, NASSCO respectfully requests that the Court approve the attached good faith settlement, and bar with prejudice all claims against the Settling South Parties for contribution or response costs relating to the South Yard of the Site.

Dated: November 4, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO,

Plaintiff,

v.

NATIONAL STEEL AND SHIPBUILDING COMPANY; et al.,

Defendants.

CASE NO. 09-CV-2275 WQH (BGS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION FOR ORDER CONFIRMING SETTLEMENT BETWEEN NATIONAL STEEL AND SHIPBUILDING COMPANY AND SAN DIEGO UNIFIED PORT DISTRICT BARRING AND DISMISSING CLAIMS

Date: December 9, 2012
Time: 11:00 a.m.
Courtroom 14B (Annex)

Action Filed: October 14, 2009
Judge: Hon. William Q. Hayes

[NO ORAL ARGUMENT UNLESS REQUESTED BY COURT]

AND RELATED CROSS-ACTIONS AND COUNTERCLAIMS

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I. INTRODUCTION

National Steel and Shipbuilding Company ("NASSCO") and the San Diego Unified Port District ("Port District") ("Settling South Parties") seek approval of a Settlement Agreement ("Agreement") entered into between them, which provides for the cleanup of the "South Yard" portion of the Shipyard Sediment Site ("Site"), as ordered by the San Diego Regional Water Quality Control Board ("Regional Board") in Cleanup and Abatement Order No. R9-2012-0024 ("Order"). They also seek protection as allowed under applicable state and federal laws entitling them to an order barring and dismissing all claims between and against them for cost recovery, contribution and equitable indemnity relating to the "Covered Matters" under the Agreement. Under the Settlement Agreement, the Port District has agreed to pay a cash payment of $1.4 million into the trust created to manage the funds for the cleanup of the South Yard.[1] In exchange, NASSCO has agreed to "be solely responsible for the implementation and completion of the Remedial Action in the Remedial Footprint required under the CAO through and until notification by the Agency that no further remedial work is required at the South Yard," comply with the requirements under the Order and related plans and permits "as they relate to the South Yard and S-Lane," and to indemnify the Port District as to certain "Indemnified Matters," all subject to certain "Excluded Matters."

The proposed settlement promotes the goals of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 U.S.C. §9601, *et seq.* by facilitating the largest sediment cleanup in San Diego Bay history. The $1.4 million cash payment by the Port District, and the obligations assumed by NASSCO, represent a fair and reasonable compromise of their

[1] For purposes of investigation and cleanup, the Site, as defined in the Order, has been divided into two distinct areas: the "North Yard" comprised of the marine sediment portion of the BAE Systems' leasehold, and the "South Yard" comprised of the marine sediment portion of the NASSCO leasehold. This Motion and Agreement concern only the South Yard portion of the Site as more particularly described in the Agreement.

respective alleged liabilities for response costs associated with cleanup of environmental contamination at the South Yard under the Order, particularly considering that NASSCO believes that its true equitable share is much less than the cost of the entire remediation less the Port District's $1.4 million payment. The terms contained in the Agreement are the result of arms' length negotiations over several years of privately-mediated and judicially-supervised settlement discussions among all parties to this action, and are without collusion, fraud, or any tortious conduct aimed to injure the interests of non-settling parties. In addition, the complexities and uncertainties of the litigation, and the significant resources that would otherwise be expended in bringing this case to trial, support approval of the Agreement as in good faith, along with the requested bar order.

The Settling South Parties therefore respectfully request that the Court grant this motion and enter the accompanying proposed order finding the Agreement to be in good faith, fair, reasonable, and consistent with the intent of CERCLA, the Uniform Comparative Fault Act (12 U.L.A. 147 (1996) ("UCFA")), adopted as federal common law, and California law, and barring and dismissing all federal and state law claims against Settling South Parties for contribution, cost recovery, equitable indemnity, and any other relief arising from the Covered Matters.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

1. The Administrative Proceedings

This case involves the allocation of costs for the cleanup of allegedly contaminated sediments at the Site pursuant to the Order. The Site encompasses approximately 60 acres of marine sediments at tidelands property along the eastern shore of central San Diego Bay, and has been used for various industrial activities since at least the early 1900s. Beginning in 1991, the Regional Board began working with various private and governmental agencies to address historical discharges of metals and other contaminants into the Site, including TBT, copper,

mercury, PCBs, and HPAHs (collectively, with arsenic, cadmium, lead, and zinc, the "COCs"). Request for Judicial Notice ("RJN") at Ex. 2 at 1-4, 29-1, 29-2.

The Regional Board issued a series of Tentative Cleanup and Abatement Orders ("TCAOs"), between 2005 and 2009, which did not name the Port District, on the stated grounds that the Port District would be considered secondarily liable unless and until its tenants, including NASSCO, failed to comply with the order or lacked financial resources to do so. RJN, Exs. 6-9. The Port District was first named as a primary discharger in the 2010 TCAO, along with current and former industrial operators at the Site. RJN, Ex. 10. Nevertheless, the Regional Board acknowledged in the Technical Report for the Order that "there is no evidence in the record that the Port District initiated or contributed to the actual discharge of waste at the Shipyard Sediment Site." Declaration of Sandi L. Nichols ("Nichols Decl."), ¶ 5, RJN, Ex. 2 at 11-4.

On March 14, 2012, after decades of investigation and deliberation,[2] the Regional Board ordered an extensive cleanup, estimated to cost approximately $24 million for the South Yard alone. Declaration of Kelly E. Richardson ("Richardson Decl."), at ¶ 6. The Order requires named parties[3] to dredge an area of approximately 656,100 square feet, including 217,800 square feet within the South Yard, and to place clean sand cover in areas where dredging is not feasible. RJN, Ex. 2, at Table 33-7; Richardson Decl., at ¶ 6. The remedy also requires

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[2] The Site has been the subject of several remedial investigations, beginning in the early-1990s. NASSCO began investigating the South Yard at the request of the Regional Board circa October 1994, and on February 14, 1997, the Regional Board issued a Water Code section 13267 Order to NASSCO requiring additional studies. Richardson Decl., at ¶ 3. In 2001, under the Regional Board's direction, NASSCO and BAE Systems funded the largest sediment investigation in San Diego Bay history, at costs claimed to be approximately $2 million. *Id.*, at ¶ 4. Additional site sampling was conducted in 2009. *Id.*

[3] The Order named seven parties with responsibility for cleanup of the Site, four of which are implicated in connection with the South Yard: NASSCO, the Port District, the City of San Diego ("City"), and the United States Navy ("Navy").

detailed monitoring and post-remedial monitoring to confirm cleanup goals are achieved. RJN at Ex. 1, at ¶ 34; Richardson Decl., at ¶ 6.

The Port District appealed its inclusion as a Discharger in the Order by a Petition filed with the State Water Resources Control Board in April, 2012. See RJN, Ex. 11. That Petition is still pending. The Port District firmly contends that it does not bear responsibility for the contamination of the Site by its tenants, and does not own or operate the municipal separate storm drain system ("MS4") that discharges into the Site, and should not be jointly and severally responsible for the contamination. See Nichols Declaration, ¶ 5.

2. The Contribution Litigation

The City filed the instant lawsuit on October 14, 2009. Dkt. No. 1. In its Complaint, the City alleges that industrial tenants at the Site and the Navy caused the contamination that triggered the Order. The City admits that it owns and operates the MS4 into which those parties allegedly discharged COCs that then discharged into the Site. *Id.* The City alleges that the Port District, as the tidelands trustee since 1963, is responsible in part for these activities of its tenants. *Id.* NASSCO and the Port District each deny the liability alleged against them by the City and, along with other defendants, filed various counterclaims and cross-claims seeking to allocate liability for the contamination and for the Site cleanup under CERCLA and similar state laws.[4] In addition, the Port District cross-claimed against NASSCO and its other current and former tenants for express contractual indemnity, including their alleged duty to defend the Port District in the administrative proceedings and in this lawsuit, and for breach of contract relating to their obligations under their respective leases and Tidelands Use and Occupancy Permits ("TUOPs"). Dkt. Nos. 11-2, 63, 210, 308. Since these initial filings, this case has been vigorously contested, and the parties have engaged in substantial

[4] *See* Dkt. Nos. 11-1, 11-2, 13, 14, 16, 17, 18, 20-1, 20-2, 21, 29, 63, 88-1, 210, 223, 225, 299, 300, 307, 308.

investigation and written discovery, including responding to document requests, interrogatories and requests for admissions about their respective Site activities.

3. The Mediation Process

Throughout this litigation and for a significant portion of the Regional Board proceedings, the parties also have been working with a court-appointed, experienced environmental litigation mediator, Timothy V.P. Gallagher. Dkt. Nos. 157. For the past few years, all parties participated in numerous mediation sessions with Mr. Gallagher to resolve liability, allocation, and contribution. *See* Richardson Decl., ¶ 8; Nichols Decl., 3, 10. NASSCO and the Port District also participated in settlement meetings conducted by Magistrate Judge Skomal and Mr. Gallagher, and ultimately reached the Agreement. *Id.*

4. Prior Discovery In This Lawsuit

During the mediation, the parties agreed to pursue "phased" discovery, which initially focused on certain categories of information designed to facilitate settlement. On July 15, 2010, the Court entered an "Order (1) Granting Joint Motion For Adoption Of Discovery Plan; (2) Setting Phase I Discovery Schedule" in response to the parties' joint motion. "Phase I" discovery under the order consisted of approximately 2,672 written discovery requests, on over 100 topics related to liability and allocation, including various operations and discharges to the Site during the past 100+ years. Richardson, Decl., at ¶ 10. The burden of this effort was substantial: Over 315,000 pages of documents were exchanged among the parties. NASSCO produced 39,718 documents, totaling 168,084 pages, and responded to 163 interrogatories, 162 document requests, and 11 requests for admission. The Port District produced over 103,000 pages of documents and responded to 111 interrogatories, 82 document requests, and 75 requests for admission. Nichols Decl., at ¶ 7. Following Phase I discovery, allocation issues were thoroughly briefed to the mediator, and the parties tentatively agreed on

allocation percentages recommended by the mediator, subject to reaching acceptable settlement terms. Richardson, Decl., at ¶ 11; Nichols Decl., ¶ 7.

B. Parties and Claims

The City's Complaint, and the counterclaims and cross-claims it triggered, were first predicated on the TCAO issued on April 4, 2008, (*see* Dkt. 1, Exh. A), and amended pleadings raised subsequent TCAOs and the final Order. These pleadings allege that the South Yard was contaminated by discharges from 50+ years of industrial activity by former tenants of the City from the early 1900s through 1963, 50+ years of shipyard operations by NASSCO from 1960 to the present, and 90+ years of naval activities from the 1920s to the present, and discharges by them and others into the MS4. *See, e.g.*, Dkt. 1, 11, 13, 14, 308.[5]

1. The City of San Diego

From the early 1900s until 1963, the City served as the trustee of the San Diego Bay tidelands, including the South Yard, which it leased to various industrial dischargers. Many of these dischargers conducted polluting operations, and are now defunct. RJN, Ex. 1, at ¶ 4. The City admittedly owns and operates the MS4 that discharged directly to, and in the vicinity of, the South Yard. Dkt. 1, ¶ 27. The Regional Board found that direct and indirect discharges to the South Yard from MS4s owned and operated by the City from the early 1900s to 1963 contributed significant pollution to the South Yard. RJN, Ex. 1, at ¶¶ 4, 10, 11.

The Regional Board also found that the City discharged untreated sewage to the South Yard from the adjacent Bayside Treatment Plant, between 1943 and 1963, and directly to the Bay prior to 1943. RJN, Ex. 1, at ¶ 4; RJN, Ex. 2, at ¶ 10.4.1.5. According to the Regional Board, these discharges were so extensive that, by 1963, they had produced sludge deposits at the Site extending two meters

[5] Although this motion relates only to the settlement between NASSCO and the Port District, the basis of liability for each party involved in activities or trusteeship associated with the South Yard is provided for context.

deep, 200 meters wide, and 9000 meters long, causing the Navy to complain that the discharges were corroding the hulls of naval ships. RJN, Ex. 2, at ¶ 10.4.1.5.

2. The United States Navy

From 1921 to the present, the Navy has provided shore support and pier-side berthing services to Pacific fleet vessels at the Naval Base San Diego ("NBSD") water acres adjacent to the South Yard. RJN, Ex. 2, at 10-1. Between 1938 and 1956, the NBSD leasehold included a parcel of land within the present-day South Yard where Navy personnel conducted operations similar in scope to a small boatyard, including solvent cleaning and degreasing of vessel parts and surfaces, abrasive blasting and scraping for paint removal and surface preparations, metal plating, and surface finishing and painting, which led to discharges and accumulation of pollutants in marine sediment in the Bay. RJN, Ex. 2, at 10-1.

The Navy also conducted operations at the NASSCO leasehold on its own ships while berthed at NASSCO for unrelated repairs, and had work conducted on its ships by the various shipyards over the years, subject to detailed contracts and specifications set forth by the Navy. *Id.* Based on historical information in the Regional Board record and the prevailing industry-wide standards employed prior to the 1980s, the Regional Board concluded that the Navy has caused or permitted waste to be discharged to the Bay as a result of these operations. *Id.* In addition, the Regional Board found that the Navy owns and operates an MS4 at the NBSD which discharged wastes commonly found in urban runoff to the Site via Chollas Creek and San Diego Bay. RJN, Ex. 2, at 10-28 to 10-90. The Regional Board found that discharges to the South Yard from MS4s owned and operated by the Navy, from the early 1900s to the present, contributed pollution to the South Yard.

3. National Steel and Shipbuilding Company

In 1960, the City leased the South Yard to NASSCO, which has conducted shipyard and repair operations at the South Yard from approximately 1960 to the present. RJN, Ex. 1, at ¶ 2. Historically, NASSCO's operations have been split

between approximately 74% of new construction and repair of Navy vessels, and 26% for commercial vessels. The Regional Board concluded that the full service ship construction and repair operations performed by NASSCO involve a variety of industrial processes including, but not limited to, formation and assembly of steel hulls; application of paint systems; installation and repair of a large variety of mechanical, electrical, and hydraulic systems and equipment; and removal and replacement of expended vessel exterior paint systems. See RJN, Ex. 2 at 2-3 to 2-31. In addition, the Regional Board concluded that Shipyard operations required use of hazardous substances at or near the waterfront, including abrasive grit, paint, oils, lubricants, grease, fuels, weld, detergents, cleaners, rust inhibitors, paint thinners, solvents, degreasers, acids, caustics, resins, adhesives, cements, sealants, and chlorines—which resulted in the generation of a variety of wastes. *See id.* The Regional Board found that discharges resulting from these activities contributed to the pollution of the South Yard. *Id.*

4. The San Diego Unified Port District

In 1963, the Port District became the trustee of the San Diego Bay tidelands, including the South Yard, inherited the City's leases, and subsequently entered into new leases with NASSCO and others. See Dkt. 308. The Regional Board found in the Order—which the Port District has appealed[6]—that the Port District also owned and operated an MS4 system, as co-permittee, from 1963 to the present, which contributed pollution to the South Yard. RJN, Ex. 1, at ¶¶ 11; Ex. 2, at 11-5.

C. The Proposed Settlement Terms

Pursuant to the Agreement, and without admitting and expressly denying any liability, the Port District is agreeing to pay $1.4 million towards the cleanup

[6] Given the Port District's pending Petition challenging this finding as well as the other basis for its being named in the Order, the Port District contends that the Regional Board's findings as to the Port District are not final, binding, or conclusive. *People ex rel. Cal. Regional Water Quality Control Bd. v. Barry*, 194 Cal. App. 3d 158, 171-176 (1987).

of the "Remedial Footprint" of the South Yard, and NASSCO is agreeing to implement and complete the Remedial Action in the Remedial Footprint of the South Yard, comply with the Order, and indemnify the Port District for the Indemnified Matters. Richardson Decl., ¶ 13; Nichols Decl., ¶¶ 8, 17; Agreement ¶¶ 2.1(a), 3.1, 6.1.[7] This work will effectuate the selected remedy for the South Yard, and promote the well-recognized CERCLA and judicial goals of promoting settlements with finality. In addition, the Settling South Parties have agreed to mutually release all claims against each other related to the Remedial Footprint for the South Yard—subject to certain enumerated exclusions—and dismiss, with prejudice, their claims against each other in this litigation.[8]

The Agreement takes into consideration the current factual record, the potential litigation risk, and the parties' interests in avoiding the substantial costs of completing fact and expert discovery, preparing for trial, and presenting defenses and prosecution of claims. Richardson Decl., ¶ 14; Nichols Decl., ¶ 9.

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[7] NASSCO believes that its reasonable allocation of response costs related to the South Yard is 37%, or less, based upon its "time on the risk" and the factual record as to the contributions to the contamination and activities of other parties, prior to 1960, when NASSCO began leasing the South Yard, and since 1960, as set forth above. NASSCO's percentage allocation does not affect its obligations under the Agreement. The Agreement reserves to NASSCO and the Port District the right to obtain contribution or otherwise recover costs or damages from persons not party to the Agreement.

[8] The "Excluded Matters" cover claims and liabilities associated with (a) any contamination in the remainder of the Shipyard Sediment Site or other areas not the Remedial Footprint; (b) the landside of any of the NASSCO leaseholds; (c) any contamination of the Remedial Footprint occurring after execution of this Agreement; (d) natural resource damage claims brought under CERCLA or any equivalent state law; (e) ongoing or future enforcement actions or proceedings not covered by the CAO, including, without limitation, the Chollas Creek TMDL proceedings, the application of the Phase II Sediment Quality Objectives for Enclosed Bays and Estuaries of California, and any other sediment quality objectives to be developed by the State Water Resources Control Board; (f) third party tort claims; (g) any obligations under Order Directives, Section A, Paragraphs 3 through 5 of the CAO addressing MS4 investigation and mitigation and any other obligations or liabilities associated with the MS4 or discharges from the MS4; and (h) any rights and obligations of these parties under any other agreements including, without limitation, leases, Tidelands Use and Occupancy Permits ("TUOPs"), permits, easements, and conveyances.

The Agreement is conditioned upon the Court issuing an order approving the Agreement and barring contribution, cost recovery, and equitable indemnity claims against the Settling South Parties. As discussed below, the terms of the Agreement are fair, reasonable, and consistent with CERCLA, and reflect a reasonable, good faith contribution under the UCFA, and California Code of Civil Procedure sections 877 and 877.6 (recognizing that NASSCO believes that its true equitable share is much less than the entire cost of the cleanup less the Port District's $1.4 million payment). The Settling South Parties are therefore entitled to contribution protection barring and dismissing claims related to the Covered Matters.

III. STANDARDS FOR REVIEW OF CERCLA SETTLEMENTS

The Settling South Parties seek an order approving the Agreement under CERCLA, the UCFA, adopted as federal common law, and California Code of Civil Procedure sections 877 and 877.6, and providing the Settling South Parties with contribution, cost recovery and equitable indemnity protection pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), Section 6 of the UCFA, and California Code of Civil Procedure section 877.6, thereby extinguishing the Settling South Parties' liability to persons not party to this Agreement and barring and dismissing all such claims against the Settling South Parties for the Covered Matters. Each of the pertinent provisions, and the Settling South Parties' entitlement to the requested relief under them, is discussed below.

A. Courts May Approve Settlements and Issue Bar Orders Under CERCLA

CERCLA has two main objectives: (1) to achieve the prompt and effective cleanup of hazardous waste sites, and (2) to allocate the cost of cleanup to those responsible for the contamination. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990). Settlements are favored because they reduce the amount of money spent litigating, and increase the amount of time and money cleaning up environmental hazards. *See, e.g.*, *United States v. Acorn Eng'g Co.*,

221 F.R.D. 530, 537 (C.D. Cal. 2004). Because settlement is consistent with CERCLA's primary goals, courts frequently exercise their authority to dismiss or bar claims against settling parties for contribution or response costs in order to facilitate settlement of multi-party CERCLA litigation. *Adobe Lumber, Inc. v. Hellman*, 2009 U.S. Dist. LEXIS 10569 at *14 (E.D. Cal., February 2, 2009) (citing *In re Heritage Bond Litig.*, 546 F.3d 667, 677 (9th Cir. 2008)).

To obtain judicial approval, a settlement must be fair, reasonable, and consistent with the purposes of CERCLA. *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved"); *see also Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 813 (D.N.J. 1996). "It is not the Court's function to determine whether [the proposal] is the best possible settlement that could have been obtained [or one which the court itself might have fashioned,] but rather . . . 'whether the settlement is within the reaches of the public interest.'" *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1036 (D. Mass 1989)), *aff'd*, 899 F.2d 79 (1st Cir. 1990) (citation omitted).

"To facilitate settlement in multi-party litigation, a court may review settlements and issue bar orders that discharge all claims of contribution by non-settling [parties] against settling [parties]." *Adobe Lumber*, 2009 U.S. Dist. LEXIS 10569 at *14. A CERCLA settlement between private parties may therefore bar future claims for contribution and indemnity by non-settling parties. *Team Enters., LLC v. Western Real Estate Trust*, 2011 U.S. Dist. LEXIS 147686, *13 (E.D. Cal. Dec. 22, 2011) (barring such claims "whether they are brought pursuant to CERCLA or pursuant to any other federal or state law"). This contribution protection functions "to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." *Cannons*, 899 F.2d 79 at 92. As courts recognize, "[i]t 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." *Allied Corp v. ACME Solvent Reclaiming, Inc.*, 771 F. Supp. 219, 222 (N.D. Ill. 1989). In fact, the measure of finality provided by a bar against cross-claims is precisely what makes settlement desirable. *Id.*; *see also Cannons*, 899 F.2d at 92 (1st Cir. 1990); *Franklin v. Kaypro*, 884 F.2d 1222, 1229 (9th Cir. 1989) ("[A]nyone foolish enough to settle without barring contribution is courting disaster."). Moreover, the degree to which a bar on contribution cross-claims will facilitate settlement outweighs any prejudice of such a bar on non-settling defendants. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 1987 U.S. Dist. LEXIS 11961 (N.D. Ill. Dec. 2, 1987).

B. Section 6 of The Uniform Comparative Fault Act

Section 6 of the UCFA provides:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

UCFA, 12 U.L.A. 147 § 6. "The overwhelming majority of courts in the Ninth Circuit that have addressed the issue have applied the UCFA in CERCLA cases," and federal courts in California have adopted section 6 of the UCFA as being consistent with CERCLA policy. *Lewis v. Russell*, 2012 U.S. Dist. 161343 at *13 (E.D. Cal. Nov. 8, 2012); *Adobe Lumber*, 2009 U.S. Dist. LEXIS 10569 at *17-*18; *AmeriPride Servs. Inc. v. Valley Indus. Servs., Inc.*, 2007 U.S. Dist. LEXIS 51364, at *9 (E.D. Cal. July 2, 2007); *Patterson Environmental Response Trust v. Autocare 2000, Inc.*, 2002 U.S. Dist. LEXIS 28323, at *14 (E.D. Cal. June 28, 2002); *see also Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 834 F.Supp. 342, 348-349 (D. Kan. 1993) (settlement between third party plaintiff and third party defendants, "nearly all courts addressing the issue of reducing non-settling parties' liability have opted for the approach set out in the [UCFA]"); *New York v.*

Solvent Chem. Co., Inc., 984 F.Supp. 160, 168 (W.D.N.Y. 1997); *United States v. SCA Serv. of Indiana, Inc.*, 827 F.Supp. 526, 535 (N.D. Ind. 1993).

The UCFA best promotes CERCLA's policy of encouraging settlements by providing for equitable apportionment of responsibility, more easily resolving complex partial settlements and eliminating the need for a good faith hearing. *United States v. Western Processing Co.*, 756 F. Supp. 1424, 1430-31 (W.D. Wash. 1990); *Barton Solvents, Inc.*, 834 F. Supp. at 348; *SCA Services of Indiana, Inc.*, 827 F. Supp. at 534. The Court should follow the majority of federal courts and adopt UCFA section 6 as the federal common law to govern the legal effect of the Agreement.

Claims for contribution and indemnification under state law are also barred under the UCFA. The contribution protection provided under the UCFA "is vital to the strong CERCLA settlement policy so that a uniform federal rule (UCFA) must be applied to state claims in the nature of contribution as well as to federal ones . . . despite the existence of state law covering the same subject." *Acme Fill Corp. v. Althin CD Med., Inc.*, 1995 U.S. Dist. LEXIS 22308, at *27-*28 (N.D. Cal. Oct. 31, 1995).

C. California Code of Civil Procedure Section 877 and 877.6

The Agreement also satisfies the good faith requirements for a contribution bar under California Code of Civil Procedure sections 877 and 877.6.

> A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

Code Civ. Proc. § 877.6(c). "Applying Section 6 of UCFA and the procedural requirements of . . . Section 877.6 will allow the parties to achieve finality in their settlements, and is warranted by the good-faith nature of the settlements." *AmeriPride Servs.*, 2007 U.S. Dist. LEXIS 51364 at *10-*11; *Adobe Lumber, Inc.*

v. Hellman, 2010 U.S. Dist. LEXIS 139778 at *2 (E.D. Cal. March 4, 2010) ("Pursuant to UCFA § 6 and the California Code of Civil Procedure § 877.6, any and all claims against the settling defendant arising out of the matters asserted in this action or addressed in the Settlement Agreement, regardless of when asserted or by whom, are barred."); *Tyco Thermal Controls LLC v. Redwood Indus.*, 2010 U.S. Dist. LEXIS 91842 at *30-*35 (N.D. Cal. 2010).

IV. THE SETTLING SOUTH PARTIES ARE ENTITLED TO A DETERMINATION OF GOOD FAITH

A. The Agreement Is Entitled To A Presumption Of Fairness

In the Ninth Circuit, settlements generally are entitled to a presumption of fairness where, as here, (1) counsel is experienced in similar litigation; (2) settlement was reached through arm's length negotiations; and (3) investigation and discovery are sufficient to allow counsel and the court to act intelligently. *Linney v. Alaska Cellular P'ship*, 1997 U.S. Dist. LEXIS 24300, at *15 -*16 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998).

B. The Settlement Agreement Is Procedurally Fair

Under CERCLA, "fairness" has both procedural and substantive components. To measure procedural fairness, courts typically attempt to gauge the candor, openness, and bargaining balance of the settlement negotiation process. Negotiation at arm's length is a primary indicator of procedural fairness. *See Patterson*, 2002 U.S. Dist. LEXIS 28323, at *22. The Agreement here is the product of lengthy and vigorous settlement discussions between sophisticated parties and counsel, overseen by both an independent mediator and Magistrate Judge Skomal. Richardson Decl., at ¶ 8; Nichols Decl., ¶ 10. As part of the administrative proceedings, the Regional Board compiled an administrative record documenting the parties' activities at the Site, consisting of over 400,000 pages of documents. Richardson Decl., ¶ 7. The parties also engaged in numerous

mediation sessions, often weekly, spanning more than five years, devoted to cleanup and allocation issues. Richardson Decl. at ¶¶ 8, 10; Nichols Decl., ¶ 10.

The lengthy, arms-length negotiations (in which *all* parties participated) before the court-appointed Mediator and Magistrate Judge Skomal, and the voluminous record supporting the proposed settlement, demonstrate that the Agreement was negotiated in good faith and is procedurally fair.

C. The Agreement Is Substantively Fair

Substantive fairness requires that the settlement terms "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*, 899 F.2d at 87. Courts will uphold the terms of a settlement so long as "the chosen measure of comparative fault" on which the settlement terms are based is not "arbitrary, capricious, and devoid of a rational basis." *Id*.

1. The Agreement Is Consistent With the Parties' Alleged Activities And "Time On The Risk"

The Agreement contemplates that NASSCO will perform the cleanup and comply with the Order as it relates to the South Yard, and the Port District will pay $1.4 million into the South Yard trust account, within 30 days following this Court's approval of the Agreement, to be used solely for the cleanup of the South Yard. (Agreement, ¶¶ 2.1, 2.2, 3.1.)

The Port District's $1.4 million contribution reflects a fair share—if not more than its fair share (in the Port District's view)—of the estimated cleanup costs for the South Yard given the limited nature of its activities. The Port District contends that it did not discharge any contamination into the South Yard (see also RJN, Ex. 10, at 11-4), and the Port District denies it ever owned or operated the MS4 that discharges into the South Yard. *See* Nichols Decl., ¶ 12; RJN, Exs. 12-15; Dkt. 307, ¶ 34. Further, the Port District's alleged liability as the tidelands

trustee since 1963 derives from the activities of its tenant at the South Yard—NASSCO. And the Port District has asserted in this action—which NASSCO denies—that NASSCO owes it a defense and indemnity under its leases for the claims made against the Port District that are predicated on NASSCO's shipbuilding-related activities at its leasehold, and that NASSCO breached its leases by its actions in causing the contamination in the South Yard, among other things (Dkt. 308 at ¶¶ 313-340; Dkt. 344 at ¶¶ 313-340). Consequently, the Settling South Parties agree that the Port District's contribution toward the cleanup is fair under this prong.[9]

NASSCO, in turn, has committed to perform the cleanup of the South Yard in compliance with the Order, while preserving its rights to seek contribution and cost recovery from non-settling parties, and, in particular, the City. Richardson Decl., ¶ 13. The Agreement further recognizes that, "notwithstanding the obligations of NASSCO to the Port District under this Settlement Agreement, NASSCO believes that its reasonable allocation for response costs related to the South Yard is 37%." Agreement, at ¶ 7.4. NASSCO was the last tenant to come to the South Yard, and the majority of its tenancy occurred during a climate of environmental regulation (including Clean Water Act and CERCLA requirements) and heightened sensitivity to such issues, including NPDES permit requirements limiting discharges to San Diego Bay and becoming a zero-discharge facility for stormwater by 2000. By contrast, prior tenants operated during time periods

[9] The Port District contends that its share should be at most 0%-1%. *See, e.g., In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991) (holding tenants liable for 100% of the cleanup costs); *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 503 (D.S.C. 2011) (assigning 0% share of liability to the City who owned a portion of the contaminated site), *aff'd* 714 F.3d 161 (4th Cir. 2013); *United States v. Davis*, 31 F.Supp.2d 45, 67 (D.R.I. 1998) (allocating a 1% share of liability to "owner of the Site [who] played a minimal role in its operation"). NASSCO believes the Port District's share is higher, based on other cases assigning higher shares of liability to non-operating landlords.

characterized by a relative lack of environmental regulation and awareness.[10] *See* MPAs In Support of NASSCO's Motion for Determination of Good Faith Settlement With United States of America, filed November 5, 2013, at 15:1-16:28.

While it is not necessary for the Court to determine the ultimate percentages of responsibility allocated to each of the parties, allocation estimates and their bases are relevant to the Court's determination of the Agreement's good faith and fairness. Because NASSCO believes its equitable share to be no more than 37%, which is much less than the entire cost of the cleanup NASSCO has agreed to perform (less the Port District's $1.4 million contribution), NASSCO, too, has satisfied the substantive fairness prong.

2. The Agreement Is Consistent With The Gore Factors

The South Settling Parties' obligations under the Agreement are also consistent with the "Gore Factors" that courts often consider in exercising their authority to allocate costs under CERCLA section 113, which include: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of hazardous waste involved; (3) the toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste, especially waste driving the remediation; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent harm to the public health or the environment. *Ashley II of Charleston, LLC,* 791 F.Supp.2d at 490.

[10] In addition to industrial discharges, the City's sewage treatment plant discharged significant volumes of contaminating sewage to the South Yard. RJN, at Ex. 2, 10-9; Ex. 3, at 1-2, 4-11, Figure 6; Ex. 4, at 19, 22-25 ¶ 2.c.

Applying the Gore Factors here confirms that the Port District's $1.4 million cash payment for the remediation of the South Yard is not unfair or unreasonable (although the Port District believes it is more than its fair share). As set forth above, the Port District contends that it did not generate the COCs that are the subject of the cleanup. The Port District also contends that liability of mere non-operating landlords, like the Port District, is generally viewed as de minimis in CERCLA cases. *See In re Dant & Russell*, 951 F.2d at 249; *Ashley II of Charleston, LLC*, 791 F.Supp.2d at 503; *United States v. Davis*, 31 F.Supp.2d at 67. And the Port District contends that it has a track record of cooperating with the public agencies to prevent harm to the public and the environment. Nichols Decl., ¶ 12; RJN, Exs. 12-15.

Likewise, application of the Gore Factors to this case confirms that NASSCO's obligations under the Agreement are not unfair or unreasonable. Although NASSCO believes its equitable share is no more than 37%, the Agreement obligates NASSCO to comply with the requirements under the Order, and all plans and permits relating to it, "as they relate to the South Yard and S-Lane," and to perform the work required with respect to the South Yard to the satisfaction of the Regional Board. This constitutes a significant obligation with risks of cost overruns from unforeseen circumstances. Richardson Decl. at ¶ 13.

D. The Proposed Settlement Is Reasonable And Furthers The Remediation Goals Of CERCLA

Courts have recognized that promoting "early and complete settlements" in CERCLA actions, facilitated by "us[ing] their settlement approval authority together with their ability to impose broad contribution bars to allow settling defendants to free themselves from the litigation," furthers CERCLA's twin goals of remediating contamination and ensuring that the costs are borne by the potentially responsible parties. *Acme Fill Corp.*, 1995 U.S. Dist. LEXIS 22308, at *7-*8 (N.D. Cal. Oct. 31, 1995). In evaluating whether a proposed settlement is

reasonable and consistent with CERCLA, courts consider various factors, including the likelihood that the settlement will promote cleanup, the relative strength of the parties' litigating positions, and the transaction costs associated with litigation. *United States v. Fort James Operating Co.*, 313 F.Supp.2d 902, 910 (E.D. Wis. 2004) (citing *Cannons*, 899 F.2d at 89-90).

In this case, the funds contributed to the cleanup by the Settling South Parties will be used to remediate the South Yard in accordance with the Order. In addition to enabling work at the South Yard to continue, the Agreement will also avoid the significant delays and transaction costs associated with protracted multi-party litigation, thereby preserving resources for remediating the South Yard.

E. The Settlement Is Consistent With California Code Of Civil Procedure Section 877.6

The proposed settlement also meets the good faith test articulated in California Code of Civil Procedure sections 877 and 877.6. Like CERCLA, California law (and common law generally), bars non-settling tortfeasors from asserting contribution claims against the settling tortfeasors following a judicially approved settlement. Cal. Code Civ. Proc. § 877.6(c).

Relevant factors in determining the good faith of a settlement under section 877 include whether the settlement amount is within the reasonable range of the settling tortfeasor's proportional share of comparative liability, a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial, and any evidence of collusion or fraud. *Tech–Bilt, Inc. v. Woodward–Clyde Assocs.*, 38 Cal.3d 488, 499 (1985). Parties opposing judicial approval of the settlement must demonstrate "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. However, a fairness hearing is not required as long as the non-settling parties are afforded an opportunity to respond to the request for a good faith determination. Cal. Code Civ. Proc. §§ 877, 877.6(a)(2).

As discussed above, the Agreement was entered into after extensive mediation and discovery of the facts and law, in good faith, and is fair, reasonable, and consistent with CERCLA. As a result, the Agreement achieves an equitable sharing of costs, consistent with the intent of both CERCLA and the California Code of Civil Procedure. Under the Agreement, the Settling South Parties will pay a substantial amount towards the cleanup, and, NASSCO has agreed to implement and complete the Remedial Action in the Remedial Footprint required by the Order for the South Yard, despite its belief that its equitable share is no more than 37%. Accordingly, there is no reason to believe that the settlement is collusive, or "so far 'out of the ballpark'" of reasonableness as to establish a "lack of good faith." *Tech-Bilt*, 38 Cal. 3d, at 499-500; Cal. Code Civ. Proc. § 877.6.

V. THE SOUTH SETTLING PARTIES ARE ENTITLED TO A CONTRIBUTION BAR AND ORDER DISMISSING CLAIMS

A. Settling South Parties Are Entitled To Contribution Protection Under CERCLA

As discussed above, in private party CERCLA litigation, settlements approved by the court as being fair and adequate will release the settling parties from non-settling parties' contribution and equitable indemnity claims. In keeping with the above considerations and pursuant to the terms of the Agreement, the Agreement will be null and void absent protection for the Settling South Parties against cost recovery, contribution, and equitable indemnity claims. Richardson Decl. ¶ 14; Nichols Decl., ¶ 8. That is because this case embodies the numerous risks recognized by the courts as attendant in complex, multi-party environmental disputes, which risks justify the settlement and contribution bars proposed here. Already, the parties have spent tens of millions of dollars on litigation before the Regional Board and this Court. With this Court's approval of the Agreement and issuance of a bar order, however, the Court can bring some finality to this litigation for the Settling South Parties.

B. This Court Should Bar and Dismiss the Non-Settling Parties' Cost Recovery, Contribution, and Equitable Indemnity Claims Under Section 6 of the UCFA

The Ninth Circuit has held that courts may dismiss and bar claims asserted against settling parties when approving partial, private party settlements. *Kaypro*, 884 F.2d at 1232 (applying federal common law to bar contribution and indemnity claims in absence of express statutory provision); *see also Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3rd Cir. 1995) (same). The Ninth Circuit has explained that where a statute does not provide for an express bar, federal common law provides the source of law in cases involving substantive rights that are the province of federal courts. *Kaypro*, 884 F.2d at 1228. In addition, CERCLA section 113(f)(1) explicitly provides that contribution claims "shall be governed by Federal law."

Accordingly, district courts in the Ninth Circuit almost uniformly enter contribution bars when approving settlements under Section 6 of UCFA, adopted as federal common law. *See, e.g., Ameripride Servs.*, 2007 U.S. Dist. LEXIS 51364, at *6 -*7 ("Within the Ninth Circuit, a court's authority to review and approve settlements and to enter bar orders has been expressly recognized."); *Tyco*, 2010 U.S. Dist. LEXIS 91842, *16-*18 (barring claims for contribution and indemnity pursuant to the UCFA); *Adobe Lumber, Inc. v. Hellman*, No. 2:05 Civ. 01510 WBS EFB, slip op. at 2 (E.D. Cal. Jan. 13, 2010) (same); *Adobe Lumber*, 2009 U.S. Dist. LEXIS 10569, at *24-*25; *United States v. Aerojet General Corp.*, 606 F.3d 1142, 1153 (9th Cir. 2010); *City of Oakland v. Keep on Trucking*, 1998 U.S. Dist. LEXIS 20213, at *12 (N.D. Cal. Dec. 21, 1998) (same); *W. County Landfill, Inc. v. Ray-Chem Int'l Corp.*, 1997 U.S. Dist. LEXIS 1791, at *2 (N.D. Cal. Feb. 14, 1997) (same). Here, the Settling South Parties have shown that the settlement is fair and reasonable. Accordingly, this Court should confirm that the Settling South Parties are protected from contribution and equitable indemnity claims, and dismiss all such claims against them.

All claims asserted or that may be asserted by the non-settling parties, including claims for cost recovery under CERCLA § 107, are in the nature of contribution claims and should be barred. Specifically, to the extent liability might exist to these other parties, that liability would arise from claims for compelled response costs from other jointly and severally liable defendants for which the non-settling parties claim to have paid, or will pay, more than their fair share. As such, they are quintessential contribution claims. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (U.S. 2007).

A common law contribution claim is a claim by and between joint tortfeasors for the reimbursement of costs when one party has paid more than his or her fair share. *Atl. Research*, 551 U.S. at 138. Courts have held that such claims, regardless of how pled, are contribution claims and can only be brought pursuant to section 113 of CERCLA. *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1044 (E.D. Wis. 2008); *Carolina Power & Light Co. v. 3M Co.*, CV 5:08-460 slip op. at 23 (E.D.N.C. March 24, 2010); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 138 (2d Cir. 2010). Furthermore, when a party seeks reimbursement for compelled rather than voluntary costs, it is a contribution claim. *New York v. Next Millennium Realty, LLC*, 2008 WL 1958002, at *6 (E.D.N.Y. May 2, 2008); *ITT Indus. Inc. v. BorgWarner, Inc.*, 615 F. Supp. 2d 640, 646 (W.D. Mich. 2009); *see also Appleton Papers*, 572 F. Supp. 2d at 1043 (explaining section 107 is only available for defendants who are "completely innocent and do not share common liability with any PRPs, or because the Government has not brought an enforcement action . . . ."). In addition, parties who have pled claims under both CERCLA sections 107 and 113 cannot elect between those two claims, but must pursue their section 113 claims. *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1345-46 (N.D. Ala. 2010).

Here, the non-settling parties each allegedly contributed to the

contamination in the Site and thus share a common liability with the Settling South Parties, to the extent the Settling South Parties have any liability at all. Moreover, the non-settling parties allege a common liability among jointly and severally liable parties in their CERCLA sections 107 and 113 claims among themselves and other defendants. A section 107 claim, coupled with a section 113 counterclaim, amounts to a singular claim to "collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share." *Atl. Research,* 551 U.S. at 138. Notably, in their Rule 26 initial disclosures, neither of the non-settling South Parties (i.e., the City and the Navy) have identified any costs they have purportedly incurred. See Nichols Decl., ¶ 14, Exs. B, C thereto. In addition, unlike the plaintiff in *Atlantic Research,* which acted wholly voluntarily, the non-settling parties incurred or will incur costs pursuant to Water Board orders. Accordingly, this Court should bar and dismiss the non-settling parties' alleged cost recovery claims as well as their contribution claims because they share the fundamental attributes of a traditional contribution claim which can only be brought pursuant to CERCLA section 113.[11]

C. Contribution Protection Is Also Proper Under California Code of Civil Procedure Section 877.6

Sections 877 and 877.6 of the California Code of Civil Procedure provide another basis for dismissing and barring all state law contribution claims. *Acme Fill,* 1995 U.S. Dist. LEXIS 22308, at *7-*8. These provisions provide that a court's determination that a settlement was made in good faith bars any other joint-tortfeasor or co-obligator from asserting any further claims against the settling defendant for contribution or indemnity based on theories of comparative

[11] *See* RJN, Ex. 16, *City of Colton v. American Promotional Events, Inc.*, Case No. ED CV 09-1864 PSG (SSx), December 22, 2011 Order by United States District Court, Central District of California, granting motion for good faith determination and barring all claims for contribution or indemnity against settling parties, including claims under both CERCLA sections 107 and 113.

negligence or fault. Cal. Code Civ. Proc. §§ 877, 877.6.

Federal courts apply the criteria set forth by the Supreme Court of California in the leading case of *Tech-Bilt Inc. v. Woodward-Clyde & Associates* to determine whether a particular settlement involving the resolution of state law claims is made in good faith. *Tyco Thermal Controls*, 2010 U.S. Dist. LEXIS 91842, at *41-*42 (citations omitted). These factors include: (1) a rough approximation of the claimant's total recovery and the settlor's proportionate liability; (2) the amount paid in settlement; (3) a recognition that a settlor should pay less in settlement than it would if it were found liable after trial; and (4) the potential for the existence of collusion, fraud, or tortious conduct aimed to injure the interest of the non-settling parties. *See Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488, 500 (1985). Any joint tortfeasor or co-obligor who challenges a good faith settlement bears the burden of proof to show that the settlement is "so far 'out of the ballpark'" in relation to the factors expressed in *Tech-Bilt* as to be inconsistent with the equitable objectives of the statute. *N. County Contractor's Ass'n v. Touchstone Ins. Servs.*, 27 Cal.App.4th 1085, 1091 (1994) (citation omitted).

California Code of Civil Procedure section 877.6 permits a settling defendant to maintain an action for indemnity and contribution against a non-settling defendant while shielding the settling defendant from liability following a good faith settlement because "section 877.6 was not intended to affect the liability of a nonsettling tortfeasor to a settling defendant." *Tatum v. Armor Elevator Co.*, 203 Cal. App. 3d 1315, 1319 fn. 5 (1988). California courts have consistently endorsed this approach. *See Sears, Roebuck & Co. v. Intl Harvester Co.*, 82 Cal. App. 3d 492, 497 (1978); *Bolamperti v. Larco Mfg.*, 164 Cal. App. 3d 249, 255 (1985); *Far W. Fin. Corp. v. D & S Co.*, 46 Cal. 3d 796, 801 (1988).

Here, an analysis of the *Tech-Bilt* factors demonstrates that the Agreement is appropriate, fair, and made in good faith. NASSCO is responsible for implementing the Remedial Action in the Remedial Footprint required under the

Order for the South Yard and ensuring its completion to the satisfaction of the Regional Board. Richardson Decl. ¶ 13; Nichols Decl., ¶¶ 8, 17, 18. NASSCO is making this commitment despite its belief that its fair share of liability is no more than and perhaps less than 37%. And the Port District has agreed to contribute $1.4 million cash, i.e., approximately 6% of the cleanup costs estimated in the Order, though it contends it has no liability and contends it is entitled to defense and indemnity and damages from NASSCO which the Port District contends could result in a significant judgment in its favor if this case is tried. Nichols Decl., ¶ 8.

Further, there is no collusion, fraud or other tortious conduct aimed to injure any non-settling parties, (*see* Richardson Decl., ¶ 8; Nichols Decl., ¶ 11), and no such claim could legitimately be made. The Agreement was the result of substantial arms-length negotiations between counsel, reached with the assistance of an experienced mediator and Magistrate Judge—following sessions where the non-settling parties were present and represented by experienced counsel. Richardson Decl., ¶ 8. Therefore, this Court should find that the Agreement is reasonable and entered in good faith in accordance with Code of Civil Procedure section 877.6, and enter an order barring and dismissing any state law claims for contribution, cost recovery, or equitable indemnity against the Settling South Parties by any other party.

VI. CONCLUSION

For the reasons set forth above, the Agreement is fair, reasonable, entered into in good faith, and promotes the goals of CERCLA. Approval of the Agreement will also allow the largest cleanup in San Diego Bay history to continue. NASSCO and the Port District respectfully request that the Court approve the Agreement, and bar and dismiss with prejudice all claims against the Settling South Parties for cost recovery, contribution, or equitable indemnity relating to the South Yard of the Site pursuant to CERCLA § 113(f), Section 6 of the UCFA, and California Code of Civil Procedure §§ 877 and 877.6.

Dated: November 6, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO

Plaintiff,

vs.

NATIONAL STEEL & SHIPBUILDING COMPANY; et al.,

Defendants.

AND RELATED COUNTER AND CROSS CLAIMS

Case No. 09-cv-2275-WQH (BGS)

CITY OF SAN DIEGO'S OPPOSITION TO JOINT MOTION OF NATIONAL STEEL AND SHIPBUILDING COMPANY AND SAN DIEGO UNIFIED PORT DISTRICT FOR ORDER CONFIRMING SETTLEMENT AND DISMISSING CLAIMS

No Oral Argument Unless Requested by the Court

Date: TBD
Time: 11:00 a.m.
Courtroom: 14B

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I. INTRODUCTION

Defendants/Cross-Defendants/Cross-claimants The San Diego Unified Port District ("the Port") and NASSCO[1] ask this Court by their joint motion to bar all contribution claims against both NASSCO and the Port due to a settlement that NASSCO and the Port reached as to their claims by and between themselves, and that did not involve the Plaintiff City of San Diego ("Plaintiff" or "the City").[2] For several reasons, both summarized below and as set forth in the body of this opposition, their motion should be denied.

First, NASSCO does not qualify as a "plaintiff" or "claimant" as intended under the UCFA[3] or CCP[4] to enable NASSCO and the Port to seek a claims bar or good faith finding. However, even should this Court find that NASSCO does so qualify, NASSCO cannot seek a bar as to the claims against it. This is not permitted by the UCFA or CCP provisions, or the case law. Only the "settling tortfeasor" or "liable party" can seek such an order. Even worse, NASSCO is not even required to pay a dime by the settlement, and might never have to. How this scenario could permit NASSCO to seek a contribution bar as to the non-settlors' claims against it, including the Plaintiff City's claims, is incomprehensible.

As to the Port, because the only claims being resolved are those between NASSCO and the Port, as is clear from how "Covered matters" is defined in the Settlement Agreement, this settlement should not impact others' claims. And, there are expressly several matters which are not, or cannot be, covered by the settlement which cannot be made the subject of any bar order, including the City's intentional tort claims and non-contribution claims, and the City's claims relating to the MS4 system (which is also an Excluded matter from the settlement).

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[1] "NASSCO" shall mean National Steel and Shipbuilding Company.
[2] NASSCO also makes this request based on its settlement with the Navy, which is addressed in NASSCO's separate good faith motion and opposed by the City in its separate opposition to that motion in more detail.
[3] "UCFA" shall mean the Uniform Comparative Fault Act.
[4] "CCP" shall mean the Code of Civil Procedure.

Additionally, the settlement amount paid to NASSCO by the Port is not fair or reasonable nor within the ballpark of the Port's potential liability. The parties' presentation as to why the settlement is in good faith, is merely conclusory and fails to set forth sufficient facts and evidence demonstrating the settlement is fair, especially in light of the contractual issues between NASSCO and the Port (the Port's express indemnity and contract claims), which shows there are claims between these parties that have resulted in a settlement value that is not reflective of the claims of others, like the City, where such claims do not exist.

Finally, Phase II discovery in this matter has barely commenced. Due to NASSCO and the Port reaching this settlement shortly after Phase II discovery opened, and the September 27, 2013 order of Magistrate Skomal which enacted a discovery stay for any party reaching a settlement, the City has not been able to do sufficient discovery as to either NASSCO or the Port on liability and allocation to be able to thoroughly oppose this motion. At a bare minimum, the City should be allowed to undertake such discovery should this Court contemplate granting the motion in whole or in part.

For these reasons, and all of the reasons set forth below in detail, the City respectfully requests this Court deny the joint motion of NASSCO and the Port confirming good faith settlement and barring claims.

II. LEGAL ARGUMENT

A. Under The Circumstances, NASSCO Does Not Qualify as a "Plaintiff" or "Claimant" to Enable NASSCO to Use the Contribution Bar Provisions of UCFA or the CCP for the NASSCO-Port Settlement.

In order for a settlement to be subject to the provisions of either the UCFA or the CCP, it must be a "…release, covenant not to sue, or similar agreement entered into by a claimant and a person liable…" [UCFA] or a "…settlement entered into by the plaintiff or claimant and one or more alleged tortfeasors or co-obligors…." [CCP]. UCFA, §6; CCP §877.6 (emphasis added).

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Virtually every case which employs the UCFA, and specifically those which do so in the CERCLA context, involves settlements between the plaintiff and one or more defendants. More rarely, it is a settlement between a third party plaintiff and a third party defendant where the latter was not sued by the plaintiff. Each federal or CERCLA case cited by NASSCO and the Port in their motion papers, were in these contexts (or, did not discuss a specific settlement scenario).[5] None of the multitude of federal or CERCLA cases cited by NASSCO and the Port involved a partial settlement between two defendants, both sued by the plaintiff, who also had cross-claims against each other that were the subject of the settlement.

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[5] *Acme Fill Corp. v. Althin CD Medical, Inc.*, 1995 WL 822664 (N.D. Cal. 1995) (plaintiff and defendant settlement); *Adobe Lumber v. Hellmann*, 2009 WL 256553 (E.D. Cal. 2009) (plaintiff and defendant settlement); *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F.Supp. 219 (N.D. Ill. 1989) (plaintiff and defendant settlement); *Ameripride Srvs., Inc. v. Valley Indust. Srvs., Inc.*, 2007 WL 1946635 (E.D.Cal. 2007) (plaintiff and defendant settlement); *Appleton Papers v. George A. Whiting Paper Co.*, 572 F.Supp.2d 1034 (E.D. Wisc. 2008) (comment on prior settlement with plaintiff); *Ashley II of Charleston v. PCS Nitrogen, Inc.*, 791 F.Supp.2d 431 (D.S.C. 2010); (allocation not settlement); *Carolina Power & Light v. 3M,* 2010 U.S.Dist. Lexis 145667 (E.D.N.C. 2010) (comment on prior plaintiff settlement); *Chevron Envt'l Mgmt v. BKK Corp.*, 2013 U.S. Dist. Lexis 31095 (E.D. Cal. 2013) (plaintiff and defendant settlement); *City of Oakland v. Keep on Trucking,* 1998 U.S.Dist. Lexis 20213 (N.D. Cal. 1998) (plaintiff and defendant settlement); *Comerica Bank-Detroit v. Allen Indust.*, 769 F.Supp. 1408 (E.D. Mich. 1991) (plaintiff and defendant settlement); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 1987 WL 27368 (N.D. Ill. 1987) (no specific settlement scenario); *Eichenholz v. Brennan,* 52 F.3d 478 (3d Cir. 1995) (plaintiff and defendant settlement); *Franklin v. Kaypro*, 884 F.2d 1222 (9th Cir. 1989) (plaintiff and defendant settlement); *In re Heritage Bond Litigation*, 546 F.3d 667 (9th Cir. 2008) (plaintiff and defendant settlement); *ITT Corp. v. Borg-Warner,* 615 F.Supp.2d 640 (W.D. Mich. 2009) (plaintiff and defendant settlement); *Linney v. Alaska Cellular P'ship*, 1997 WL 450064 (N.D. Cal. 1997), aff'd, 151 F.3d 1234 (9th Cir. 1998) (plaintiff and defendant settlement); *New York v. Next Millenium Realty*, 2008 WL 1958002 (E.D.N.Y. 2008) (not settlement); *Niagara Mohawk Power Corp. v. Chevron USA,* 08-cv-3848 (2d Cir. 2010) (admin. Settlement); *Patterson Envt'l Response Trust v. Autocare 2000, Inc.*, U.S. Dist. Lexis 28323 (E.D. Cal. 2002) (plaintiff and defendant settlement); *SEC v. Randolph,* 736 F.2d 525 (9th Cir. 1984) (plaintiff and defendant settlement); *Solutia, Inc. v. McWane,* 726 F.Supp.2d 1316 (N.D.Ala. 2010) (admin. Settlement); *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F.Supp.790 (D.N.J. 1996) (plaintiff and defendant settlement); *Team Enterprises v. Western Inv. Real Estate Trust,* 2011 U.S.Dist. Lexis 147686 (E.D.Cal. 2011) (plaintiff and defendant settlement); *Tyco Thermal Controls v. Redwood Indus.*, 2010 U.S.Dist. Lexis 116371 (N.D.Cal. 2010) (not settlement); *U.S. v. Acorn Eng.*, 221 F.R.D. 530 (C.D. Cal. 2004) (plaintiff and defendant settlement); *U.S. v. Atl. Research Co.*, 551 U.S. 128 (2007) (plaintiff and defendant settlement); *U.S. v. Cannons Eng. Co.*, 720 F.Supp. 1027 (D. Mass. 1989), *aff'd.* 899 F.2d 79 (1st Cir. 1990) (plaintiff and defendant settlement); *U.S. v. Fort James Op. Co.*, 333 F.Supp.2d 902 (E.D. Wisc. 2004) (plaintiff and defendant settlement);*U.S. v. Mallinckrodt,* 2006 U.S.Dist. Lexis 83211 (E.D. Mo. 2006) (third party plaintiff and third party defendant settlement where TPDs not sued by plaintiff); *U.S. v. SCA Servs. Of Indiana,* 827 F.Supp.526 (N.D. Ind. 1993) (third party plaintiff and third party defendant settlement where TPDs not sued by plaintiff); *W. County Landfill v. RayChem Int'l Corp.*, 1997 U.S.Dist. Lexis 1791 (N.D. Cal. 1997) (plaintiff and defendant settlement).

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This situation before the Court now, is novel. NASSCO, a defendant/cross-claimant, who is undisputedly not the plaintiff, has entered into a settlement with the Port, a defendant/cross-defendant. Both are sued in the main action by the plaintiff City, and are defendants in the main action; and both have cross-claims against each other, as well as against other parties, including the City. But the City, the plaintiff, is not a party to this settlement. Moreover, by this motion, not only the Port—the party paying NASSCO the settlement funds—seeks a contribution bar, but NASSCO, the party receiving the funds, ALSO seeks a contribution bar (just as it does with its Navy settlement).

Thus, it appears, by this motion (and its other motion) that NASSCO is attempting to say that it, like the Port (and the Navy), is also a "person liable" or "tortfeasor," such that it should be able to obtain a contribution bar under the UCFA or CCP. The problem with this is that if NASSCO is not the "claimant" in this settlement with the Port (as discussed under Section B, *infra*) and instead is a "person liable" or "tortfeasor," then the UCFA and CCP settlement provisions do not apply at all to the NASSCO-Port settlement, because then there is no claimant, and neither party can seek any relief under these provisions.

At least one court resolved this problem by finding that a cross-claimant, who is not the actual plaintiff in the action, who has entered into a settlement with a cross-defendant who was sued by the actual plaintiff as well, does not qualify as a "plaintiff or claimant" to permit such a bar of any claims.

In *Arizona Pipeline Co. v. Superior Court,* 22 Cal.App.4th 33 (1994), the court evaluated the settlements among the defendants, which were claimed to work detriment to one non-settling defendant, and did not involve the plaintiffs who had initiated the main litigation. The court held that CCP 877.6 did not apply to this settlement situation, where the parties to the settlement were joint tortfeasors asserting various contribution and indemnity claims against each other:

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> [W]e conclude that in an action where two or more persons are alleged to be joint tortfeasors, a judicial determination that a settlement between joint tortfeasors was made in good faith does not bar under section 877.6 any non-settling tortfeasor from prosecuting any existing or future claims against any settling tortfeasor for comparative indemnity, because section 877.6 relates only to those settlement agreements "entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors." (§877.6 subd. a.)) **In the context of tort litigation, the "plaintiff or other claimant" refers to the injured party claimant, and does not include joint tortfeasors named as cross-complainants and cross-defendants in cross-complaints seeking contribution or indemnity....[w]here the only complainants are joint tortfeasors asserting various indemnity and contribution claims against each other, the statute does not apply**. To hold otherwise would be to rewrite the statute to apply to settlements entered into not only by the tort plaintiff or other claimant and one or more alleged joint tortfeasors, but also to settlements entered into only among and between some joint tortfeasors.

Id. at 42 (emphasis added).

The *Arizona Pipeline* court also found that the policy of promoting settlements was not met in this context, because there is no assurance that the other main policy established by section 877.6, equitable cost sharing among the parties at fault, would be served. If the non-settling parties cannot get a reduction in their ultimate liability to the plaintiff, but are still barred from asserting their cross-claims against the settling defendants, this works an inequity and no such benefit is available, "because the tort plaintiffs, not being parties to the settlements among the joint tortfeasors, are not bound by the settlements." *Id.* at 42-44 (quote at 44).

Other courts have agreed with the logic of *Arizona Pipeline*, even though the specific concerns of that case were not present in their situations. *See, e.g., Wilshire Ins. Co. v. Tuff Boy Holding, Inc.,* 86 Cal.App.4th 627, 642-43 (2001). Other courts have noted that there are problems with in settling multiparty cases and obtaining court approval of these settlements, as not all cases fit the neat "one defendant settles with one plaintiff" situation. Sometimes, there is uncertainty because the settlement covers causes of action with different damages, or, the

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settled claims are for separate injuries, not all of which would be attributable to the conduct of the remaining defendants/parties. *See, e.g., Alcal Roofing & Insulation v. Superior Court,* 8 Cal.App.4th 1121, 1124 (1992). Yet other courts, including the California Supreme Court, have inferred that the legislative history and background of section 877.6 supports that this statute was intended to apply to only settlements between a plaintiff and a defendant/alleged tortfeasor. *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal.3d 488, 493, 499 (1985) ("…the intent and policies underlying section 877.6 required that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery…the allocation of settlement proceeds among plaintiffs….") (emphasis added); *Far West Financial Corp. v. D&S Co.*, 46 Cal.3d 796, 800 (1988) (analyzing the background and legislative history of Code Civ. Proc., §877.6, subd.(c), regarding good faith settlements by alleged tortfeasors with plaintiffs).

The UCFA, section 6, uses language similar to the CCP ("claimant" and "person liable" versus "plaintiff or claimant" and "tortfeasors"), and draws the same distinction between the "claimant" and the "person liable" as those parties entering the agreement as does the CCP language, as to who is entitled to seek the protections of that provision ["…entered into by a claimant and a person liable…."]. UCFA, §6. Thus, the *Arizona Pipeline* logic should apply equally to the UCFA. This is supported by the UCFA, section 6 comments, which illustrate examples of the application of the provision, only using scenarios wherein there is a settlement involving the plaintiff. UCFA, §6, *comments*.

The same concerns are raised with the UCFA language as those voiced by the *Arizona Pipeline* court: a settlement among tortfeasor defendants, which does not involve the plaintiff, results in the non-settlors not getting a reduction in liability or credit as to the plaintiff's claims, but only as to the cross-claimant.

This is precisely the problem with the settlement here. The plaintiff, the City, who initiated this action, is not a party to the settlement. Should the Court

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bar the non-settling parties' contribution and indemnity cross-claims (including the City's such claims) against the Port, this works an injustice. The non-settling parties are getting no benefit of any reduction off of the City's claims under state law; and under the UCFA, as to the CERCLA claims, the proportionate liability being measured is only the Port's liability to NASSCO, not to the City, which leaves a gap. The parties would face difficulty in filling that gap, to try to present the full picture of the Port's liability at trial, as their claims against the Port would be barred if the Court grants the order requested. Such biased relief from contribution and indemnity claims for a settling party was not the intent of either UCFA section 6 or CCP section 877.6.

Even worse, what NASSCO seeks by the motion is the Court's approval of only a partial settlement between tortfeasors/persons liable, not involving the plaintiff, and then a bar of the remaining claims against NASSCO by the non-settling parties—namely, the City—despite this limited context of the settlement. This request for relief from contribution and indemnity claims for a party who accepts the settlement funds from the other party, is not only not intended by either UCFA section 6 nor CCP section 877.6, but it is expressly not permitted by them.

NASSCO, as a defendant and joint tortfeasor in this litigation, should not qualify as a "claimant." NASSCO claims to qualify as a person liable/tortfeasor in this settlement with the Port to try to seek a settlement bar, which confirms that there is no true "claimant" in the NASSCO-Port settlement and neither the UCFA nor CCP bar provisions should apply to the settlement.

B. If the Court finds NASSCO Does Qualify as the "Claimant," Neither the UCFA nor the CCP Permit the Claimant (versus the "Person Liable" or "Tortfeasor" to Request a Contribution Bar.[6]

Under the UCFA, the only person who can seek a contribution bar is the "person liable," not the "claimant." UCFA, §6 ("A release, covenant not to sue, or

[6] The City cross-references its Opposition to NASSCO's Motion for Good Faith Settlement with the Navy, filed concurrently herewith, and incorporates its arguments to this end herein as though set forth in full.

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similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution…") To be able to use UCFA section 6 at all for the NASSCO-Port settlement, NASSCO must be the "claimant" under UCFA section 6 in its settlement with the Port. The Port is paying NASSCO money to settle NASSCO's claims against it, not the other way around. (Ex. A to Nichols Decl., ¶2.1, 2.2). If NASSCO is NOT the claimant, then the Port has no ability to seek a contribution bar itself, because then there would be no "claimant.". If NASSCO instead claims that it too is a "person liable" such that it can seek a contribution bar just like the Port (as it appears to be doing), then UCFA section 6 cannot apply, because then there are only two persons liable, and no claimant.

Similarly, section 877.6 of the CCP also only allows the "settling tortfeasor" to seek a contribution bar, not the "plaintiff or other claimant." CCP §877.6(a), (c) ("…a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors….[a] determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor….").

Nothing in either statute says that both parties—that is, both the claimant and the settling party/settling tortfeasor—can seek a bar order. Instead, both statutes make clear that only the liable party/tortfeasor can seek such a bar.

Case law also supports this. Cross-claims against a settling plaintiff (or claimant) are not barred under section 877.6, even if the settling plaintiff is made into an arguable tortfeasor by the cross-claims. Its position as the plaintiff or claimant, does not make it into a settling tortfeasor able to seek a contribution bar. *Doose Landscape, Inc. v. Superior Court,* 234 Cal.App.3d 1698, 1700-01 (1991)("[t]he subdivision only acts to bar claims against a *settling tortfeasor.* The court was without jurisdiction under the statutory provision to bar cross-claims for equitable indemnity against the *settling plaintiff.*" (emphasis in original)). This same logic should apply equally to the UCFA because the terms used are virtually

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identical. NASSCO, if it does qualify as the "claimant" in this settlement with the Port to be able to invoke these provisions in the first place, cannot itself as the settling claimant seek a contribution bar as to any claims or cross-claims against it.

C. If the Court Determines NASSCO Does Qualify as a "Claimant," The Court Must Rule as to Whether the Uniform Comparative Fault Act or Code of Civil Procedure Section 877.6 Controls.

Should this Court decide that NASSCO qualifies as the "claimant" for the purposes of the NASSCO-Port settlement, but still wishes to undertake a more detailed review of the settlement to evaluate whether NASSCO and/or the Port can seek the contribution bar they request, Court must first determine whether the UCFA or the CCP (or some hybrid of both) apply to this settlement.

NASSCO and the Port argue on the one hand that the UCFA should control the analysis, as this is a CERCLA case and multiple Ninth Circuit courts have applied the UCFA to both the settlement of federal CERCLA claims and any accompanying state law claims. (Mot. at p. 21). The City does not dispute that there is authority so holding that the UCFA can or should be used in the CERCLA action context as to the CERCLA claims. If this approach is used, then the UCFA would, generally speaking, work to reduce the "claimant's" (NASSCO's) claims[7] by the percentage of the Port's liability, to be ultimately determined at trial, not the exact settlement amount. This is a "proportionate share" approach. This approach works to ensure some fairness to the non-settlors, in that were a settlement figure in reality too low, the claimant, who accepted the settlement to resolve its claims, would bear the risk at trial that if there was a greater percentage of liability assigned to the settlor than actually paid, it would have to discount its claims by the percentage amount and not just the actual amount of the settlement. UCFA, §6.

However, NASSCO and the Port also ask this Court to find that their settlement is in "good faith" under CCP section 877.6. (Mot. at p.23-24). The

[7] This would be a reduction of the claims of NASSCO against the other non-settling parties, as NASSCO would be the party who would qualify as the "claimant" to use the UCFA at all.

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approach used by the CCP, however, is different than the UCFA approach. The CCP uses a "pro tanto" approach, where the amount the settling party actually paid, is offset directly in amount from the claimant's claim. *Arbuthnot v. Relocation Realty Service Corp.*, 227 Cal.App.3d 682, 687 (1991). In this situation, there is no ability of the non-settling parties to try to prove at trial that the settling party paid too little or that its liability is a much greater percentage. Moreover, in using this approach, it is a requirement that the offset under section 877.6 be fully allocated between liability and damages issues in order to obtain a good faith determination, to ensure that the settlement was reached in an adversarial manner. *Tech-Bilt, supra,* at 499; *Arizona Pipeline, supra,* at 46. Nowhere in the motion papers or the settlement agreement is this done. (*See* further discussion at section I., *infra*). Additionally, an evaluation of whether the settlement is, in reality, in "good faith," invoking a detailed analysis of all of the "*Tech-Bilt*" factors,[8] is also required.

As such, this Court must decide whether the UCFA applies to this settlement, or whether the CCP applies, or both.

D. If the Court Decides NASSCO Does Qualify as a "Claimant," the Only Claims at Issue Are NASSCO's Cross-Claims against the Port; and the Definition of "Covered Matters" Limits the Scope of the Settlement.

If the Court determines that NASSCO qualifies as a "claimant," then the Court must find that NASSCO only qualifies as such because of its cross-claims in this matter. NASSCO is not the plaintiff. So, if NASSCO is the "claimant" in this settlement, then it holds this designation only because of its own claims; and, specifically, its cross-claims against the Port:

> **UCFA Section 6**: "A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the

[8] The factors in evaluating whether a settlement is in good faith under CCP section 877.7 under the California Supreme Court's opinion in *Tech-Bilt, supra,* at 499.

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> released person's equitable share of the obligation, determined in accordance with the provisions of Section 2."
>
> **CCP Section 877.6:** "[a]ny party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors…." and "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor…."

It is clear that the claims at issue are only those brought by the "claimant" (NASSCO) against the Port (who it is releasing from those claims). There are also other parties in the litigation which NASSCO sued (i.e., City), who are not being released from NASSCO's claims against them by this settlement. But while the parties aside from the Port are not released from NASSCO's claims (and this is clear from the terms of the settlement agreement at ¶¶ 1.6, and 5.2), NASSCO's claims against those non-released parties ARE reduced by the amount of the Port's proportionate fault (or, if the CCP is used, a direct deduction from the amount of NASSCO's claims). Critically, it is not the plaintiff City's claims which are so reduced, as the City is not the "plaintiff or claimant" in this settlement scenario; it is NASSCO, and it is important this be kept in mind. This is the critical distinction and problem which arises from this defendant—defendant settlement, as discussed more fully in Section II A.[9]

Thus, no claims outside of the context of NASSCO's claims against Port and Port's claims against NASSCO can be subject to any bar order, as those are the only claims which are being settled. Moreover, NASSCO and the Port have expressly chosen to settle the claims between themselves only, and this does not settle the full universe of the plaintiff's claims nor the claims brought against them by any other party:

[9] That is, the parties who are not settling are not allowed to take the proportionate share of the Port's fault or direct deduction of the Port's payment off of the plaintiff's claims, to whom they remain ultimately liable, but only off of NASSCO's claims, which leaves a gap and an inequity which supports that this settlement should not be subject to any bar order at all.

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> "Covered matters" shall mean (1) any and all claims that were, that were, that could have been, that could now be, or that could hereafter be asserted by any of the Settling South Parties against any of the other Settling South Parties…..and, (2) any and all costs incurred by the Settling South Parties….

(Ex. A to Nichols Decl., ¶1.5) (emphasis added).

To the extent there are separate claims brought against NASSCO or the Port by the City, or other parties, those claims cannot be pulled into the context of any bar order or good faith finding, because they are not under the "Covered matters" of the settlement by definition. And, NASSCO as the claimant cannot seek a bar order as to claims against it. Only to the extent the non-settling parties have contribution and indemnity based claims against the Port which directly derive from NASSCO's claims against the Port, as to the "Covered matters" of the settlement, only those claims could *potentially* be subject to a bar order.

However, there are specific claims and issues, in some number, as discussed below, which cannot be subject to any bar order. And, as neither NASSCO nor the Port dismiss their own cross-claims against the non-settling parties, these also cannot be subject to any bar order and makes any bar order virtually impossible.

E. As Neither NASSCO nor the Port Dismiss Their Counter-or Cross-claims against Other Parties There Should Be No Bar Order.

Notably, neither NASSCO nor the Port, in the settlement agreement, agree to dismiss their cross- or counter-claims against any party but themselves. In fact, NASSCO and the Port, in the agreement, expressly reserve their rights to pursue such claims. (Ex. A to Nichols Decl., ¶5.2.)

If NASSCO and the Port do not dismiss these claims, and still reserve their right to prosecute their cross- or counterclaims against the non-settling parties for contribution, there can be no reciprocal contribution bar against NASSCO or the Port. If NASSCO and the Port can still pursue their claims, the non-settling parties can still present their defenses, and as such should be able to present their claims,

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and contribution/allocation between NASSCO, the Port and the non-settling parties will still be a live issue for adjudication at trial. Simply put, a contribution bar was not intended to be issued in this context, where neither the claimant nor the settling tortfeasor are buying their peace from the litigation, and are still intending to pursue their counter- and cross-claims against the non-settling parties, including the plaintiff. It would work a vast injustice to bar the City's claims against NASSCO or the Port, but still allow NASSCO and the Port to pursue their claims against the City. This was not the intent of a contribution bar.

F. There Are Multiple Matters Which Fall Outside the "Covered Matters" Under the Settlement Agreement and Multiple Claims Against NASSCO Which Cannot Be Barred by this Settlement Under Any Circumstances.

Notwithstanding the City's arguments, that 1) NASSCO does not qualify as a claimant to allow NASSCO and the Port to seek a bar order at all, and 2) that the Covered Matters are limited to just claims between NASSCO and the Port and do not impact the non-settling parties claims, the City also discusses below specific issues and claims which cannot fall under the Agreement, under any circumstance.

1. NASSCO and the Port Admit That Claims Involving the Site Brought By Other Parties Are Not Part of the Release.

The Settlement Agreement makes clear that claims relating to third parties are not part of the release or agreement. (Ex. A to Nichols Decl., ¶¶1.8, 5.2.) Thus, this agreement expressly, beyond the definition of "Covered Matters" which limits the parameters of the settlement, does not cover any claims that other parties bring.

2. There Are Multiple Other Matters Which Are Otherwise Not Subject to Any Contribution Bar under the UCFA or the CCP.

a. Intentional Torts, Express Indemnity Claims, & Other Non-Contribution/Indemnity Claims/Cost-Recovery Claims

Intentional torts are explicitly not subject to UCFA section 6. UCFA, Sec. 1, *comments* ("The Act does not include intentional torts"). Neither are claims which are not contribution or equitable indemnity claims, but instead are affirmative

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claims for damages. *See In re Heritage Bond Litigation*, 546 F.3d 667 (9th Cir. 2008) (finding a bar order impermissibly broad in covering potential non-contribution claims). Moreover, intentional torts and affirmative/independent claims (non-contribution claims) are also not subject to any good faith finding or bar under CCP section 877.6. *See, e.g., Cal-Jones Properties v. Evans Pacific Corp.,* 216 Cal.App.3d 324, 328 (1989). Express indemnity claims, or purely contractual claims, are also not subject to any bar orders. UCFA, Sec. 1, *comment* ("There is no intent to include in the coverage of the Act actions that are fully contractual"); *Bay Development Ltd. v. Superior Court,* 50 Cal.3d 1012, 1019 (1990).

The City brings not only contribution claims against NASSCO and the Port, but also affirmative claims for damages, including arising from its role as Trustee of the Tidelands and landlord to various parties, including NASSCO, and its predecessors, and as a governmental entity. (Ex. N,[10] Plaintiff's First Amended Complaint ("FAC") at ¶¶ 29-58, 114-119; 120-128; 159-164; 165-188; 202-218). Among the City's affirmative claims against NASSCO (and its predecessors), and the Port, are for the intentional torts of nuisance and trespass, including public nuisance. (Ex. N, FAC at ¶¶ 202-218). The City also has express indemnity and contract claims against NASSCO based on its leases with NASSCO which are purely contractual and cannot be subject to a bar order. (Id. at ¶¶ 165-188).

The City also brings cost recovery claims under CERCLA and Water Code Section 13304, which cannot be subject to a bar order under UCFA. (*Id.* at ¶¶ 120-128, 159-164). These are cost recovery claims under statutes which provide for full recovery of damages irrespective of contributory fault: CERCLA is a joint and several liability and strict liability statute, and the Water Code provides for recovery against any liable person by any governmental agency who incurs

[10] Lettered exhibits are exhibits to the Declaration of Brian Ledger unless otherwise noted.

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cleanup costs. UCFA, Sec. 1, *comment* ("A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault"); *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 140 (2007)(CERCLA contribution settlement bars do not impact cost recovery claims); Cal. Water Code §13304(a), (c)(1). As the City brings cost recovery claims and has incurred damages in connection with those claims (Dec. of Ortlieb at ¶¶3-4), those claims are not subject to a contribution bar.

NASSCO and the Port cite various cases to try to support that the City's cost recovery claims cannot survive a contribution bar, but, these cases (and 9th Circuit case law) say the opposite. *See, e.g., Atlantic Research, supra; see also Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 963-64 (9th Cir. 2013)(section 107 cost recovery actions by any party who has incurred response costs is authorized by CERCLA and such claims are complimentary to section 113 claims; both are permitted at the same time). It is clear that cost recovery claims are not subject to contribution bars.[11] The City has expended funds towards the investigation at the Site, and has approved further expenditure of funds for the remediation at the Site, in particular, at the NASSCO site! (Dec. of Ortlieb, ¶4).

The City's claims which sound in intentional tort, contract, and are affirmative claims relating to damage sustained by the City by NASSCO's and the Port's actions and breaches, and for cost recovery, are not subject to any bar order.

b. The City's Claims Against NASSCO and the Port as to the Entire Shipyard Sediment Site.

The City maintains claims against NASSCO which do not only relate to the contamination at the NASSCO site (the "South Yard," which is the subject of the NASSCO-Port settlement for which the Port is paying NASSCO and NASSCO

[11] BAE, to contrast, even agrees that cost recovery claims are not subject to contribution bars by not seeking such in its own, separate, good faith papers. [Doc. 368].

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takes "responsibility" (Ex. A to Nichols Decl. at ¶¶ 2.1, 2.2, Mot. at p. 1, fn. 1), but for contamination of the entire Shipyard Sediment Site. The City's claims are not limited as to just the "South" against NASSCO (or its predecessors). (Ex. N, FAC at ¶¶ 40, 46, 52, 58). The Cleanup & Abatement Order[12] similarly, does not limit NASSCO's discharger status to just the South. (Ex. 1,[13] CAO, Sec. 2). The claims by the City as to NASSCO, which are broader than NASSCO's "South" liability, must survive any potential contribution bar under any circumstance.

The Port does not seek a bar order over the claims against it in the North. (Mot. at p.1, fn.1). Thus, any such claims also would survive any bar order.

c. The City's Claims against NASSCO and the Port Relating to NASSCO's Contamination/Releases to the City's MS4 System

NASSCO made direct discharges, in various fashions, which ultimately went into the City's MS4 system through runoff and stormdrains. (Ex. N, FAC at ¶¶37, 38). This is also a subject of the Technical Report as to NASSCO, where pages and pages are dedicated to discussion of and charts documenting such releases. (Ex. 2, TR, [14]*e.g.,* at ¶¶2.3.1, 2.3.5.2, 2.3.5.3, 2.4, 2.7, 2.8). The City is being counterclaimed against by multiple parties, including NASSCO, for its MS4 system discharges, as a contributing factor to the Site contamination. (*See, e.g.,* Ex. P, NASSCO Counter-claims at ¶¶316-322). NASSCO's liability to the City as to this specific mode of release—contaminants which got into the City's MS4, including SW9 and Chollas Creek—cannot be a part of any settlement with the Port and no bar order can be issued covering this specific matter, as this is undisputedly an issue and claim between the City and NASSCO.

Additionally, the City maintains claims against the Port as to its MS4-based liability, as the Port also operates an MS4 system which the Board in the CAO

[12] The Cleanup and Abatement Order or "CAO" shall mean the Regional Board's Cleanup & Abatement Order R9-2012-0024 (Ex. 1 to the Request for Judicial Notice ("RJN")).
[13] Numbered exhibits are exhibits to the Request for Judicial Notice.
[14] "TR" shall mean the Technical Report of the Regional Board which accompanies the CAO.

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found has caused discharges of contaminants to the Shipyard Sediment Site through its lessee's leaseholds, including NASSCO, for which the Port bears at least some responsibility. (Ex. 1, CAO, Sec. 11; Ex. 5, TR, ¶11.3; Ex. N, FAC, at ¶¶115-119, Ex. 6, City Presentation to Board, 11/2011, at p.2-7). Moreover, under the CAO, the Port and the City are jointly required to perform various MS4 investigation and work items. (Ex. 1, CAO at Order Directives, ¶¶3-5). This matter is expressly an Excluded Matter under the NASSCO-Port settlement, as are "any other obligations or liabilities associated with the MS4 or discharges from the MS4." (Ex. A to Nichols Decl., at ¶1.8). This demonstrates that not only is the MS4 issue not a "Covered Matter" under the Settlement Agreement, but that any claims by the City against the Port, or NASSCO, relating to the MS4 releases at the NASSCO Site cannot be subject to any bar order.

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d. The City's Claims Against NASSCO for Successor Liability for Earlier Shipyard Operators at the NASSCO Site.

The City brings claims against NASSCO that it has successor liability for entities which pre-date NASSCO's operations in the South, including National Steel and Shipbuilding Corporation, National Iron Works, and Martinolich Shipbuilding. (Ex. N, FAC at ¶¶29, 41-58). Discovery has revealed that this liability may also extend to other entities who operated at the South, including National Marine Terminal, and Westgate-California, by assumptions of liabilities in agreements and assignments of leases. (Exs. Q, R (1959 purchase agreement, leases)). No other party makes such claims against NASSCO. These claims must also survive any potential contribution bar, as they are not a part of the settlement.

G. The Settlement Is Not Fair or Reasonable under the UCFA, nor is it Within the Ballpark of NASSCO's or the Port's Potential Liability under the CCP.

The court must evaluate the NASSCO-Port settlement for reasonableness, fairness and adequacy, both under the UCFA and the CCP. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *Tech-Bilt, supra,* at 499.

Additionally, under the CCP, in determining the good faith of a settlement, the court must consider "each of the plaintiff's claims and possible recoveries and the potential liabilities of the joint tortfeasors." *Cal-Jones Properties v. Evans-Pacific Corp.*, 216 Cal.App.3d 324, 328 (1989). As the California Supreme Court has repeatedly stated, the trial court's good faith evaluation must "take into account the settling tortfeasor's potential liability for indemnity to a cotortfeasor, as well as the settling tortfeasor's potential liability to the plaintiff." *Far-West Fin. Corp., v. D&S Co.,* 46 Cal.3d 796, 816, fn.16 (1988); *Tech-Bilt,* supra, at 499-502.

Notably, in *Tech-Bilt*, the California Supreme Court found that the settlement at issue there was not in good faith, when the non-settling parties' claims were taken into consideration, because the settlement between the plaintiff and settling tortfeasor, for a dismissal for a waiver of costs, where there existed certain defenses the tortfeasor had to the plaintiff's claims, worked an injustice on the non-settling parties, where these defenses or issues were not in play. *Id.* There are very similar considerations here.

The Port and NASSCO have a specific contractual relationship that impacts the settlement, as one of the Port's main defenses to NASSCO's claims, and one of its own claims against NASSCO, is express indemnity arising out of NASSCO's leases with the Port (such that the Port argued it had no or minimal liability to NASSCO and NASSCO owes it indemnity). (Ex. X, Port's 3d Amended Cross-claims at ¶¶313-340). The Port is only paying NASSCO $1.4 million under the settlement, and NASSCO is not actually required to pay any money in settlement. (Ex. A to Nichols Decl., ¶2.1). Thus, NASSCO, by the settlement, is getting paid a modest amount by the Port to resolve NASSCO's claims against the Port, and the Port is in essence dismissing its claims against NASSCO for a waiver of costs. For this waiver of costs, NASSCO wants the non-settlor's claims against it dismissed. For $1.4 million, the Port wants the non-settlors' claims against it dismissed. But, the Port does not have the same express indemnity defenses/claims as to the non-

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settlors. NASSCO's request is wholly inequitable, and the Port's is not reflective of the value of the non-settlor's claims against the Port.

1. NASSCO is Not Required to Pay Any Money in the Settlement and It May Never Have To Pay a Dime.

NASSCO, by the settlement agreement, is not required to pay any money toward the remediation at the Site. Instead, all NASSCO is required to do, is be "responsible to" and "agree to perform" the work required at the South Yard, and "ensure" it is implemented and completed. (Ex. A to Nichols Decl., ¶2.1.) Then, NASSCO is being paid $1.4 million, for both past and future response costs, for the South Yard work by the Port. (Id. at ¶2.2). [15] NASSCO also plans to attempt to obtain further money from the City for the South remediation, which does not even take into account the approximate $6 million the City has already authorized to fund the South Yard work. (Mot. at p.6; Dec. of Ortlieb at ¶4).

Thus, it is entirely possible, that NASSCO might not ever pay a dime to actually fund the South Yard work. It has not agreed, by its settlement with the Port, to pay anything, even though it concedes that its responsibility is in the range of 37% (of the $24 million estimated for the South Yard cleanup).[16] (Mot. at p.9 fn. 7). Thus, NASSCO's own admission is that it should pay some $8.8 million toward the remediation in the South.

NASSCO's representations that it will perform the work, or ensure it is performed, certainly could be interpreted that it will perform the work with the money of others. From the tone of NASSCO's other good faith motion (re the Navy settlement) as to the City, and what it thinks the City's liability is, NASSCO's goal is clearly to minimize what it has to fund and use the funds others pay it first. [Doc. 367]. Because the agreement does not require NASSCO to pay

[15] By its settlement with the Navy, it is also being paid at least another $7 million for the South [Doc. 367]. NASSCO is not required to pay any money in that settlement either.

[16] The City believes NASSCO's liability is greater, especially taking into account successor liability, but for purposes of argument, even NASSCO states in its motion the 37% figure.

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anything itself, and the agreement's language is such that NASSCO might not ever have to pay anything if it gathers enough funds from others, NASSCO's request to find that its promises and non-payment are somehow a good faith settlement such that it deserves a contribution bar, is outrageous. It is wholly uncertain whether NASSCO will ever pay anything, and thus it is not possible to evaluate whether the "potential" amount it "might" pay one day in the future is fair or not. The potential amount it might pay might be nothing, or it might be more than that. Such a contingent settlement payment is not capable of evaluation for reasonableness, except from the standpoint that when one party accepts money from another, but pays nothing itself and then seeks a contribution bar based on the mere possibility it might one day have to pay some amount yet unknown, that is not reasonable.

What NASSCO is basically seeking to do is to bar the City's claims against it, to preclude the City from seeking its own response costs back from NASSCO or obtaining a fair allocation from the Court involving NASSCO. But NASSCO also wants to still pursue its claims against the City. (Ex. A to Nichols Decl., ¶¶5.2, 5.3). The result of what NASSCO seeks would be that it would be free to seek money from others, but no one would be able to seek money from it, when it has not paid a dime to resolve its liability and might never pay a dime. The Court should reject this ploy out of hand.

2. NASSCO's Liability is Significant.[17]

NASSCO's liability in this matter is significant. NASSCO argues conclusorily in its motion that this settlement was reasonable and within the ballpark of its potential liability, but it only glosses over how it has been regulated since the mid-1970s, or developed controls over the years, to support this. (Mot. at p.16-17). Upon review of the findings of the Regional Water Board, and

[17] The City discusses NASSCO's liability in more detail in its Opposition to NASSCO's motion for good faith settlement and contribution bar [title] filed concurrently herewith, and cross-references that opposition and incorporates the discussion on NASSCO's liability therein here, as though set forth in full.

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additional evidence, NASSCO's liability is revealed to be substantial.

"[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." *Torres v. Union Pacific R.R. Co.,* 157 Cal.App.3d 499, 509 (1984). Good faith requires that the price of a defendant's settlement bear some relationship to the merits and values of the case against that defendant. *Id.* It has long been recognized that the price of a settlement is the prime badge of its good or bad faith. *River Garden Farms, Inc. v. Superior Court, (Lambert)*, 26 Cal.App.3d 986, 996 (1972). Here, there is not any fixed price. The price might be nothing. And NASSCO is one of the primarily responsible parties.

NASSCO has been found by the Water Board to be a "discharger" under the Water Code as to the entire Shipyard Sediment Site and liable for contamination at the entire Site from stemming from its operations "since at least 1960." (Ex. 1, CAO, Sec. 2). Among the Board's findings are that NASSCO used abrasive grit containing metals, paints containing metals, and oils and lubricants, and generated such waste as well. (Id. at ¶2.3.4). Inspections at NASSCO as recently as the late 1980s and early 1990s revealed discharges of storm water runoff of blast waste grit and paint from dry docks into the Bay. (Id. at ¶¶2.3.5, 2.3.6; Exs. S-U, W). Elevated levels of metals were found in sampling conducted at the storm drains. (Ex. 2, TR at ¶2.3.5.3).

The Board also found that, prior to the early 1990s, all surface water runoff from NASSCO was discharged directly into the Bay. (*Id.*)

NASSCO was found by the Board to have also violated its NPDES permits and WDR requirements for discharges of oils and metals. (*Id.* at ¶¶2.6-2.8) Over fifty (50) pages of charts document the violations and exceedances. (*Id.*). Citizen complaints were made against NASSCO over the years, noting discharge of abrasive blast waste to the Bay on numerous occasions. (*Id.*) Employees also complained. (Ex. V). The Board also found such violations regularly. (Exs. S, T).

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Even though there were regulations during the bulk of the time that NASSCO operated, NASSCO apparently did not feel it important to adhere to them.

The City has also gathered evidence supporting that NASSCO has successor liability for other "South Yard" operators, dating back to at least the 1940s. (Ex. Q, R (purchase agreement, leases); Exs. 3, 4 (website, news article on NASSCO corporate history). During these years, as NASSCO concedes in its motion, there were not many, or any, regulations controlling discharges from the Bay-side industry into the Bay. (Mot. at p.16-17). Similarly, in the years NASSCO itself operated prior to the implementation of environmental regulations, in the 1960s and early 1970s, NASSCO also operated in such an atmosphere. Given its violations and discharge history AFTER regulations were enacted, NASSCO likely was responsible for even more significant releases, in the 15 years prior to that time. If NASSCO has liability for the other operators dating back to the 1940s, or before, that is another 20 plus years of unregulated discharges attributable to NASSCO.

Thus, there is a substantial body of evidence supporting that NASSCO's direct contributions to the contamination at the Shipyard Sediment Site from the decades of its own operations, and the operations of its predecessors, is significant. Certainly, it is worth something more than a promise to "ensure" the site is remediated and a possibility that it might have to pay something toward that remediation at some unknown point in the future, after it is able to pursue others. This is the epitome of gross disproportionality to NASSCO's estimated liability.

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Further, taking the Gore Factors into account,[18] the settlement is shown to be even MORE unfair. Almost each one of the Gore factors weighs against NASSCO under the facts which are known, including that NASSCO's contamination and liability is significant, and NASSCO knew of its various releases over time but did not correct them. NASSCO's acceptance of money from the Port, with no guarantee it will ever pay anything, is nowhere near reasonable nor even in the same universe (much less ballpark) as its liability.

3. The Port's Liability is More Significant Than Reflected by the Settlement Payment; There Was A Discount to NASSCO Due to the Port's Indemnity Claim.

The main issue with the amount paid by the Port is that the Port was found by the Board to be a primarily liable discharger at the Shipyard Sediment Site based on the discharges made by its tenants, including NASSCO, and this is one of the bases of the City's claims against the Port. (Ex. N, FAC at ¶¶115-119; City Presentation to Board, p.2-4; Ex. 5, TR, ¶11.2). But, the Port's payment to NASSCO clearly reflects a significant defense it has to NASSCO's claims, and is also reflects its own claims against NASSCO: that NASSCO owes it express indemnity. The City does not owe the Port indemnity and the Port has no such claims against the City. Also, NASSCO and the Port do not support with facts why the Port's settlement payment is fair and reasonable, other than that the Port claims NASSCO breached its leases and owes the Port indemnity. (Mot. at p. 16). The settlement is tinged by these claims and defenses which do not apply to others.

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[18] Many courts apply the so-called "Gore factors" to evaluate allocations, which are: [T]he ability of the parties to demonstrate that their contribution to the site can be distinguished; the amount of hazardous waste involved; the degree of toxicity of the hazardous waste involved; the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste; the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristic of such waste; and the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment. H.R. 7020, 126 Cong. Rec. 26,779, 26,781 (1980).
Id. (citing cases).

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H. There Has Not Been Sufficient Discovery to Date Against NASSCO or the Port to Properly Evaluate the Settlement.

A further issue is that insufficient discovery has been conducted against NASSCO or the Port on their liability, allocation or apportionment issues. While NASSCO and the Port claim that discovery has been significant, this is not the case. Phase II discovery was to be focused on allocation, and such only commenced at the end of August 2013. Due to the timing of the settlements between NASSCO and the Navy, and now the Port, and the Magistrate's Order staying discovery for parties who lodged settlement agreements, the City has been unable to conduct discovery against NASSCO, including getting responses to its Phase II discovery to NASSCO. (Ledger Decl. ¶¶2-10; Exs. A-M).

Also, neither NASSCO nor the Port have agreed to dismiss any of their cross-claims or counter-claims against any other party. Thus, it appears that NASSCO, in particular, has been using the Magistrate's discovery stay order as a shield, to prevent discovery against it (including that which would assist in opposing any good faith motion). This is unfair.

Should the Court be inclined to grant the motion in any respect, additional discovery should be permitted against NASSCO and the Port first to allow the City the ability to gather additional information on NASSCO's and the Port's liability for releases, their contribution and comparative culpability.

I. The Settlement Papers Provide No Allocation Between Liability or Damages Issues.

While NASSCO and the Port seek this Court's good faith approval of its settlement under CCP sections 877 and 877.6, they nowhere in the papers, or in the settlement agreement, attempt to allocate the settlement funds between liability issues or damages issues. The settlement payment is not even divided between past and future costs. (Ex. A to Nichols Decl., ¶2.2). In this multi-party, complex environmental case, this is necessary, especially because the settlement is between

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two defendants, and does not involve the plaintiff.

J. The Motion Was Not Served by Certified Mail as Required by the CCP

Under CCP section 877.6, it is a requirement that any party seeking a good faith settlement under this section "shall" serve its papers on all interested parties by certified mail. CCP §877.6(a)(2). That this is a federal case which e-files, does not excuse this specific requirement, as NASSCO and the Port seek the Court's determination that the settlement is in good faith under this California state law code provision. The City, at least, did not receive the papers by certified mail, but only by e-filing. (Ledger Decl. at ¶18). The failure to serve the papers by certified mail does not comply with the statute. Until they comply with the statute's pre-requisites, the Court cannot make any order in NASSCO's or the Port's favor under CCP section 877 or 877.6.

III. CONCLUSION

For all of the foregoing reasons, the City of San Diego respectfully requests that this Court deny NASSCO's motion for determination of good faith settlement.

Dated: December 6, 2013

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO Plaintiff, vs. NATIONAL STEEL & SHIPBUILDING COMPANY; et al., Defendants. AND RELATED COUNTER AND CROSS CLAIMS	Case No. 09-cv-2275-WQH (BGS) **PLAINTIFF CITY OF SAN DIEGO'S OPPOSITION TO DEFENDANT UNITED STATES NAVY'S MOTION FOR ORDER DETERMINING GOOD FAITH SETTLEMENT AND BARRING CLAIMS** Date: December 2, 2013 Time: 11:00 a.m. Courtroom: 14B (Annex) Judge: Honorable William Q. Hayes **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Cross-defendant United States Navy ("Navy") asks this Court to do something extraordinary: to enter an order barring the plaintiff in this case, the City of San Diego, from pursuing its cost recovery and other claims against the Navy based on its settlement only of cross-claims by and between the Navy and defendants National Steel & Shipbuilding Co. ("NASSCO") and BAE Systems San Diego Ship Repair, Inc./Southwest Marine, Inc. ("BAE"). Though the Navy concedes at pages 4-5 of its memorandum of points and authorities that it did not achieve a global settlement of this case, the Navy nevertheless seeks the benefit of a global settlement – an order barring all claims asserted by non-settling parties. That includes the plaintiff in this case, the City, to which it has not agreed to pay a single cent. In their coordinated good faith motion filings now before this Court, the Navy, NASSCO, and BAE brazenly attempt to leave the City of San Diego and its taxpayers "holding the bag" for an orphan share of potentially tens of millions of dollars of cleanup costs for many decades of operations by the Navy, NASSCO, and BAE that caused substantial contamination to the Shipyard Sediment Site.

Indeed, the settlement agreement between the Navy, NASSCO, and BAE on which the Navy's good faith motion is based expressly limits the "Covered matters" to claims asserted by and among the Navy, NASSCO, and BAE; costs incurred by the Navy, NASSCO and BAE; and past response costs owed by Navy. Thus, the settlement agreement expressly does not include claims against the Navy by the City, or the City's costs. The settlement between the Navy, NASSCO, and BAE therefore excludes much, if not most, of the Navy's liability for contamination of the Shipyard Sediment Site, both in terms of the scope of the matters covered by the settlement, and the time frame. This is because NASSCO claims herein that it only started operations at the South Yard in 1960, and that it has no successor liability for the prior operators (including the similarly named NASSCORP). Likewise, BAE contends that it only began operations at the North

Yard in 1979. However, the Navy's operations at the adjacent NAVSTA, and also at the South Yard, go back to the early 1920s, and the 1930s, respectively, and similarly go back to at least the 1930s in the North. In their own pending good faith motions and counterclaims, NASSCO and BAE attribute to the City all liability for contamination of the South Yard prior to 1960, and the North Yard prior to 1962, based on its role as landlord trustee of the property. The City also asserts claims against the Navy for its contamination of the City's MS4 and Chollas Creek, which cannot be part of the settlement between Navy, NASSCO, and BAE. By its motion, then, the Navy seeks to leave the City on the hook for the costs to remediate contamination the Navy caused in those locations before 1960 and 1962, respectively, and for its own contamination of the MS4 and Chollas Creek.

Additionally, the settlement amount paid to NASSCO and BAE by the Navy is not fair or reasonable nor within the ballpark of the Navy's potential liability. As explained by the City below, the Navy's liability is significant after nearly 100 years of extensive operations adjacent to San Diego Bay. The Navy's presentation in its motion as to why the settlement is in good faith is merely conclusory and fails to set forth facts and evidence demonstrating the settlement is fair and reasonable, especially in light of the evidence presented by the City in this motion as to the Navy's liability that is not within the scope of the covered matters under the settlement agreement, and the application of the Gore Factors. Furthermore, the Navy, NASSCO, and BAE have a longstanding business relationship whereby the Navy is one of NASSCO's and BAE's biggest customers. The danger of a collusive settlement is particularly apparent here, where NASSCO and BAE have incentives to assist the Navy in obtaining a settlement and contribution bar at a major discount, and then to help the Navy recoup the funds it is ostensibly paying in settlement from the City, to then be returned to the Navy via discounts on future services. The gross disproportionality between the scope of the matters covered by

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the settlement agreement and the scope of the bar order the Navy seeks suggests such that collusion may be more than theoretical. As is explained in the City's oppositions to the good faith motions of NASSCO and BAE filed herewith, those parties make clear their plan to pursue the City in this action to try to recover also the large orphan share of cleanup costs that their settlement with the Navy leaves unaddressed.

Finally, the Navy filed its good faith motion after doing its level best to prevent the City from conducting any of the allocation-based discovery it needs to properly evaluate and oppose the motion. Other than eight months of limited written discovery on enumerated issues, discovery was stayed between May 2011 and June 2013. When Phase II discovery commenced on August 26, 2013, the City immediately sought to meet and confer with the Navy regarding proposed topics for the depositions of its Rule 30(b)(6) witnesses; served a deposition notice for those witnesses; and promptly served interrogatories, requests for production of documents, and requests for admissions on the Navy. Unfortunately, the Navy stonewalled the City ever since. It first demanded that the City serve it with a deposition notice before it would identify witnesses and deposition dates, despite the plain language of the Court's order requiring that the meet and confer occur before notices were served. It then repeatedly requested excessive additional time, raised spurious objections, and upon issuance of the Magistrate's September 27, 2013 discovery stay order (which relieved it from further discovery only as to settled claims), it refused to respond to any of the City's pending Phase II written discovery and requests for a Rule 30(b)(6) deposition (even though no settlement agreement had yet been signed and the City's claims are not covered by the settlement). At a minimum, before there is any ruling on this motion, the City should be entitled to the discovery against the Navy it needs, and which it should have been allowed to pursue previously, to thoroughly oppose the motion.

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The City therefore respectfully requests that the Court enter an order denying the Navy's motion for order determining good faith settlement.

II. BACKGROUND

A. U.S. Navy Operations at the Site Since 1921

The United States Navy has provided shore support and pier-side berthing services to the U.S. Pacific fleet vessels at what is now known as Naval Base San Diego since in or about 1921. (Request for Judicial Notice ("RJN") Ex. 1, TR,[1] at 10-1, 10-4). During the 1920s and 1930s, the base was used for repair and maintenance of U.S. Navy Destroyer vessels, with documented activities including cleaning marine growth and rust, painting, and treating with oil or heavy coats of grease. (*Id.*) In the 1930s and 1940s, the base expanded to include property located within the present-day NASSCO leasehold, and in the 1940s the facility was renamed as U.S. Naval Repair Base San Diego "to reflect an expanding industrial capacity and changing role." (*Id.* at 10-5) After more than 5,000 ships were sent to the base for various maintenance and repairs between 1943 and 1945, the base was designated as Naval Station San Diego in 1946 with the primary mission of providing logistical support, ship repair and dry docking, to the U.S. Naval Fleet. (*Id.*)

The Regional Board has found that the Navy caused or permitted wastes to be discharged into San Diego Bay in numerous ways. It operated ship repair basins for disposal of hazardous and non-hazardous solid waste, including lubricants and oils from decommissioned ships. (*Id.* at 10-6) In the 1990s, lubricants, oils, metals, PCBs, and volatile and semi-volatile organic compounds were identified in the ship repair basins. (*Id.*) The Navy also operated a 22-acre triangular area known as Mole Pier, in which creosote-coated pier pilings, lumber, refuse concrete, waste paints, gasoline, solvents, oil, and diesel fuel were burned

[1] "TR" shall mean the Technical Report for Cleanup and Abatement Order No. R9-2012-0024 (Ex. 1 to RJN).

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between 1945 and 1972. (*Id.*) Approximately 500,000 gallons of diesel fuel were sprayed, burned, or buried in that area during the 1970s to decontaminate trucks and heavy equipment, which vehicles were then dunked into Paleta Creek. (*Id.* at 10-6 to 10-7) Chemical constituents identified at the Mole Pier Site included fuels, oils, solvents, paint sludges, metals, TPH, VOCs, SVOCs, dibutylin, monobutylin, tetrabutylin, and tributylin. (*Id.* at 10-7) The Navy also operated a salvage yard, Defense Property Disposal Office Storage Yard, firefighter training facility, PCB storage facility, material storage yard, dry docks, sandblast area, at each of which chemicals of concern were found. (*Id.* at 10-8 to 10-12).

The Board also found that the Navy caused contamination from its operation of a municipal separate storm sewer system (MS4) at Naval Base San Diego, through which it caused the discharge of wastes to Chollas Creek and the Bay. (Ex. 1, TR, at 10-1). These wastes included excessive concentrations of copper, lead, and zinc. (*Id.*) The Board also found that the Navy caused marine sediment and associated waste to be resuspended in the water column from shear forces generated by the thrust of propellers during ship movements at Naval Base San Diego. (*Id.*) The Naval Base San Diego leasehold also included a parcel of land within the current NASSCO leasehold from 1938 to 1956. (*Id.*) The Board found that the Navy caused wastes to be discharged into the Bay at that location when it conducted operations similar to a small boatyard, including use of solvents to clean and degrease vessel parts and surfaces, abrasive blasting and scraping for paint removal and surface preparations, metal plating, and surface finishing and painting. (*Id.*) The Navy characterized these discharges as "limited in scale" and "causing '… a relatively minimal contribution to elevated sediment contaminant concentrations'" at the Shipyard Sediment Site. (*Id.* at 10-12) (*See also* RJN, Ex. 2; Declaration of Matthew P. Nugent, Exs. X, Y, and Z (evidencing discharges by Navy)).

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B. The Navy's Refusal to Respond to the City's Deposition Notice and Written Discovery

On August 26, 2013, the first day it was permitted to do so under the Court's case management order, the City sent the Navy a letter requesting the depositions of its Rule 30(b)(6) witnesses, with a list of proposed topics. (Nugent Decl., ¶ 2.) During a meet and confer telephone conference on September 4, 2013, it was obvious the Navy not begun to identify its potential witnesses and available dates for their depositions. (*Id.*, ¶ 3.) Counsel for the Navy took the position that the City was required to serve a deposition notice before the Navy had any obligation even to start the process of identifying its witnesses and providing the City with deposition dates. (*Id.*) Though the Court's order specifically required the deposition topics to be provided and a meet-and-confer process to occur *before* a notice was served, the City nevertheless served a deposition notice with placeholder dates that contained the same topics that were in the initial letter, so as to try to move the process forward. (*Id.*, ¶ 4.) On August 27, 2013, the City also served the Navy with requests for admissions. (*Id.*, ¶ 5.) On September 27, 2013, the City served the Navy with second sets of interrogatories and requests for production of documents. (*Id.*)

During a second meet and confer telephone conversation on September 6, 2013, counsel for the City and the Navy discussed each of the proposed deposition topics, and the City agreed to narrow the scope of the topics as requested by the Navy and to serve an amended notice. (*Id.*, ¶ 6.) The City served its first amended deposition notice on September 11, 2013. (*Id.*, ¶ 7.) In an accompanying letter, the City reminded the Navy that it was under time constraints to conduct discovery and that it had purposefully initiated the deposition meet and confer process at the earliest juncture, so that it could move in an expeditious fashion toward accomplishing the necessary discovery on time. (*Id.*) The City requested that the Navy also move expeditiously to evaluate its witnesses and provide the City with

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workable dates and locations for its witnesses' depositions. (*Id.*)

Through a series of letters over the ensuing several weeks, the Navy then stonewalled on providing any witness information or dates, relying on various excuses such as the spurious arguments that the City had expanded the scope of the deposition notice by changing the dates in the topics to "since 1920" instead of "1921," and that the Navy was required to appear only for a single day of deposition limited to seven hours. (*Id.*, ¶ 8.) The Navy made it clear that it did not intend even to begin the process of identifying its witnesses and dates until further meet-and-confer sessions had taken place, and then only after it had sought a protective order – a process that would take months. (*Id.*)

After the City immediately pointed out the fallacies in those and similar arguments in a letter dated September 12, 2013, and observed that the Navy was engaged in obvious obstruction of the discovery process, the Navy began to take a different tack. (*Id.*, ¶ 9.) It then excused its refusal to identify its witnesses and provide available deposition dates based first on the Navy Yard shootings, then on the government shutdown, and then on its pending settlement with NASSCO and BAE and improper interpretations of the Court's September 27 order. (*Id.*) Though a brief delay in light of the Navy Yard shootings was understandable, by its own admission, the Navy's counsel's first conference with Navy representatives to discuss the City's deposition notice was not scheduled to occur until September 30, 2013 – 35 days after the City's first meet-and-confer letter. (*Id.*, ¶ 11.) Despite repeated follow-ups by the City, the Navy never provided the City with the names or available dates for any of its witnesses' depositions, and never responded to any of the City's Phase II written discovery. (*Id.*, ¶¶ 10-18.) It refuses to do so on the basis that its pending good faith motion protects it from discovery, even though by the terms of the settlement, the Navy does not dismiss its claims against the City. (*Id.*, ¶ 14.) Moreover, while steadfastly obstructing the City's discovery efforts, the Navy has repeatedly demanded that the City respond to its own written

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discovery directed to the City, thus using the September 27 order as both a shield and a sword. (*Id.*, ¶¶ 16-17.)

III. LEGAL ARGUMENT

A. Under The Circumstances, NASSCO and BAE Do Not Qualify as "Plaintiffs" or "Claimants" to Enable the Navy to Use the Provisions of UCFA or the CCP to Bar Any Claims Against it.

In order for a settlement to be subject to the provisions of either the UCFA[2] or the CCP,[3] it must be a "…release, covenant not to sue, or similar agreement entered into by a claimant and a person liable…" [UCFA] or a "…settlement entered into by the plaintiff or claimant and one or more alleged tortfeasors or co-obligors…." [CCP]. UCFA, §6; CCP §877.6 (emphasis added).

Virtually every case which employs the UCFA, and specifically those which do so in the CERCLA context, involves settlements between the plaintiff and one or more defendants. More rarely, the situation is a settlement between a third party plaintiff and a third party defendant where the latter was not sued by the plaintiff. Each federal or CERCLA case cited by the Navy in its motion papers, for example, was in these contexts (or, did not even discuss a specific settlement scenario).[4] None of the federal or CERCLA cases cited by the Navy involved a situation of a

[2] "UCFA" shall mean the Uniform Comparative Fault Act.

[3] "CCP" shall mean the California Code of Civil Procedure.

[4] *Acme Fill Corp. v. Althin CD Medical, Inc.*, 1995 WL 822664 (N.D. Cal. 1995) (plaintiff and defendant settlement); *Adobe Lumber v. Hellmann*, 2009 WL 256553 (E.D. Cal. 2009) (plaintiff and defendant settlement); *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F.Supp. 219 (N.D. Ill. 1989) (plaintiff and defendant settlement); *Ameripride Srvs., Inc. v. Valley Indust. Srvs., Inc.*, 2007 WL 1946635 (E.D.Cal. 2007) (plaintiff and defendant settlement); *City of Emeryville v. Robinson*, 621 F.3d 1251 (9th Cir. 2010) (plaintiff and defendant settlement); *Comerica Bank-Detroit v. Allen Indus., Inc.*,769 F. Supp. 1408 (E.D. Mich. 1991) (plaintiff and defendant settlement and state government and defendant settlement); *Hillsborough County v. A&E Rd. Oiling Srvs*., 853 F.Supp. 1402 (M.D. Fla. 1994) (plaintiff and defendant settlement); *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019 (D. Mass. 1989) (plaintiff and defendant settlement); *In re Dant & Russell, Inc.*, 951 F.2d 246 (9th Cir. 1991) (no specific settlement scenario); *In re Heritage Bond Litigation*, 546 F.3d 667 (9th Cir. 2008); *Lewis v. Russell*, 2012 WL 5471824 (E.D. Cal. 2012) (plaintiff and defendant settlement); *Linney v. Alaska Cellular P'ship*, 1997 WL 450064 (N.D. Cal. 1997), aff'd, 151 F.3d 1234 (9th Cir. 1998); *New York v. Solvent Chem. Co.*, 984 F.Supp. 160 (W.D.N.Y. 1997) (plaintiff and defendant settlement); *Officers for Justice v. Civil Srvs. Comm'n*, 688 F.2d 615 (9th Cir. 1982) (plaintiff and defendant settlement); *T.H. Agric. & Nutrition Co. v. Aceto Chem. Co.*, 884 F.Supp. 357 (E.D. Cal. 1995) (plaintiff and defendant settlement); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993) (plaintiff and defendant settlement); *U.S. v. Acorn Eng'g Co.*, 221 F.R.D. 530 (C.D. Cal. 2004) (no specific settlement scenario); *U.S. v. SCA Srvs. Of Ind*., 827 F.Supp. 526 (N.D. Ind. 1993) (third party plaintiff and third party defendant settlement where third party defendant not sued by plaintiff directly).

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partial settlement between two defendants, both sued by the plaintiff, who also had cross-claims against each other that were the subject of the settlement.

This situation before the Court now is novel: the Navy, a defendant/cross-defendant, has entered into a settlement with NASSCO and BAE, defendants/cross-claimants, who are undisputedly not the plaintiff. All are parties sued in the main action by the plaintiff City, and are defendants in the main action; and all have cross-claims against each other, as well as against various other parties, including the City. But the City, the plaintiff, is not a party to this settlement.

At least one court has found that a cross-claimant, who is not the actual plaintiff in the action, who has entered into a settlement with a cross-defendant who was sued by the actual plaintiff as well, does not qualify as a "plaintiff or claimant" in a contribution bar context to permit such a bar of any claims.

In *Arizona Pipeline Co. v. Superior Court,* 22 Cal.App.4th 33 (1994), the court evaluated the settlements among the defendants, which were claimed to work detriment to one non-settling defendant, and did not involve the plaintiffs who had initiated the main litigation. The court held that CCP 877.6 did not apply to this settlement situation, where the parties to the settlement were joint tortfeasors asserting various contribution and indemnity claims against each other:

> **In the context of tort litigation, the "plaintiff or other claimant" refers to the injured party claimant, and does not include joint tortfeasors named as cross-complainants and cross-defendants in cross-complaints seeking contribution or indemnity….[w]here the only complainants are joint tortfeasors asserting various indemnity and contribution claims against each other, the statute does not apply**. To hold otherwise would be to rewrite the statute to apply to settlements entered into not only by the tort plaintiff or other claimant and one or more alleged joint tortfeasors, but also to settlements entered into only among and between some joint tortfeasors.

Id. at 42 (emphasis added).

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The *Arizona Pipeline* court also found that the policy of promoting settlements was not met in this context, because there is no assurance that the other main policy established by section 877.6, equitable cost sharing among the parties at fault, would be served. Because if the non-settling defendants cannot get a reduction in their ultimate liability to the plaintiff, but they are still barred from asserting their cross-claims against the settling defendants, this works an inequity and no such benefit is available, "because the tort plaintiffs, not being parties to the settlements among the joint tortfeasors, are not bound by the settlements." *Id.* at 42-44 (quote at 44).

Other courts have agreed with the logic of *Arizona Pipeline*, even though the specific concerns of that case were not present in their situations. *See, e.g., Wilshire Ins. Co. v. Tuff Boy Holding, Inc.,* 86 Cal.App.4th 627, 642-43 (2001). Even other courts have noted that there are problems in settling multiparty cases and obtaining court approval of these settlements, as not all cases fit the neat "one defendant settles with one plaintiff" situation. Sometimes, there is uncertainty because the settlement covers causes of action with different damages, or the settled claims are for separate injuries, not all of which would be attributable to the conduct of the remaining defendants/parties. *See, e.g., Alcal Roofing & Insulation v. Superior Court,* 8 Cal.App.4th 1121, 1124 (1992). Yet other courts, including the California Supreme Court, have inferred that the legislative history and background of section 877.6 supports that this statute was intended to apply to only settlements between a plaintiff and a defendant/alleged tortfeasor. *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal.3d 488, 493, 499 (1985) ("…the intent and policies underlying section 877.6 required that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery…the allocation of settlement proceeds among plaintiffs…") (emphasis added); *Far West Financial Corp. v. D&S Co.*, 46 Cal.3d 796, 800 (1988) (analyzing the background and legislative history of Code Civ. Proc., §877.6, subd.(c), regarding

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good faith settlements by alleged tortfeasors with plaintiffs).

The UCFA, section 6, uses language similar to the CCP ("claimant" and "person liable" versus "plaintiff or claimant" and "tortfeasors"), and draws the same distinction between the "claimant" and the "person liable" as those parties entering the agreement as does the CCP language, as to who is entitled to seek the protections of that provision ["…entered into by a claimant and a person liable…."]. UCFA, §6. Thus, the *Arizona Pipeline* logic should apply equally to the UCFA. This is supported by the UCFA, section 6 comments, which illustrate examples of the application of the provision, only using scenarios wherein there is a settlement involving the plaintiff. UCFA, §6, *comments*.

The same concerns are raised with the UCFA language as those voiced by the *Arizona Pipeline* court: a settlement among tortfeasor defendants, which does not involve the plaintiff, results in the non-settling parties not getting any reduction in liability or credit as to the plaintiff's claims, but only as to the cross-claimant's claims. Yet, the non-settlors would still have their claims barred against the settling defendant/cross-defendant, which works an inequity.

This is precisely the problem with the settlement presented to the Court in this matter. The plaintiff, the City, which initiated this action, is not a party to the settlement. Should the Court bar the non-settling parties' cost recovery, contribution and indemnity cross-claims (including the City's such claims) against the Navy, this works an injustice. The non-settling parties are getting no benefit of any reduction off of the City's claims under state law; and under the UCFA, as to the CERCLA claims, the proportionate liability being measured is only the Navy's liability to NASSCO and BAE, not to the City, which leaves a gap. And, the parties would face difficulty in filling that gap, to try to present the fuller picture of the Navy's liability at trial, as they will see their claims against the Navy barred should the Court grant the order requested.

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What the Navy seeks is the Court's approval of only a partial settlement between tortfeasors/persons liable, not involving the plaintiff, and then a bar of the remaining claims against the Navy by the non-settling parties despite this limited context of the settlement. This type of lopsided and biased relief from contribution and indemnity claims for a settling party was not the intent of either UCFA section 6 nor CCP section 877.6. NASSCO and BAE, as defendants and joint tortfeasors, should not qualify as "claimants" under the logic of *Arizona Pipeline* to qualify their settlement with the Navy for a contribution bar or good faith finding.

B. If it Determines that NASSCO and BAE Do Qualify as "Claimants," the Court Must Decide Whether the Uniform Comparative Fault Act or Code of Civil Procedure Section 877.6 Controls this Analysis.

Should this Court decide that NASSCO and BAE qualify as "claimants," the Court must then preliminarily determine whether the UCFA or the CCP (or some hybrid of both) apply to this settlement.

The Navy argues on the one hand that the UCFA should control the analysis of this settlement and its effect, as this is a CERCLA case and multiple Ninth Circuit courts have applied the UCFA to both the settlement of federal CERCLA claims and any accompanying state law claims. (Mot. at p.11-12). The City does not dispute that there is authority so holding that the UCFA can or should be used in the CERCLA action context as to the CERCLA claims. If this approach is applied, then the UCFA would, generally speaking, work to reduce the "claimant's" claims[5] by the percentage of the Navy's liability or fault, to be ultimately determined at trial, not the exact settlement amount. This is a "proportionate share" approach. This approach works to ensure some fairness to the non-settling parties, in that were a settlement figure in reality too low, the claimant, who accepted the settlement amount to resolve its claims, would bear the

[5] As discussed in more detail under subsection C, below, this would be a reduction of the claims of NASSCO and BAE, as only NASSCO and BAE would ostensibly qualify as a "claimant" to use the UCFA as pertains to their own cross -claims.

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risk at trial that if there was a greater percentage of liability assigned to the settling party than that actually paid, it would have to, in effect, still discount its claims by the percentage amount and not just the actual amount of the settlement. UCFA, §6.

However, the Navy also asks this Court to find that its settlement with NASSCO and BAE is in "good faith" under CCP section 877.6. (Mot. at p.12-14). The approach used by the CCP, however, is different than the UCFA approach. The CCP uses a "pro tanto" approach, where the amount the settling party actually paid is offset directly in amount from the claimant's claim. *Arbuthnot v. Relocation Realty Service Corp.*, 227 Cal.App.3d 682, 687 (1991). In this situation, there is no ability of non-settling parties to try to prove at trial that the settling party paid too little or that its liability is a much greater percentage.

Moreover, in using this approach, it is a requirement that the offset under section 877.6 be fully allocated between liability and damages issues in order to obtain a good faith determination, to ensure that the settlement was reached in a sufficiently adversarial manner. *Tech-Bilt, supra,* at 499; *Arizona Pipeline, supra,* at 46. Notably, nowhere in the motion papers or the settlement agreement between the Navy and NASSCO and BAE is this done. (*See* further discussion of this issue at section III.H, *infra*). Additionally, an evaluation of whether the settlement is, in reality, in "good faith," invoking a detailed analysis of all of the "*Tech-Bilt*" factors,[6] is also required.

As such, this Court must decide whether the UCFA applies to this settlement, or whether the CCP applies, or both, so that the non-settling parties can properly ascertain their rights, as well as the impact, of the settlement.

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[6] The factors in evaluating whether a settlement is in good faith under CCP section 877.7 under the California Supreme Court's opinion in *Tech-Bilt, supra,* at 499.

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C. If the Court Decides That NASSCO and BAE Qualify as "Claimants," the Only Claims at Issue Are NASSCO's and BAE's Cross-Claims, as These Are the Only Claims on Which NASSCO and BAE Could Possibly Qualify as "Claimants" to Allow The Use of UCFA Section 6 or CCP 877.6; and the Definition of "Covered Matters" Limits the Scope of the Settlement to Just Claims Between the Navy, NASSCO, and BAE, Such that Claims Outside this Context Must Survive.

If the Court determines that NASSCO and BAE qualify as "plaintiffs" or "claimants," then the Court must find that NASSCO and BAE only qualify as such because of their cross-claims in this matter. NASSCO and BAE are clearly not the plaintiffs. So, if NASSCO and BAE are "claimants," then they hold that designation only because of their own claims that they have brought against the other parties, in response to the suit from the plaintiff City. And, specifically, it is only by NASSCO's and BAE's cross-claims against the Navy, that they can qualify as "claimants" under either UCFA section 6 or CCP section 877.6 for the purposes of this settlement, given the language of these provisions in discussing the nature of the settlement at issue and the claims at issue:

> **UCFA Section 6**: "A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2."
>
> **CCP Section 877.6:** "[a]ny party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors…." and "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor…."

It is clear that the claims at issue are those brought by the "claimants" (NASSCO and BAE) against the Navy (who they are releasing from those claims). There are also other parties in the litigation that NASSCO and BAE sued as well (i.e., City, Port, Campbell, SDG&E), who are not being released from NASSCO's and BAE's claims against them by this settlement. But while the parties aside

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from the Navy are not released from NASSCO's and BAE's claims (and this is clear from the terms of the settlement agreement at paragraphs 4.1, 4.2(b), 4.2(c)), NASSCO's and BAE's claims against those non-released parties ARE reduced by the amount of the Navy's proportionate fault (or, if the CCP is used, a direct deduction from the amount of NASSCO's and BAE's claims is made in the amount the Navy paid). Critically, it is not the plaintiff City's claims which are so reduced, as the City is not the "plaintiff or claimant" in this settlement scenario; it is NASSCO's and BAE's, and it is important this be kept in mind. This is the critical distinction and problem which arises from this defendant—defendant settlement, as discussed more fully in Section II A.[7]

Thus, to the extent the non-settling parties have contribution and indemnity based claims against the Navy that derive from NASSCO's and BAE's claims against the Navy, which are what comprises the "Covered matters" of the settlement, those claims could potentially be subject to a bar order. However, no claims outside of this context should be subject to a bar order, as those are not the claims that are being settled. NASSCO, BAE, and the Navy have chosen to settle the claims between themselves only, and this does not settle the full universe of the plaintiff's claims nor the claims brought against it by any other party:

> "Covered matters" shall mean (1) any and all claims that were, that were, that could have been, that could now be, or that could hereafter be asserted by any of the Settling Parties against any of the Settling Parties…..and, (2) any and all costs incurred by the Settling Parties….

(Ex. A to Spear Decl., Settlement Agreement, ¶ 1.5) (emphasis added).

To the extent there are separate claims brought against the Navy by the City, the Port, Campbell, SDG&E, or other parties, those claims cannot be pulled into the context of any bar order or good faith finding under any circumstance, because

[7] That is, the parties who are not settling are not allowed to take the proportionate share of the Navy's fault or direct deduction of the Navy's payment off of the plaintiff's claims, to whom they remain ultimately liable, but only off of NASSCO's and BAE's claims, which leaves a gap and an inequity which supports that this settlement should not be subject to any bar order at all.

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they are not under the "Covered matters" of the settlement by definition.

Additionally, there are also specific claims and issues, in quite some number, as discussed directly below, which cannot be subject to any bar order. And, as the Navy does not dismiss its own cross-claims against the non-settling parties either, these also cannot be subject to any bar order and makes any bar order virtually impossible.

D. The Navy Does Not Release or Dismiss Its Counter-or Cross-claims Against Other Parties As Part of the Settlement and Thus There Should Be No Bar Order.

Notably, in its settlement agreement with NASSCO and BAE, the Navy does not agree to release or to dismiss its cross- or counter-claims against any parties other than NASSCO and BAE. In fact, it expressly reserves its rights to pursue such claims. (Ex. A to Spear Decl., Settlement Agreement, ¶¶ 1.8, 4.1, 6.3). The agreement expressly allows the Navy, NASSCO and BAE the ability to seek contribution against third parties even though the Navy seeks a contribution bar of claims against it. (*Id.*, ¶ 4.2(b)) This is reiterated as to NASSCO and BAE in Paragraph 4.2(c). Paragraph 6.3 also makes clear that Navy, NASSCO, and BAE are only dismissing their claims among each other, not as to others.

As the Navy does not release or dismiss these claims, and still reserves the right to prosecute them against the non-settling parties for contribution (i.e., for the Navy to see if it can recoup any of the money it paid to NASSCO and BAE), there can be no reciprocal contribution bar against the Navy. If the Navy can still pursue its claims, the non-settling parties can still present their defenses, and as such should be able to present their claims, and contribution/allocation among the Navy and the non-settling parties will still be a live issue for adjudication at trial. Simply put, a contribution bar was not intended to be issued in this context, where the settling tortfeasor (the Navy) is not really buying its peace from the litigation, and is still intending to pursue its cross-claims.

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Not only are the Covered matters per the agreement only the claims between Navy, NASSCO, and BAE; costs incurred by the Navy, NASSCO and BAE; and past response costs owed by Navy, which do not expressly include claims against the Navy by the City. The future response costs the Navy is paying for are only those costs being paid by NASSCO and BAE, or State oversight costs. They do not include response costs incurred by others, like the City. Likewise, the past response costs are also only those that NASSCO and BAE have paid, not others.

E. There Are Multiple Matters That Clearly Fall Outside the "Covered Matters" Under the Settlement Agreement and Multiple Claims That Cannot Be Barred by this Settlement.

Notwithstanding the City's argument, in Section III.C, *supra*, that the Covered Matters by its terms are limited to just claims by and between the Navy, NASSCO, and BAE and thus do not impact the non-settling parties claims whatsoever, the City also discusses below specific issues and claims which cannot fall under the Settlement Agreement, under any circumstance.

1. Cost-Recovery Claims Against the Navy

Claims which are not contribution or equitable indemnity claims, but instead are affirmative claims for damages, are explicitly not subject to the UCFA. *See In re Heritage Bond Litigation*, 546 F.3d 667 (9th Cir. 2008) (finding a bar order impermissibly broad in covering potential non-contribution claims). Moreover, affirmative/independent claims (non-contribution claims) are also not subject to any good faith finding or bar under CCP section 877.6. *See, e.g., Cal-Jones Properties v. Evans Pacific Corp.,* 216 Cal.App.3d 324, 328 (1989).

Contrary to the Navy's suggestion at page 14 of its motion that the City has "conceded that it initiated this litigation as a 'contribution action,'" in fact, the City's First Amended Complaint asserts causes of action against the Navy for cost recovery under CERCLA, declaratory relief under CERCLA, and cost recovery

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under California Water Code section 13304. (Nugent Decl., Ex. S,[8] Plaintiff's First Amended Complaint ("FAC") at pp. 31-36). While the Navy suggests that the City does not have "any valid claims for damages from any party to the litigation," the City in fact asserts claims arising from its role as Trustee of the tidelands and landlord to various parties in the 1950s, which cannot be subject to a bar order under UCFA. (Ex. S, FAC at ¶¶ 109-113). The City has expended funds towards the investigation at the Site, and has approved further expenditure of funds for the remediation at the Site. (Dec. of Frederick M. Ortlieb, ¶ 4). These are cost recovery claims under statutes which provide for full recovery of damages irrespective of contributory fault: CERCLA is a joint and several liability and strict liability statute, and the Water Code provides for recovery against any liable person by any governmental agency that incurs cleanup costs. UCFA, Sec. 1, *comment* ("A tort action based on violation of a statute is within the coverage of the Act if the conduct comes within the definition of fault and unless the statute is construed as intended to provide for recovery of full damage irrespective of contributory fault"); *U.S. v. Atlantic Research Corp.,* 551 U.S. 128, 140 (2007)(CERCLA contribution settlement bars do not impact cost recovery claims); Cal. Water Code §13304(a), (c)(1). Thus, as the City brings express cost recovery claims and has incurred damages in connection with those claims, those claims are not subject to any bar order.

2. The City's Claims against the Navy Relating to the Navy's Contamination/Releases to the City's MS4 System

There are also factual differences between the City's claims against the Navy and NASSCO's and BAE's claims against the Navy which do not merit a bar order precluding claims of the City that do not fall within the purview of the settlement.

[8] References to lettered exhibits are to exhibits to the Nugent Declaration unless otherwise noted.

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NASSCO's and BAE's claims against the Navy allege that the Navy caused contamination at the NASSCO and BAE leaseholds by virtue of having its vessels serviced there and conducting some of such repairs using Navy personnel at the NASSCO and BAE leaseholds. (Ex. T, Doc. 14, NASSCO Cross-Claims against Navy, at ¶¶ 18-39; Ex. U, Doc. 300, Southwest Marine & BAE Supplemental and Amended Cross-Claims against Navy, at ¶¶ 23-24). The City's claims, however, allege not only that the Navy's operations caused contamination of the entire Shipyard Sediment Site, but also allege that the Navy made direct discharges, in various fashions, which ultimately went into the City's MS4 system. (Ex. B, FAC at ¶¶109-111). The City is being counterclaimed against by multiple parties, including NASSCO and BAE, for its MS4 system discharges, as a contributing factor to the contamination. (*See, e.g.,* Ex. V, NASSCO Counterclaims, ¶¶ 303-323; Ex. W, BAE Amended Counterclaims, ¶¶15-17, 25).

Indeed, the settlement agreement says that NASSCO is not responsible for any MS4 measures in certain paragraphs of the CAO,[9] which confirms that the City's claims against the Navy regarding the MS4 are not part of this agreement. (Ex. A to Spear Decl., ¶3.5). The Navy's potential liability to the City as to this specific mode of release—contaminants which got into the City's MS4—cannot be a part of any settlement with NASSCO or BAE and no bar order can be issued covering this specific matter, which is undisputedly an issue and claim discrete to the City and the Navy.

3. The City's Claims against Navy For Pre-1962 Navy Activities & Releases.

As discussed both *supra* and *infra* in more detail, the settlement does not appear to encompass Navy's releases in the North pre-BAE or in the South pre-NASSCO, as these entities' cross-claims do not cover such and these are what are

[9] "CAO" shall mean Cleanup & Abatement Order No. R9-2012-0024 (Ex. 1 to RJN).

being settled. (*See* Secs. II.E.2., II.F, II.H.). Thus, the City's claims against Navy which do cover such releases cannot be barred by the settlement.

F. The Settlement Is Not Fair or Reasonable under the UCFA, nor is it Within the Ballpark of the Navy's Potential Liability under the CCP.

The Navy acknowledges in its motion that the court must evaluate the settlement for reasonableness, fairness and adequacy, both under the UCFA and the CCP. (Mot. at p. 13; citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *Tech-Bilt, supra,* at 499. Additionally, under the CCP, in determining the good faith of a settlement, the court must consider "each of the plaintiff's claims and possible recoveries and the potential liabilities of the joint tortfeasors." *Cal-Jones Properties v. Evans-Pacific Corp.*, 216 Cal.App.3d 324, 328 (1989). As the California Supreme Court has repeatedly stated, the trial court's good faith evaluation must "take into account the settling tortfeasor's potential liability for indemnity to a cotortfeasor, as well as the settling tortfeasor's potential liability to the plaintiff." *Far-West Fin. Corp., v. D&S Co.,* 46 Cal.3d 796, 816, fn.16 (1988); *Tech-Bilt, supra*, at 499-502. Notably, in *Tech-Bilt*, the California Supreme Court found that the settlement was not in good faith, when the non-settling parties' claims were taken into consideration, because the settlement between the plaintiff and settling tortfeasor, where there existed certain defenses the tortfeasor had to the plaintiff's claims, worked an injustice on the non-settling parties where these defenses or issues were not in play. *Id.* There are similar considerations here.

The Navy argues conclusorily in its motion that its settlement is reasonable and within the ballpark of its potential liability, but does not specify its liability *to whom*. It is strongly implied, by the nature of the settlement, that it is its liability to NASSCO and BAE, as the Navy makes it clear that it does not consider its settlement to include any consideration as to the plaintiff City's claims, by baldly stating that the City has no valid claim for damages. (Mot. at p. 13). Importantly,

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the Navy misunderstands the burden of proof under *Tech-Bilt*. The City's burden to establish that the settlement is "outside the ballpark" can arise only when the Navy has provided the Court with sufficient facts to locate the ballpark. The Navy sets forth no facts supporting that the settlement is within its ballpark liability to NASSCO, BAE, or anyone else. (Mot. at p.14-16). The Navy ignores that the City has agreed to pay $6,451,000.00 toward cleanup of the South portion of the Shipyard Sediment Site. (Ortlieb Decl., ¶ 4). The Navy also submits no evidence of how much NASSCO or BAE have agreed to fund, and in fact they do not agree to fund any specific amount in the settlement. Though the amount paid by the Navy in settlement is significant, the Navy has simply done nothing to establish the "ballpark" of its liability. The Court cannot judge whether the Navy's settlement payments are within the ballpark of its liability when the Navy has provided it no information regarding how much NASSCO, BAE, the City, and others are contributing – and especially when the Navy falsely suggests the City is paying nothing.

Moreover, "a defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be." *Torres v. Union Pacific R.R. Co.,* 157 Cal.App.3d 499, 509 (1984). Good faith requires that the price of a defendant's settlement bear some relationship to the merits and values of the case against that defendant. *Id.* It has long been recognized that the price of a settlement is the prime badge of its good or bad faith. *River Garden Farms, Inc. v. Superior Court*, *(Lambert)*, 26 Cal.App.3d 986, 996 (1972).

Here, even based on the record at bar (which is far from complete due to the state of discovery, discussed more in section II.B, *supra),* the Navy's liability may be far more extensive than the amount it has paid. As set forth above, the Navy has already been found by the Water Board to be a "discharger" under the Water Code as to the entire Shipyard Sediment Site and liable for contamination at the

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entire Site (without distinction between the North and South of the Site) by metals, PCBs (polychlorinated biphenyls), PAHs (poly-aromatic hydrocarbons) and total petroleum hydrocarbons (TPH).

There is a substantial body of evidence supporting that the Navy's contribution to the contamination at the Shipyard Sediment Site from its nearly 100 years of operations is quite significant, and certainly, occurred during a period (the early 1920s to 1960, as to the South Yard and the early 1920s to 1962, as to the North Yard) not within the scope of the settlement agreement, as discussed in detail in Section II.A., *supra*. This era of releases and liability does not appear to be covered by the Navy's settlement with NASSCO and BAE due to the scope of their cross-claims. Certainly, nothing in the motion or the Settlement Agreement attempts to allocate the amounts the Navy is paying to its activities pre-NASSCO and pre-BAE versus during those entities' tenures at the Site. Though the amount paid by the Navy in settlement is significant, because it appears to be allocated only to a portion of the Navy's overall liability (as it is expressly limited to cross-claims asserted by NASSCO and BAE), the Court has insufficient evidence to determine whether the amount of the settlement is within the ballpark of the Navy's liability for the entire period of 1921 to the present, and for all portions of the Shipyard Sediment Site.

Further, taking the Gore Factors into account,[10] the settlement is shown to be even more unfair. Virtually every one of the Gore factors weighs against the Navy under the facts that are known: the Navy's contribution is significant, probably the

[10] Many courts apply the so-called "Gore factors" to evaluate allocations, which are: [T]he ability of the parties to demonstrate that their contribution to the site can be distinguished; the amount of hazardous waste involved; the degree of toxicity of the hazardous waste involved; the degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste; the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristic of such waste; and the degree of cooperation by the parties with federal, state or local officials to prevent any harm to the public health or the environment. H.R. 7020, 126 Cong. Rec. 26,779, 26,781 (1980).
Id. (citing cases). Other factors are also relevant to the issue of equitable allocation, including "the financial resources of the liable parties; the extent of the benefit that the parties received from the hazardous waste disposal practices; the extent of the parties; knowledge and awareness of the environmental contamination of the site; the efforts made, if any, to prevent environmental harm and the efforts made to settle the case." *Id.* (citing cases).

greatest of all defendants, due to the timeframe it is associated with the Site; the Navy is directly tied to significant contamination from its operations; and there is evidence that the Navy knew of the contamination and other releases but did not respond timely. The Navy also clearly has significant financial resources, and certainly received a benefit from how it has operated at Naval Base San Diego since the early 1920s, and at the Site since at least the 1930s. In the face of this evidence, especially where more evidence supporting the Navy's liability and culpability would be forthcoming from further discovery into allocation issues, the Navy's settlement simply is not reasonable or in the ballpark of its liability, as it leaves decades of polluting activities unaccounted for.

G. <u>There Has Not Been Sufficient Discovery to Date Against the Navy to Properly Evaluate the Settlement.</u>

While the City believes that the available evidence and findings cited above supports that the settlement amount paid by the Navy is not reasonable and not within the ballpark of its potential liability under *Tech-Bilt*, a further issue is that insufficient discovery has been conducted against the Navy on its liability, allocation or apportionment issues. Phase II discovery was to be focused on allocation, and such only commenced at the end of August 2013. As set forth in Section II.B, *supra*, the City has been unable to conduct discovery against the Navy, including getting responses to its Phase II discovery and deposition notice to the Navy. The Navy has been using the Magistrate's discovery stay order as a shield, to prevent discovery against it (including that which would assist in opposing any good faith motion), but all the while not really "buying its peace" in this litigation by its partial settlement with NASSCO and BAE, and intending to still pursue its own contribution claims and not acknowledging that certain claims fall outside of its settlement with NASSCO and BAE (as even supported by the Settlement Agreement itself). This is patently unfair.

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The Navy has prevented any Phase II discovery against it, by the City and others, by using its partial settlement with NASSCO and BAE and the discovery stay order to avoid the discovery obligations it really had all along: knowing its settlement was only partial, did not cover certain claims, that certain claims could not be subject to a contribution bar, and most critically, knowing it would not dismiss its cross- or counterclaims. Should the Court be inclined to grant the motion in any respect, additional discovery should be permitted against the Navy to allow the City to gather additional information on the Navy's liability for releases, its contribution of contaminants, and its comparative culpability.

H. The Settlement Papers Provide No Allocation Between Liability or Damages Issues.

Notably, while the Navy seeks this Court's good faith approval of its settlement under CCP sections 877 and 877.6, nowhere in its papers, or settlement agreement, does it attempt to allocate the settlement funds between liability issues or damages issues. In this multi-party complex environmental case, this is necessary, especially because the settlement is between defendants (NASSCO, BAE and the Navy), and does not involve the plaintiff.

As to liability issues, it is disputed whether there exists any "orphan share" liability in both the South and the North. In the North, BAE claims that its operations started in 1979, and other shipyards, SDG&E, and the City and Port, are responsible as to the timeframe prior. BAE's claims against Navy relate only to NAVSTA and the work Navy did for BAE. (Ex. U, BAE Cross-claims at ¶¶21-26). As to the South, NASSCO claims that it only started operations in 1960, and that it has no successor liability for prior operators (including the similarly named NASSCORP). In its good faith motion and its counterclaims, NASSCO tries to attribute the pre-1960 share to the City as landlord. (NASSCO Mot. at p.16-17; Ex. V, NASSCO Counterclaims at ¶¶274-275, 286-305). However, the Navy's operations at NAVSTA, and also at the South, go back to the 1920s, and the 1930s,

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respectively. (Ex. S, FAC at ¶¶102-113). NASSCO's claims against Navy, however, only relate to NAVSTA/28th Street, certain equipment, and its work for NASSCO. (Ex. T, NASSCO Cross-claims at ¶¶19-33). Given this dynamic, the Navy must explain whether any of the settlement—as it appears it is none—relates to the Navy's operations at the Site pre-NASSCO and BAE, to enable the City to evaluate whether (and if so how much of) any of the settlement relates to the timeframe when it was associated with the Site as landlord Trustee, and to evaluate whether that allocation is fair.

I. The Motion Was Not Served by Certified Mail as Required by the CCP

CCP section 877.6 requires that any party seeking a good faith settlement serve its papers on all interested parties by certified mail. CCP §877.6(a)(2). The City did not receive the papers by certified mail, only by e-filing. (Nugent Decl. at ¶ 19). The Navy's failure to serve its papers by certified mail does not comply with the statute. Until the Navy complies with the statute's pre-requisites, the Court cannot make any order in the Navy's favor under CCP section 877 or 877.6.

IV. CONCLUSION

For all of the foregoing reasons, the City of San Diego respectfully requests that this Court deny the motion of the United States Navy for good faith settlement approval and an order barring claims.

Dated: December 6, 2013

GORDON & REES, LLP

By: /s/ Matthew P. Nugent
Brian M. Ledger
Kristin N. Reyna
Kara B. Persson
Matthew P. Nugent
Attorneys for Plaintiff
CITY OF SAN DIEGO

Gordon & Rees LLP
101 West Broadway
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San Diego, CA 92101

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP 101 W. Broadway, Suite 2000, San Diego, CA 92101. On December 6, 2013, I served the within documents:

1. **PLAINTIFF CITY OF SAN DIEGO'S OPPOSITION TO DEFENDANT UNITED STATES NAVY'S MOTION FOR ORDER DETERMINING GOOD FAITH SETTLEMENT AND BARRING CLAIMS;**
2. **DECLARATION OF MATTHEW P. NUGENT IN SUPPORT OF PLAINTIFF CITY OF SAN DIEGO'S OPPOSITION TO DFENDANT UNITED STATES NAVY'S MOTION FOR ORDER DETERMINING GOOD FAITH SETTLEMENT AND BARRING CLAIMS;**
3. **EXHIBITS A THRU Z TO THE DECLARATION OF MATTHEW P. NUGENT IN SUPPORT OF PLAINTIFF CITY OF SAN DIEGO'S OPPOSITION TO DFENDANT UNITED STATES NAVY'S MOTION FOR ORDER DETERMINING GOOD FAITH SETTLEMENT AND BARRING CLAIMS**
4. **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CITY OF SAN DIEGO'S OPPOSITION TO UNITED STATES NAVY'S MOTION FOR ORDER CONFIRMING GOOD FAITH SETTLEMENT AND BARRING CLAIMS;**
5. **EXHIBITS 1 AND 2 TO THE CITY OF SAN DIEGO'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CITY OF SAN DIEGO'S OPPOSITION TO UNITED STATES NAVY'S MOTION FOR ORDER CONFIRMING GOOD FAITH SETTLEMENT AND BARRING CLAIMS**

☐	by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
☐	by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at San Diego, addressed as set forth below.
☐	**BY ELECTRONIC MAIL SERVICE.** I caused all of the pages of the above-entitled document(s) to be electronically served on the parties listed below.
☒	**BY ELECTRONIC CASE FILING.** I caused all of the pages of the above-entitled document(s) to be electronically filed and served on designated recipients through the Electronic Case Filing system for the above-entitled case. The file transmission was reported as successful and a copy of the Electronic Case Filing Receipt will be maintained with the original document(s) in our office.
☐	**BY FEDEX.** by placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery by FedEx as part of the ordinary business practices of Gordon & Rees LLP described below, addressed as follows:

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 6, 2013, at San Diego, California.

Coral M. Rogers

LATHAM & WATKINS LLP
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Attorneys for Defendant, Cross-Defendant, Counterclaimant and Cross-Claimant NATIONAL STEEL AND SHIPBUILDING COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO,

Plaintiff,

v.

NATIONAL STEEL AND SHIPBUILDING COMPANY; et al.,

Defendants.

AND RELATED CROSS-ACTIONS AND COUNTERCLAIMS

CASE NO. 09-CV-2275 WQH (BGS)

REPLY BRIEF IN SUPPORT OF NATIONAL STEEL AND SHIPBUILDING COMPANY'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT BETWEEN NATIONAL STEEL AND SHIPBUILDING COMPANY AND UNITED STATES OF AMERICA

Date: TBD
Time: TBD
Courtroom 14B (Annex)

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Action Filed: October 14, 2009
Judge: Hon. William Q. Hayes

I. INTRODUCTION

The City claims that the settlement agreement between NASSCO and the United States it is not "fair or reasonable" because NASSCO, which has committed to be solely responsible to perform the estimated $24 million cleanup of the South Yard and already incurred millions of dollars to this end, allegedly is not required to pay a "dime," while the United States, which has agreed to contribute at least $7,666,024.78 to the cleanup, supposedly is dismissing its claims against NASSCO for merely a "waiver of costs." The City's hyperbole speaks for itself. The settlement, reached after five years of mediation and following more than a decade of administrative proceedings before the Regional Board, facilitates the largest sediment cleanup in San Diego Bay history and promotes CERCLA's goal of achieving prompt cleanups by favoring settlement over litigation. For the reasons set forth below, NASSCO's motion should be approved.

II. DISCUSSION

A. The City Is Impeding The Remediation Of The South Yard

The City contends that NASSCO "might never" "pay a dime" towards the South Yard remediation. The City knows this claim is false, as it has received invoices demonstrating that millions of dollars in cleanup costs already have been incurred and paid by NASSCO. The City has persistently refused to acknowledge responsibility for its share of these invoices, and has indicated it will seek to reallocate responsibility for the partial payments it has made to date among the other South Parties.[1] The City is the lone South party that has not settled, and the lone party opposing the settlements between NASSCO and the United States and the San Diego Unified Port District. In other words, the City is refusing to accept responsibility for its fair share of remediation costs and impeding the ability of

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[1] On December 11, 13 and 30, 2013, the City made total payments in the amount of $2,547,906.47, against invoiced amounts of $3,930,419.92 million that NASSCO believes are attributable to the City.

others to pay their fair share.

Because funding from the United States and the Port is contingent upon Court approval of these settlements, NASSCO currently is not receiving funding from these parties for the field work that started on September 30—work which has totaled more than $11 million so far[2] and which NASSCO has agreed to be "solely responsible" to implement through to completion. Supplemental Declaration of Kelly E. Richardson, at ¶ 2. NASSCO undertook this work based in part on its settlements with the United States and Port, and in so doing has kept the parties, including the City, in compliance with the Cleanup and Abatement Order R9-2012-0024 ("CAO"). The City's opposition threatens to derail the cleanup mid-stream by preventing funding from the United States and Port.

The City's obstruction of the South Yard remediation runs counter to the purposes of CERCLA, and should not be countenanced. *See, e.g., United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990) (CERCLA's two main objectives are to achieve the prompt and effective cleanup of hazardous waste sites and to allocate the costs of cleanup among responsible parties). Even if the City insists on a Court order determining its allocation, there is no basis to unravel settlements reached among the other South parties that will facilitate the cleanup.

B. A Settlement Between Co-Defendants Is Subject To A Good Faith Determination Under The CCP And UCFA

Relying on *Arizona Pipeline Co. v. Superior Court*, 22 Cal. App. 4th 33 (1994), the City contends that the plaintiff must be a party to a settlement in order for the UCFA or Code of Civil Procedure section 877.6 to apply. But the City fails to mention (much less distinguish) a decision issued one year after *Arizona Pipeline*, by the same District Court of Appeal, that expressly disagreed with

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[2] In addition, the Regional Board has invoiced over $2 million in oversight costs. To date, NASSCO has paid over $8.2 million in remediation costs, and over $5 million in investigation and oversight costs. Richardson Decl., at ¶ 2.

Arizona Pipeline and held that "a settlement made between a cross-complainant and a cross-defendant . . . is entitled to a good faith determination under section 877.6." *KAOM, Inc. v. Superior Court*, 35 Cal. App. 4th 549, 554 (1995) ("It creates an artificial and unsustainable distinction to say, as *Arizona Pipeline* does, that a cross-defendant who settles with the plaintiff is entitled to a good faith determination under section 877.6 [citation omitted], but that a cross-defendant who settles with a cross-complainant cannot.")

An Eastern District of California opinion also criticized *Arizona Pipeline* and agreed with *KAOM*. *See KLS Air Express, Inc. v. Cheetah Transp. LLC*, 2008 U.S. Dist. LEXIS 3039 (E.D. Cal. 2008), at *78 ("KAOM is more in line with the language of the statute, which expressly applies to settlements by the 'plaintiff *or other claimant* and one or more alleged tortfeasors or coobligors.") (original emphasis). "KAOM is also consistent with the dual purposes of the statute to encourage settlements and promote the equitable sharing of cost." *Id.* at *7; *see also Cayo v. Valor Fighting & Mgmt. LLC*, 2009 U.S. Dist. LEXIS 103067 (N.D. Cal.), at *8 (upholding good faith settlement between two co-defendants).

Here, NASSCO has agreed to be solely responsible to complete the remediation in the South Yard under the CAO, estimated to cost $24 million, while maintaining that a substantial portion of the costs are allocable to other parties and expressly reserving its contribution rights against the City. NASSCO is thus a "claimant," and entitled to recover the other parties' equitable share of costs for work NASSCO is undertaking, including the Navy's good faith share set forth in the settlement agreement. By contrast, although it is the plaintiff in this case, the City stated in its August 23, 2013 Initial Disclosures that it had not incurred any direct costs, and the City is not participating in or overseeing the remediation.[3] In

[3] In the Declaration of Frederick M. Ortlieb, the City purports to identify response costs incurred in 2009, 2011, and 2012. None of these costs were identified in the City's Initial Disclosures, which state that the City brought this action to seek "contribution" for the allocation of costs for work to be

fact, the City had not paid *any* cleanup costs prior to the filing of its oppositions.

Further, because, as the City states, UCFA, section 6 uses language similar to section 877.6, and contemplates good faith settlements "entered into by a claimant and a person liable," good faith settlements between co-defendants also are cognizable based on the plain language of UCFA and the reasoning of *KAOM.*

C. The UCFA's "Proportionate Share" Approach Should Apply

While NASSCO believes that the settlement agreement meets the good faith tests under both CERCLA and section 877.6, settlement credit should be applied in accordance with UCFA's "proportionate share" approach, which is the majority view for settlements under CERCLA.[4] Under the "proportionate share" approach, the nonsettling defendants' liability is reduced by the equitable share of the settling party's obligation, and nonsettling parties do not bear the risk that the partial settlement is too low. *Adobe Lumber,* 2009 U.S. Dist. LEXIS 10569, at *15-*16. UCFA best promotes CERCLA policy of encouraging settlements by equitably apportioning responsibility, more easily resolving complex partial settlements, and eliminating the need for a good faith hearing. *United States v. W. Processing Co.*, 756 F. Supp. 1424, 1430-31 (W.D. Wash. 1990); *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.,* 834 F. Supp. 342, 348 (D. Kan. Sep. 30, 1993); *U.S. v. SCA Servs. of Indiana, Inc.,* 827 F. Supp. 526, 534 (N.D. Ind. June 28, 1993).

The City agrees that UCFA should apply. Particularly in light of this agreement, the Court should follow the majority of federal courts and adopt UCFA

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performed. The City may not oppose this motion by referencing information not included in its Initial Disclosures; hence, these purported costs may not be considered. *Hoffman v. Constr. Protective Servs.*, 541 F.3d 1175, 1179 (9th Cir. 2008) ("Rule 37(c)(1) provides that a party failing to provide the information required [under the Initial Disclosure provisions] '*is not allowed to use that information . . . to supply evidence on a motion*, at a hearing, or at trial, unless the failure was substantially justified or is harmless.") (emphasis added).

[4] "The overwhelming majority of courts in the Ninth Circuit that have addressed the issue have applied the UCFA in CERCLA cases." *Lewis v. Russell*, 2012 U.S. Dist. LEXIS 161343, at *13 (E.D. Cal. Nov. 8, 2012); *Adobe Lumber, Inc. v. Hellman*, 2009 U.S. Dist. LEXIS 10569, at *17 (E.D. Cal. Feb. 3, 2009).

section 6 as the federal common law governing the legal effect of the agreement. This would ameliorate many of the City's stated concerns. Under UCFA, nonsettling parties are responsible only for their proportionate share of liability, thus, the City's equitable allocation will be determined at trial. As the City concedes, this approach thus ensures fairness to non-settling parties. Opp., at 9:4-12. For the same reason, there is no basis for the City's claim that it needs discovery to oppose the motion. In addition, the City's argument that any settlement offset must be allocated between liability and damages is inapplicable if UCFA is applied. *See* Opp. at 9:20-23 (asserting, under the "pro tanto" approach, that any settlement offset must be fully allocated between liability and damages).

D. Settling Co-Defendants Are Entitled To A Contribution Bar

1. NASSCO Is A Claimant/Joint Tortfeasor

The City contends that only the "person liable" in a settlement, as opposed to the "claimant," can seek a contribution bar. NASSCO is both. It is the claimant because NASSCO has agreed to complete the remediation of the South Yard, in exchange for the contribution of funds by the Navy and the Port, and has reserved the right to seek (and will pursue) the City's equitable share of the work NASSCO is conducting. NASSCO also is a "person liable" because it bears some responsibility for the cleanup (which NASSCO believes is no more and perhaps much less than 37%, as indicated in the settlement agreement), and other parties including the City have filed claims against NASSCO.

The City's reliance on *Doose Landscape, Inc. v. Superior Court*, 234 Cal. App. 3d 1698 (1991) is misplaced. *Doose* involved a construction defect action by a plaintiff condominium association against the developer of the condominium project, and the plaintiff sought to bar, through a settlement with the developer, cross-claims for indemnity brought by the landscape architect. *Id.* at 1700. The court found that the landscaper's naming of the plaintiff in the indemnity cross-claim, "albeit wrongly," made plaintiff "at least a co-obligor if not a joint tortfeasor

with respect to its own damages." *Id.* at 1701 (emphasis added). But the court concluded that plaintiff was "certainly" not a settling tortfeasor in the context of resolving its own damage claim: "[c]learly, it was settling as the plaintiff." *Id.*

By contrast, NASSCO, along with the other parties to this case, was named a "discharger" in the CAO, and claims have been filed against NASSCO by multiple parties seeking recovery of NASSCO's alleged share of liability, making it a settling tortfeasor. NASSCO has agreed to implement fully the South Yard remediation, for which other parties bear liability, so that NASSCO too is a claimant. The settlement agreement recognizes NASSCO's dual role. In *Doose*, the plaintiff did not reach settlement or bring its good faith motion in any capacity other than as plaintiff. Because *Doose* simply prohibits a settling "plaintiff" from obtaining the protection of section 877.6(c), it does not preclude a claimant/joint tortfeasor/defendant like NASSCO from obtaining contribution protection.

2. Equitable and Policy Considerations Favor A Bar

NASSCO's commitment to remediate the South Yard removes potentially years of litigation delay before implementation of a remedy, and NASSCO already has incurred over $16 million in compliant response costs. This furthers CERCLA goals favoring settlement and environmental cleanup, and a contribution bar is appropriate to reward NASSCO's actions as a settling party. Without a contribution bar, the incentive for parties like NASSCO to settle and remediate would be seriously undermined, and parties would withhold remediating in favor of litigating. Moreover, even with a contribution bar entered in favor of NASSCO, the City's equitable share of liability will still be adjudicated in the context of NASSCO's contribution claim against the City, so the City will not be prejudiced.

3. The City's Claims As To Individual Liability Theories Fail

The City incorrectly contends that its intentional tort claims of nuisance and trespass cannot be barred under UCFA. Where "independent claims" (e.g., for the "intentional tort" of contamination) are not truly independent, but merely "a

'disguised' contribution or indemnity claim," they should be barred. *In re Heritage Bond Litigation*, 546 F. 3d 667, 679 (9th Cir. 2008). Similarly, state common law claims that conflict with CERCLA's statutory settlement scheme are preempted. *See, e.g., Fireman's Fund Ins. Co. v. City of Lodi,* 302 F. 3d 928, 945-47 (9th Cir. 2002). In other words, because the common law claims are employed for the same purpose—to achieve contribution for cleanup costs—a settlement as to the CERCLA claims necessarily must bar the remaining common law claims.

The City's assertion that its cost recovery claim under CERCLA section 107 is not subject to a contribution bar also is not well taken. As a threshold matter, the City does not have a viable cost recovery claim in light of admissions in its Initial Disclosures that it had not incurred response costs and is pursuing only contribution. Further, claims by and between joint tortfeasors are contribution claims under CERCLA section 113, regardless of how pled. *E.g., Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1044 (E.D. Wis. 2008). Also, reimbursement sought for compelled costs—such as costs incurred in response to a Regional Board order—as opposed to voluntary costs, must be by way of contribution. *E.g., New York v. Next Millennium Realty, LLC*, 2008 WL 1958002, at *6 (E.D.N.Y. May 2, 2008).

The City further contends that it has claims against NASSCO for costs related to the North Yard which cannot be barred. However, BAE Systems has agreed through the settlement agreement to complete the remediation of the North Yard, and the proper allocation of costs for the North Yard remediation between the City and BAE Systems does not involve NASSCO.

The City also asserts that it has claims related to MS4 and successor liability. But these are plainly elements of the City's contribution claim regarding the allocation of remediation costs in the South Yard, and subject to a bar.[5]

[5] The City's request for judicial notice of certain documents purporting to show that NASSCO is liable for prior operators at the South Yard, and the alleged

Finally, the City argues that only the "Covered Matters" in the settlement agreement are barred. NASSCO agrees. Because the Covered Matters (defined in Section 1.8 of the settlement agreement) involve claims for the remediation of the South Yard under the CAO, the City's claims seeking contribution for such costs are properly barred. The City purports to rely on Section 4.1 of the settlement agreement for the proposition that "claims relating to the Site brought by a party other than the Settling Parties to this Agreement" are not covered. But that provision does not affect the definition of Covered Matters, and simply addresses the scope of releases between the parties to the settlement agreement.

E. The Settlement Is Fair And Reasonable

The City contends that the United States' agreement to pay $6,765,000 towards the South Yard cleanup, $991,024.78 for past response costs, and 33% of future response costs in the South Yard that exceed $20,500,000, in exchange for NASSCO's commitment to be solely responsible to ensure completion of the estimated $24 million cleanup, somehow is not fair or reasonable. As discussed below, the City fails to overcome the presumption of fairness where (1) counsel is experienced in similar litigation, (2) settlement was reached through arm's length negotiations, and (3) investigation and discovery are sufficient to allow counsel and the court to act intelligently. *Linney v. Cellular Alaska P'ship*, 1997 U.S. Dist. LEXIS 24300, at *15-*16 (N.D. Cal. July 18, 1997); Mot., at 11:24-18:5.

First, the City contends that NASSCO and the United States may "have specific contractual or relationship issues between them that impact the settlement (given that NASSCO's business is doing work for the Navy on its ships)..." Opp., at 16:20-23. This vague allegation of collusion or impropriety is dispelled by the plain terms of the settlement agreement, which, through Article 5, specifically

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responsibility of NASSCO for discharges at the South Yard (Exhs. 3-4,6, S-W to City's RJN [Dkt. 392-1]), should be denied as irrelevant because this Motion does not seek an adjudication of liability as between NASSCO and the City.

prohibit any "double recovery" in connection with work done by NASSCO for the United States. These provisions prohibit NASSCO from including any costs for which it receives payment under the settlement agreement as indirect costs in any contract with the United States, and require NASSCO to reduce its appropriate current fiscal year indirect cost pools for amounts received by any party to this case, for past response costs that were previously included in NASSCO's indirect cost pools for any contract with the United States.

Second, the City claims that NASSCO will pay no money towards the cleanup and "the Navy, is in essence dismissing its claims against NASSCO for a waiver of costs." It is unclear how the City equates NASSCO's performance of an estimated $24 million remediation, and the Navy's payment of at least $7,666,024.78 (and possibly more), as merely a "waiver of costs." While the Navy has committed to pay 33% of the cleanup costs, a substantial contribution, NASSCO is obligated to perform the remediation through completion, regardless of the extent of funds that NASSCO obtains from the City, and despite NASSCO's good faith belief that its share is no more than 37%. NASSCO's commitment is substantial. The settlement terms, which were reached by experienced counsel and with substantial oversight by the mediator for five years, and at settlement conferences held by Magistrate Judge Skomal, clearly are "fair and reasonable."

F. Further Discovery Is Not Necessary To Approve This Motion

The City claims that more discovery is needed before the settlement agreement can be approved.[6] But courts recognize that CERCLA settlements can be approved under UCFA without completing discovery because "[a]llowing

[6] Discovery already has been voluminous. Mot., at 4:11-5:4. Further, NASSCO has not "prevented" the City from taking discovery. The Magistrate's September 27, 2013 Order provided that parties, like NASSCO, that had submitted settlement agreements for *in camera* review were stayed from the obligation to respond to discovery. The City and NASSCO subsequently agreed to a limited stay of discovery, to facilitate settlement discussions, after the Court extended the fact discovery deadlines to November 24, 2014. Declaration of Jeffrey P. Carlin.

discovery and evidentiary hearings before confirming settlements would require something approaching full blown litigation," which would discourage settlement and conflict with CERCLA's policy of early settlement. *Acme Fill Corp. v. Althin CD Medical, Inc.*, 1995 U.S. Dist. LEXIS 22308, at *23-*24 (N.D. Cal. Nov. 2, 1995) (citations omitted); *Tyco Thermal Controls, LLC v. Redwood Indust.*, 2010 U.S. Dist. LEXIS 91842, at *15 n.5 (N.D. Cal. Aug. 12, 2010) (settlement approved despite ongoing discovery because "a determination of good faith settlement must be made based on the facts as they exist at the time a settlement agreement is reached.").

G. The Motion Was Properly Served

Finally, the City contends that NASSCO's motion needed to be served by certified mail pursuant to section 877.6(a)(2). But "*the section 877.6 procedures do not govern a federal action . . .*" *Fed. Sav. & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 511 (9th Cir. 1990) (emphasis added).[7] Further, section 877.6(a)(2) provides that any nonsettling party must file "a notice of motion to contest the good faith settlement." Here, the City did not file a notice of motion, but instead an "opposition." The City did not comply with its own procedural argument, which lacks merit because federal procedure governs.

III. CONCLUSION

For each of the foregoing reasons, NASSCO respectfully requests that the Court approve its settlement agreement with the United States.

Dated: January 9, 2014

Respectfully submitted,
LATHAM & WATKINS LLP

By: /s/Kelly E. Richardson
Kelly E. Richardson
Attorneys for NASSCO
Kelly.Richardson@LW.com

[7] Regardless, the City does not claim any prejudice from being electronically served.