UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
QUEBECOR WORLD (USA) Inc., et al.,	:	Case No. 08-10152 (JMP)
Debtors.	:	(Jointly Administered)

UNITED STATES' MEMORANDUM IN SUPPORT OF DEBTORS' MOTION PURSUANT TO FED. R. BANKR. P. 9019 SEEKING APPROVAL OF SETTLEMENT AGREEMENT AMONG THE REORGANIZED DEBTORS, THE UNITED STATES, THE STATE OF ILLINOIS, THE KEYSTONE PRP GROUP, LENZ PRP GROUP AND RINGIER A.G.

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PRELIMINARY STATEMENT

The United States of America (the "United States"), on behalf of the United States Environmental Protection Agency ("EPA"), respectfully submits this memorandum of law in support of Debtors' Motion Pursuant to Federal Rule of Bankruptcy Procedure 9019 Seeking Approval of (I) The Settlement Agreement Among the Reorganized Debtors, the United States, the State of Illinois, the Keysonte PRP Group, Lenz PRP Group and Ringier A.G. and (II) Assumption of the Specified Environmental Contracts, as Modified ("Debtors' Rule 9019 Motion"). For the reasons set forth below, the United States requests that this Court approve as a final judgment, the proposed Settlement Agreement Among the Reorganized Debtors, the United States, the State of Illinois, the Keysonte PRP Group, Lenz PRP Group and Ringier A.G. (the "Settlement Agreement") lodged with the Court on July 1, 2010.[1]

The proposed Settlement Agreement resolves the claims of the United States under, *inter alia*, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601 - 9675, against Quebecor World (USA) Inc. ("Quebecor World") and 52 of its affiliated debtors (collectively with Quebecor World, the "Debtors") for environmental liabilities for response costs and civil penalties in connection with hazardous waste sites and facilities. Under the Settlement Agreement, the United States shall have an allowed Class 3 General Unsecured Claim against the Debtors in the aggregate amount of $374,613.88, as well as receive a cash payment of $38,617.58 from non-debtor Ringier, A.G.,

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1 While this brief is filed only on behalf of the United States, the State of Illinois has authorized the United States to inform the Court that it joins in the United States' request that the Court approve and enter the Settlement Agreement.

A copy of the Settlement Agreement, containing the signatures of the parties, was attached to the Notice of Lodging filed with the Court on July 1, 2010. Another copy of the Settlement Agreement is attached hereto at Exhibit 1.

in connection with four non-debtor-owned sites. In addition, the United States shall have an allowed Class 3 General Unsecured Claim against Quebecor World Retail Printing Corp. in the amount of $183,109 for civil penalties arising from violations of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* at a separate facility. The Settlement Agreement further provides that the Debtors or Ringier, A.G. as the indemnitor for the Debtors, will continue to comply with work obligations imposed by judicial consent decrees with respect to two additional sites, with certain agreed-upon modifications.

The proposed Settlement Agreement requires the Court's approval under two different sets of laws. First, pursuant to Federal Bankruptcy Rule of Procedure 9019, the Court must approve the proposed Settlement Agreement as in the best interest of the bankruptcy estate and as being consistent with applicable bankruptcy law. On August 20, 2010, the Debtors filed a motion for approval of the proposed Settlement Agreement pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Second, the Court must approve the fairness of the proposed Settlement Agreement and its consistency with environmental law. Approvals of settlements under environmental law include a procedure for obtaining public comment. This memorandum of law in support of the Debtors' Rule 9019 Motion seeks approval of the proposed Settlement Agreement under environmental law.

Notice of the settlement was published in the Federal Register on July 8, 2010, 75 Fed. Reg. 39278. The United States accepted public comments on the proposed Settlement Agreement through August 9, 2010.

After reviewing the single comment received, the United States has determined that the proposed Settlement Agreement is fair, reasonable and consistent with environmental law. The settlement memorialized in the proposed Settlement Agreement was reached after lengthy negotiations of its terms. In addition, the parties weighed the merits, costs, risks and delays that litigation would entail, against the value of settlement, in particular, the EPA's ability to receive cash towards funding cleanup efforts at the sites.

Accordingly, for the reasons set forth herein, the United States respectfully requests that this Court approve and enter as a final judgment the proposed Settlement Agreement lodged with this Court on July 1, 2010. The function of the Court in reviewing such motions is not to substitute its judgment for that of the parties to the proposed Settlement Agreement, but to confirm that the terms of the proposed Settlement Agreement are fair and adequate and are not unlawful, unreasonable, or against public policy. *United States v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), *aff'd*, 749 F.2d 968 (2d Cir. 1984). If the Court finds that these standards have been met, then the settlement should be approved. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991).

GENERAL STATUTORY/FACTUAL BACKGROUND

A. Statutory Background

CERCLA was enacted to provide a framework for cleanup of the nation's worst hazardous waste sites. The primary goal of CERCLA is to protect and preserve public health and the environment from the effects of releases or threatened releases of hazardous substances to the environment. *See Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir.

1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040, n.7 (2d Cir. 1985); *O'Neil v. Picillo*, 682 F. Supp. 706, 726 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989).

CERCLA also created a Hazardous Substance Superfund, known simply as the Superfund, to finance federal response actions undertaken pursuant to Section 104(a) of CERCLA. The Superfund was established under 26 U.S.C. § 9507. Although CERCLA authorizes cleanup of hazardous waste sites using money provided by the Superfund, the Superfund is a limited source and cannot finance cleanup of all of the many hazardous waste sites nationwide. *See* S. Rep. No. 96-842, 848, 96th Cong., 2d Sess. at 17-18 (1980), *reprinted in* 1 Sen. Comm. on Env't & Pub. Works, Legislative History of CERCLA 305, 324-25 (1983). Replenishment of expended Superfund monies is crucial to the continuing availability of funds for future cleanups. Thus, the United States is tasked with seeking to ensure that potentially responsible parties ("PRPs") pay for or perform site cleanups, or that the limited Superfund monies expended by the federal government in response to a release or threatened release of hazardous substances are recovered through the liability scheme set forth in Section 107 of CERCLA wherever possible. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (one statutory purpose of CERCLA is to hold responsible parties liable for the costs of the cleanup).

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), permits the United States to recover its costs of responding to releases of hazardous substances from PRPs. Pursuant to Section 107(a), PRPs include the owners and operators of Superfund sites at the time of the disposal of hazardous substances at the sites, the current owners and operators of Superfund sites, as well as the generators and transporters of hazardous substances sent to Superfund sites. *See United*

States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993); *O'Neil*, 883 F.2d at 178; *United States v. Monsanto*, 858 F.2d 160, 168-171 (4th Cir. 1988). Section 107(a) of CERCLA creates strict, joint and several liability where environmental harm is indivisible. *See Alcan Aluminum Corp.*, 990 F.2d at 722.

Sections 104(a) and (b) of CERCLA, 42 U.S.C. §§ 9604(a) and (b), authorize EPA to use Superfund monies to investigate the nature and extent of hazardous substance releases from contaminated sites and to clean up those sites. Moreover, pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, EPA may issue unilateral administrative orders to PRPs, requiring them to clean up sites, may seek injunctive relief through a civil action to secure such relief, or may seek to reach agreements with PRPs through which they agree to perform the necessary cleanup of sites. *See* Sections 104, 106 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9622.

Having created the liability system and enforcement tools to allow EPA to pursue responsible parties for Superfund cleanups, Congress expressed a strong preference that the United States settle with responsible parties in order to avoid spending resources on litigation rather than on cleanup. 42 U.S.C. § 9622(a).[2] CERCLA encourages settlements, *inter alia*, by providing parties who settle with the United States protection from contribution claims for

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2 *See also United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1184 (3d Cir. 1994); *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991); *In re Cuyahoga Equipment Corporation*, 980 F.2d 110 (2d Cir. 1992) (citing *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 693 (S.D.N.Y. 1988)); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 (1st Cir. 1990); *United States v. DiBiase*, 45 F.3d 541, 545-46 (1st Cir. 1995); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S. Code Cong. & Ad. News 2862.

matters addressed in the settlement. 42 U.S.C. § 9613(f)(2). This provision provides settling parties with a measure of finality in return for their willingness to settle.[3]

B. Procedural Background

On January 21, 2008, Quebecor World and 52 affiliated entities filed Chapter 11 petitions in this Court.

On January 21, 2009, the United States filed, on behalf of the EPA, eight proofs of claim against various Debtors, alleging that the debtors were liable for past and future response costs pursuant to section 107(a) of CERCLA, and civil penalties pursuant to the Clean Air Act (the "EPA Proofs of Claim").[4] The EPA Proofs of Claim assert, in part, that certain Debtors are jointly and severally liable, along with other responsible parties, for past and future response costs at five sites. The EPA Proof of Claim filed with respect to Quebecor World Retail Printing Corporation ("Quebecor Printing") asserts that Quebecor Printing is liable for civil penalties under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, arising from its operation of a facility located at 50 John Hancock Road in Taunton, Massachusetts ("Hancock Road Facility").

The EPA Proofs of Claim also included protective claims for work that the Debtors are or may be required to perform in the future pursuant to regulatory requirements or in compliance with court or administrative orders under CERCLA or RCRA at two particular sites, the Keystone Sanitation Landfill Site in Union Township (the "Keystone Site") and the Lenz Oil Site

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3 *Cannons Engineering*, 899 F.2d at 92; *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989); *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96 (1st Cir. 1994); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S. Code Cong. & Ad. News 2862.

4 One of these proofs of claim, Claim Number 9176, is not the subject of the Settlement Agreement and therefore shall not be addressed herein.

in Lemont, Illinois (the "Lenz Oil Site"). The EPA Proofs of Claims set forth the United States' position that "injunctive obligations to comply with work requirements arising under court orders, administrative orders, and other environmental regulatory requirements imposed by law that are not claims under 11 U.S.C. § 101(5)."

On May 18, 2009, the Debtors filed the Third Amended Joint Plan of Reorganization of Quebecor World (USA) Incorporated and Certain Affiliated Debtors and Debtors-in-Possession (the "Plan"). The Court confirmed the Plan by order entered on July 2, 2009. The Effective Date of the Plan is July 21, 2009.

C. The Proposed Settlement Agreement

1. *Liquidated Sites*

Pursuant to Section V of the Settlement Agreement, the United States will receive, on behalf of EPA, Allowed Class 3 General Unsecured Claims totaling $374,613.88 for past and future response costs in connection with four non-debtor-owned sites. The EPA will also receive an additional cash payment of $38,617.58 from Ringier with respect to one of the four sites, specifically the Lake Calumet Cluster Superfund Site.

The amount of the allowed claim(s) for each site was determined, for settlement purposes, on a site-by-site basis taking into account: (1) estimated total past and future response costs of EPA for the site; (2) the Debtors' estimated percentage allocation or fair share of liability for the site; and (3) litigation considerations. Under the Settlement Agreement, only the amount or value that the United States receives from the Debtors, not the total amount of the allowed claim, will be credited by EPA to the accounts for a particular site, which credit will reduce the

liability of non-settling PRPs for the particular site by the amount of the credit. *See* Settlement Agreement ¶ 5(a).

2. *Work Consent Decrees*

Pursuant to Section VIII of the Settlement Agreement, the Debtors and/or Ringier have agreed to comply with obligations to perform work imposed by two separate consent decrees, with certain modifications.

First, the Debtors have agreed to continue performing under the Consent Decree entered by the United States District Court for the Middle District of Pennsylvania on or about September 10, 1999, in *United States v. C&J Clark America, Inc.*, No. 1:CV:93-1484 (the "Keystone Consent Decree"), with respect to the Keystone Site. The Settlement Agreement provides however, that in the event that the United States seeks to enforce the Keystone Consent Decree in a manner that would result in the Debtors' being required to pay more than 17.39% of the response costs incurred at the Keystone Site, then the Debtors may seek a judicial determination that their obligation to perform under the Keystone Consent Decree was discharged by the confirmation of the Plan. In the event that there is a judicial determination that these obligations were discharged, then the Debtors' further obligations under the Keystone Consent Decree shall be limited to paying 17.39% of future response costs at the Keystone Site.

Second, Ringier, as indemnitor for the Debtors, has agreed to implement the obligations imposed upon Debtors pursuant to the Consent Decree entered by the United States District Court for the Northern District of Illinois on or about August 14, 2002, in *United States v. Alpha Construction Co.*, No. 02 C 3609 ("Lenz Consent Decree"), with respect to the Lenz Oil Site, subject to a cap on its liability that, in the United States' estimation, is unlikely to come into play.

The United States and Illinois have agreed not to seek performance of the Lenz Consent Decree from the Debtors or Ringier, as indemnitor for the Debtors in any manner other than by requiring Ringier to meet the obligations discussed above.

3. *Debtor-Owned/Operated Sites*

Section VI of the Settlement Agreement memorializes the Debtors' responsibility to meet ongoing environmental obligations at debtor-owned or operated sites. Specifically, the Settlement Agreement provides that the following obligations of the Debtors with respect to debtor-owned or operated sites are not discharged or impaired by the bankruptcy: (i) any obligation for response costs incurred after the Petition Date; or (ii) any obligation to perform removal actions, remedial actions, corrective actions, or other cleanup actions under CERCLA or RCRA.

Paragraph 14 of the proposed Settlement Agreement provides for an Allowed Class 3 General Unsecured Claim in the amount of $183,109 for civil penalties under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, arising from the operation of the Hancock Road Facility. The amount of the allowed claim was arrived at by taking into account, *inter alia*, the gravity of the violations, the economic benefit Debtors realized from noncompliance with the statutory and regulatory requirements, and litigation considerations.

4. *Discharged Sites*

The parties have agreed that the Debtors' liabilities and obligations arising under Sections 106 and 107 of CERCLA have been discharged with respect to three sites — the Byron Salvage Yard in Ogle County, Illinois; the Operating Industries Site in Monterey Park, California; and the Calumet Containers Site in Hammond, Indiana — to the extent that those liabilities and

obligations arise from pre-petition acts, omissions or conduct. Settlement Agreement, ¶ 21.a. Liability for post-petition conduct at those three sites has not been discharged, however. *Id.* ¶ 21.b.

5. *Excluded Sites*

Pursuant to Section XVII of the Settlement Agreement, Debtors' liability at twelve different sites — specifically, (i) the Bulk Terminals Site in Louisville, Kentucky; (ii) the Constitution Road Site in Atlanta, Georgia; (iii) the M&J Solvents Site in Atlanta, Georgia; (iv) the Seaboard Chemical Corp. Site in Jamestown, North Carolina; (v) the Frontier Chemical Waste Processing Site in Niagara Falls, New York; (vi) the Somersville Road Site in Contra Costa County, California; (vii) the Crymes Landfill Site in Tucker, Georgia; (viii) the Interstate Pollution Control Site in Rockford, Illinois; (ix) the Old Land Reclamation Landfill Site in Depew, New York; (x) the GBF Pittsburgh Landfill Site in Contra Costa, California; (xi) the Chemical Control Corp. Site in Elizabeth, New Jersey; and (xii) the Brampton Road Site in Garden City, Georgia — are not affected by the Settlement Agreement. Both the Debtors and the EPA retain their respective claims and defenses with respect to those sites.

6. *Additional Sites*

Under Section IX of the Settlement Agreement, all sites other than the Liquidated Sites, the Debtor-Owned Sites, the Consent Decree Sites, the Discharged Sites and the Excluded Sites are designated as "Additional Sites." Under the Settlement Agreement, the Debtors agree that the EPA may pursue claims with respect to the Additional Sites as if the Chapter 11 cases had never been commenced. In return, the United States agrees not to issue or seek injunctive orders against the Debtors under CERCLA Section 106 or RCRA Section 7003 based on the Debtors'

pre-petition conduct with respect to the Additional Sites. Once the Debtors' liability for any Additional Site is liquidated by settlement or judgment, the liquidated amount will be paid substantially as if it had been an allowed general unsecured claim under the Plan of Reorganization.

7. *Covenants Not to Sue and Contribution Protection*

Under the proposed Settlement Agreement, the Debtors will receive covenants not to sue from the EPA with respect to the Liquidated Sites and with respect to civil penalties arising from the violations of the Clean Air Act outlined in the EPA Proofs of Claim with respect to the Hancock Road Facility. *See* Settlement Agreement, Sections XV. EPA has also given a covenant not to sue to Ringier in its capacity as indemnitor of the Debtors with respect to the Lake Calumet Cluster Superfund Site and the Lenz Oil Site.

The Debtors will also receive contribution protection pursuant to 42 U.S.C. § 9613(f)(2) with respect to the Liquidated Sites, while Ringier, in its capacity as indemnitor for the Debtors, will receive contribution protection with respect to the Lake Calumet Cluster Superfund Site and the Lenz Oil Site.

D. Comments and Objections

The United States received one written comment regarding the Settlement Agreement. This comment is attached hereto as Exhibit 2.

The comment was submitted on behalf of the Lake Calumet Cluster Site PRP Group ("Lake Calumet PRPs"). The comment first states that the Settlement Agreement does not contain explicit language making clear that the $38,617.58 cash payment from Ringier will be "credited by EPA to its account for a particular site, which credit shall reduce the liability of non-

settling potentially responsible parties for the particular site by the amount of the credit," as there is with respect to monies received from the Debtors on account of EPA's general unsecured claims. The Lake Calumet PRPs submit that "Ringier's payment must [similarly] be credited by EPA to its account for the LCCS Site," as there is "no factual or legal basis to treat" Ringier's cash payment in a different fashion than the funds received on account of the EPA's general unsecured claims.

Second, the Lake Calumet PRPs take issue with Paragraph 20.a.iii of the Settlement Agreement, which provides that the "EPA may, in its sole discretion, direct any portion of any cash distribution, or the proceeds of any non-cash distribution, into site-specific special accounts established to fund response actions at Liquidated Sites in the event that future work is anticipated at such sites." The Lake Calumet PRPs assert that, because future response actions are anticipated at the Lake Calumet Cluster Superfund Site, "the cash EPA will receive from Debtors and Ringier must be allocated into a special account for use at the LCCS Site," as the "use of these funds for purposes other than the remediation of the LCCS would be unfair and unreasonable."

ARGUMENT

A. The Court Should Approve the Proposed Settlement Agreement Because It is Fair, Reasonable, and Consistent With Environmental Law

Approval of a settlement agreement is a judicial act committed to the informed discretion of the Court. *In re Cuyahoga Equipment Corp.*, 908 F.2d 110, 118 (2d Cir. 1992) *United States v. Hooker Chem. & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), *aff'd*, 749 F.2d 968 (2d Cir. 1984); *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1035 (D. Mass 1989), *aff'd* 899 F.2d 79 (1st Cir. 1990). Judicial review of a settlement negotiated by the United

States is subject to special deference; the Court should not engage in "second-guessing the Executive Branch." *Cannons Eng'g Corp.*, 899 F.2d at 84; *In re Cuyahoga*, 980 F.2d at 118 (noting the "usual deference given the EPA"); *New York v. Solvent Chemical Corp.*, 984 F. Supp. 160, 165 (W.D.N.Y. 1997) ("This Court recognizes that its function in reviewing consent decrees apportioning CERCLA liability is not to substitute its judgment for that of the parties to the decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy.") (internal quotation marks omitted). An evidentiary hearing is not required in order to evaluate a proposed CERCLA consent decree. *United States v. Charles George Trucking Co.*, 34 F.3d 1081, 1085 (1st Cir. 1994); *Cannons*, 899 F.2d at 94. For the reasons discussed below, the Court should approve the Settlement Agreement because it is fair, reasonable, and furthers the goals of CERCLA. *See Charles George Trucking Co.*, 34 F.3d at 1084; *Cannons*, 899 F.2d at 85. This "limited standard of review reflects a clear policy in favor of settlements." *Solvent Chem. Corp.*, 984 F. Supp. at 165.

1. *The Settlement is Fair*

The fairness of a CERCLA settlement involves both procedural fairness and substantive fairness. *Cannons*, 899 F.2d at 86-88. To measure procedural fairness, the Court "should look to the negotiation process and gauge its candor, openness, and bargaining balance." *Id.* at 86. The negotiation of the Settlement Agreement was procedurally fair because it was negotiated at arm's length over a period of nine months and the parties were represented by experienced counsel.

To measure "substantive" fairness, the Court should consider whether the settlement is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability . . . according to rational (if necessarily imprecise) estimates of how much

harm each PRP has done." *Id.* at 87. *See also United States v. Davis*, 261 F.3d 1, 24 (1st Cir. 2001); *Charles George Trucking, Inc.*, 34 F.3d at 1087; *United States v. DiBiase*, 45 F.3d 541, 544-45 (1st Cir. 1995).

Here, the proposed Settlement Agreement is "substantively" fair. The proposed Settlement Agreement is the product of a complex analysis of the Debtors' environmental liabilities, as well as litigation risks, the existence of other PRPs, the circumstances under which contamination occurred, and multiple other factors. These issues formed the backdrop for lengthy negotiations between the parties. The resulting terms of the settlement, which permit the United States to recover past and estimated future response costs for four non-debtor-owned sites; grant a general unsecured claim in settlement of the EPA's claims for civil penalties arising under the Clean Air Act; require Debtors or Ringier to continue to comply with existing injunctive obligations at the Keystone Site and the Lenz Site, with certain modifications; and leave unaffected the Debtors' liability to the EPA with respect to the twelve Excluded Sites, are substantively fair.

2. *The Settlement is Reasonable*

Courts evaluating the reasonableness of CERCLA settlements have considered three factors: technical adequacy of the cleanup work to be performed; satisfactory compensation to the public for response costs; and the risks, costs and delays inherent in litigation. *See Charles George*, 34 F.3d at 1087; *Cannons*, 899 F.2d at 89-90.

Although the first prong of the reasonableness inquiry is not at issue in this settlement, the proposed Settlement Agreement does satisfy the other, necessarily intertwined, considerations relevant to reasonableness. As discussed above, the United States will receive allowed general

unsecured claims totaling approximately $374,613.88, as well as receive a cash payment of $38,617.58, in connection with four non debtor owned sites. These settlement terms satisfactorily compensate the public, and reasonably balance myriad competing factors, including the strength of the United States' case against the Debtors; the Debtors' bankruptcy; and the need to recover funds for cleanup and minimize the expense and potential delay of protracted litigation. Accordingly, the proposed Settlement Agreement is reasonable.

3. *The Settlement is Consistent with the Goals of CERCLA*

The primary goals of CERCLA are to "encourage prompt and effective responses to hazardous waste releases and to impose liability on responsible parties," and to "encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation." *In re Cuyahoga*, 980 F.2d at 119. This settlement furthers these statutory goals. As discussed above, the proposed Settlement Agreement accounts for past and estimated future response costs at non-debtor-owned sites, as well as requires Debtors or Ringier to continue to perform under two existing consent decrees, at the Keystone Site and the Lenz Site, subject to certain modifications. The settlement further meets CERCLA's statutory goal of providing final resolution of liability for settling parties. Moreover, the proposed Settlement Agreement serves CERCLA's goal of reducing, where possible, the litigation and transaction costs associated with response actions, as well as the public policy favoring settlement to reduce costs to litigants and burdens on the courts. *See Winberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

B. The Public Comment Received Does Not Indicate that the Settlement Agreement Is Inappropriate, Inadequate, or Improper

The United States has considered the issues raised in the single public comment that it received with respect to the Settlement Agreement from the Lake Calumet PRPs and, as set forth

below, has determined that nothing raised in this comment indicates that the Settlement Agreement is inappropriate, inadequate or improper.

First, the Lake Calumet PRPs seek language that requires EPA to give non-settling PRPs a credit for the cash payment it will receive from Ringier - in the amount of $38,617.58 - with respect to the Lake Calumet Cluster Superfund Site. The Lake Calumet PRPs' comment misapprehends the credit process. By operation of Section 113(f)(2) of CERCLA, all funds actually received pursuant to this Settlement Agreement will be credited to the appropriate site account and that credit will reduce the liability of non-settling PRPs. Specifically, Section 113(f)(2) states:

> A person who has resolved its liability to the United States or a State in an administratively or judicially approved settlement shall not be liable for contribution for matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible persons unless its terms so provide, *but it reduces the potential liability of the others by the amount of the settlement.*

42 U.S.C. § 9613(f)(2) (emphasis added). Nothing in the Settlement Agreement deprives the Lake Calumet PRPs of the credits to which they are legally entitled. The EPA will credit the Lake Calumet Cluster Superfund Site's account with all funds actually received for that site pursuant to the settlement, whether the monies are received from the Debtors on account of EPA's allowed claim with respect to the site or from Ringier as a separate cash payment.

The Comment cites to Paragraph 5.a of the Settlement Agreement for the proposition that credits are being afforded for amounts received from the Debtors, but not amounts received from Ringier. The Lake Calumet PRPs misread the pertinent language. As the full language of the paragraph makes clear, Paragraph 5.a of the Settlement Agreement merely establishes that the

amount of the credit received with respect to the EPA's Allowed Class 3 General Unsecured Claim will not be the full amount of the allowed claim, but rather the amount of value received by the EPA on account of the allowed claim.[5] Paragraph 5 does not limit the credits to be afforded to non-settling PRPs to only those amounts received on account of general unsecured claims.

Second, the Lake Calumet Cluster PRPs assert that EPA must place all of the funds received in connection with the Lake Calumet Cluster Superfund Site - whether from the Debtors (dividend received on $2,701.12 allowed claim) or from Ringier ($38,617.58) - into an EPA site-specific special account for the Lake Calumet Cluster Superfund Site and that EPA must also use such monies for future remedial action the site.[6] Although EPA has the discretion to place such monies into a site-specific special account, *see* Settlement Agreement ¶ 20(a)(iii), it is under no obligation to do so. CERCLA requires that the non-settling PRPs receive the appropriate credit

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5 Courts have regularly approved CERCLA bankruptcy settlements which provide, for purposes of Section 113(f)(2), that the amount of the settlement is the amount received by the settling governmental parties, not the face value of the allowed claims. *See*, *e.g.*, *Eagle-Picher Indus.*, 197 B.R. 260, 271-72 (Bankr. S.D. Ohio 1996). Section 113(f)(3) of CERCLA plainly contemplates that the United States can pursue non-settlors whenever it obtains "less than complete relief" from settlors. *See* 42 U.S.C. § 9613(f)(3) ("If the United States . . . has obtained less than complete relief from a person who has resolved its liability to the United States . . . in a[] . . . judicially approved settlement, the United States . . . may bring an action against any person who has not so resolved its liability."). As the legislative history indicates, nonsettling persons "remain potentially liable for the amounts not *received* by the government through the settlement." *See* 131 Cong. Rec. 34,646 (Dec. 5, 1985) (remarks of Rep. Glickman incorporating House Judiciary Committee explanations of amendments to CERCLA); H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 3, at 19 (1985), *reprinted in* 1986 U.S. Code Cong. & Ad. News 3042 (emphasis added).

6 A special account is an account set up by EPA to be used to fund response actions at a particular Superfund site, as distinguished from monies in the general EPA Hazardous Substance Superfund, which are used at all sites.

under Section 113(f)(2). It does not, however, dictate how funds the EPA receives in settlement of a claim for response costs brought pursuant to section 107(a) of CERCLA must be expended. And the Lake Calumet PRPs cite no authority for the proposition that EPA is required to deposit settlement money into site-specific accounts or that EPA is required to expend monies received in connection with a settlement at any particular site. Finally, the Lake Calumet PRPs have ignored the fact that, as set forth in several of the proofs of claim filed by the United States, Debtors are liable to EPA for approximately $2 million in unreimbursed past response costs with respect to the Lake Calumet Cluster Superfund Site.[7]

7 Nor could the Court in any event modify the Consent Decree without the United States' consent. The law is clear that the Government cannot be forced to enter into settlements to which it does not consent. *Akzo Coatings*, 949 F.2d at 1435; *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348 (6th Cir. 1986); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc); *Cannons Engineering*, 899 F.2d at 93; *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985); *Arizona v. Nucor Corp.*, 825 F. Supp. 1452, 1458 (D. Ariz. 1992); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 698 (D.N.J. 1989). The United States does not consent to any modification of the terms of paragraph 20.

III. CONCLUSION

For the reasons stated above, the Court should approve and enter the proposed Settlement Agreement.

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