WOMBLE BOND DICKINSON (US) LLP
Kevin J. Mangan (NJ Bar No. 030721989)
1313 North Market Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
Email: kevin.mangan@wbd-us.com

Counsel for Montana Natural Resource Damage Program and Montana Department of Environmental Quality

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY**

In re: WHITTAKER, CLARK & DANIELS, INC., *et al.*, Debtors.[1]	Chapter 11 Case No. 23-13575 (MBK) (Jointly Administered)

STATE OF MONTANA'S (A) RESPONSE IN SUPPORT OF DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE CONSENT DECREE AND ENVIRONMENTAL SETTLEMENT AGREEMENT BETWEEN THE DEBTORS, THE GOVERNMENT ENVIRONMENTAL CREDITORS, THE BERKSHIRE ENTITIES, BRENNTAG, AND THE DBUS ENTITIES, (II) AUTHORIZING THE DEBTORS TO PERFORM ALL OF THEIR OBLIGATIONS THEREUNDER, AND (III) GRANTING RELATED RELIEF; AND (B) NOTICE OF PUBLIC COMMENTS RECEIVED AND RESPONSES THERETO

INTRODUCTION

The State of Montana through the Montana Natural Resource Damage Program ("NRDP") and the Montana Department of Environmental Quality ("DEQ") (collectively, "Montana) respectfully requests the Court enter an order substantially in the form of Docket No. 2626 (the

[1] The Debtors in these chapter 11 cases, along with the last four digits of the Debtors' federal tax identification numbers, are Whittaker, Clark & Daniels, Inc. (4760); Brilliant National Services, Inc. (2113); L. A. Terminals, Inc. (6800); and Soco West, Inc. (3400). The location of Debtors' principal place of business and the Debtors' service address in these chapter 11 cases is 100 First Stamford Place, Stamford, Connecticut 06902.

"Approval Order") and approve the settlement agreement (the "Settlement Agreement") attached thereto as an Exhibit 1, thereby satisfying Proof of Claim No. 58, in which Montana has asserted claims concerning the Lockwood Solvent Superfund Site outside Billings, Montana. Additionally, Montana provides notice of public comments received and responses thereto which are attached as Exhibit A hereto.

BACKGROUND

1. On October 23, 2023, Montana filed Proof of Claim 58 for $11,167,773, which includes $9,430,000.00 for DEQ's claim and $1,737,773.00 for NRDP's claim against Soco West, Inc. for natural resource damages and costs incurred and to be incurred by the State of Montana in response to releases and threats of releases of hazardous substances in connection with the Lockwood Solvent Site. The proposed Settlement Agreement includes a portion for cleanup costs and natural resource damages for the Lockwood Solvent Site.

2. Montana, through DEQ and NRDP, solicited public comments on the proposed Settlement Agreement from April 8, 2026, through May 8, 2026, as required by Section 713 of the Montana Comprehensive Cleanup and Responsibility Act (CECRA), Montana Code Annotated (MCA) Section 75-10-713.

3. DEQ published notice of the public comment period in the Billings Gazette on April 8, 2026, as well as subsequent weeks. Both DEQ and NRDP placed it on their websites where public notices are placed. NRDP notified their mailing list for the 2011 Yellowstone River Oil Spill, which is in a similar geographic area to the Lockwood site. DEQ provided notice to the Yellowstone County Commissioners on April 3, 2026.

4. Montana received two comments. All received public comments are provided in full in Exhibit A. In Montana's response to public comments, Commenter 2 raised many issues,

so Montana broke the comment up into multiple issues to ensure an adequate response to the comment.

5. Under Paragraph 48 of the proposed Settlement Agreement and paragraph 2 of the Amended Scheduling Order Regarding Environmental Settlement Motion (Docket No. 2769), Montana is required to file notice with the Bankruptcy Court of any comments received, as well as Montana's responses to those comments. This response to the Debtors' motion is Montana's method for fulfilling this obligation.

6. Under Paragraph 48 of the proposed Settlement Agreement, Montana "reserve[d] the right to withdraw or withhold their consent if the comments regarding this CD and Environmental Settlement Agreement disclose facts or considerations which indicate that this CD and Environmental Settlement Agreement is not in the public interest."

ANALYSIS

7. Through consideration of the public comments and responding to them, Montana has determined that the public comments do not disclose facts or considerations that indicate that the Settlement Agreement is not in the public interest; Montana therefore is not seeking to withdraw or withhold its consent and supports prompt entry of an order by the Court approving the Settlement Agreement. Montana also has determined that the settlement is fair, adequate, reasonable, and consistent with the goals of the *Comprehensive Environmental Response, Compensation and Liability Act*, as amended, 42 U.S.C. § 9601 *et seq*. (CERCLA) and CECRA, § 75-10-701 *et seq*. Further information on this analysis is outlined in **Exhibit A**.

RELIEF REQUESTED

8. Montana respectfully requests that the Court approve the Settlement Agreement and enter the proposed Approval Order in substantially the form as shown in Docket No. 2626.

NOTICE

9. The State of Montana has provided notice of this Motion to the following parties or their respective counsel: (a) the U.S. Trustee for the District of New Jersey; (b) the Official Committee of Talc Claimants; (c) the Top Counsel List;[2](d) the Berkshire Entities and counsel thereto; (e) the Office of the United States Attorney for the District of New Jersey; (f) the Internal Revenue Service; (g) the Securities Exchange Commission; (h) the EPA; (i) the DTSC; (j) the State Water Board; (k) the Los Angeles Water Board; (l) the OCWD; (m) the offices of the attorneys general in states where the Debtors conduct their business operations; (n) Brenntag and counsel thereto; (o) the DBUS Entities and counsel thereto; (p) the future claimants' representative and counsel thereto; and (q) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, no other or further notice is required.

WHEREFORE, the State of Montana requests the Court enter the Approval Order in substantially the form in Docket No. 2626: (i) approving the Settlement Agreement; (ii) authorizing the Parties to enter into and take all actions contemplated in the Settlement Agreement; and (iii) granting such other relief as may be appropriate.

Dated: July 17, 2026

WOMBLE BOND DICKINSON (US) LLP

/s/ Kevin J. Mangan
Kevin J. Mangan (NJ Bar No. 030721989)
1313 North Market Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
Email: kevin.mangan@wbd-us.com

Counsel for Montana Natural Resource Damage Program and Montana Department of Environmental Quality

[2] As defined in the *Debtors' Motion for Entry of an Order (A) Authorizing the Debtors to (I) File a List of the Top Law Firms and Use the Addresses of Counsel in Lieu of Claimants' Addresses and (II) Redact Personally Identifiable Information, (B) Approving Certain Notice Procedures, and (C) Granting Related Relief* [Docket No. 8].

EXHIBIT A

PUBLIC COMMENTS RECEIVED AND MONTANA'S RESPONSES

State of Montana's Response to Comments on the proposed Consent Decree in In re: Whittaker, Clark & Daniels, Inc. et al., Case No. 23-13575 (MBK) for the Lockwood Solvent Ground Water Plume Superfund Site

Prepared Jointly by the Montana Natural Resource Damage Program and the Montana Department of Environmental Quality

July 2026

Introduction

From April 8, 2026, through May 8, 2026, the Montana Department of Environmental Quality (DEQ) accepted public comment on a proposed bankruptcy settlement involving the Montana Natural Resource Damage Program (NRDP) and DEQ. The proposed settlement includes a portion for cleanup costs and natural resource damages for the Lockwood Solvent Site. Lockwood Solvent Site is a contaminated groundwater plume Superfund site in Lockwood, Montana (outside of Billings, Montana).

DEQ published notice of the public comment period in the Billings Gazette on April 8, 2026, as well as subsequent weeks. Both DEQ and NRDP placed it on their websites where public notices are placed. NRDP notified their mailing list for the 2011 Yellowstone River Oil Spill, which is in a similar geographic area to the Lockwood site. DEQ provided notice to the Yellowstone County Commissioners on April 3, 2026.

Public comments could be submitted to: DEQFSCB@mt.gov or mailed to Attn: Federal Superfund Public Comment, MT DEQ/WMRD P.O. Box 200901, Helena, MT 59620. DEQ received two comment letters during the public comment period. Copies of the comment letters are included at the end of this response to comments.

This response to comments summarizes the public comments received and provides the State's responses to those comments. The DEQ and NRDP have considered all comments received and has determined that the comments received do not disclose facts or considerations that indicate that the agreement is not in the public interest such that the State should modify or withdraw its consent.

Comment 1:

The Commenter said that the responsible party should not be released from their responsibility to pay for the cleanup and referred to Lockwood having to make costly updates to their water treatment system.

Response:

Montana understands that the commenter would like Montana not to enter into this Settlement Agreement and DEQ and NRDP were aware of the impacts to the Lockwood water system when entering into the Settlement Agreement. (In fact, the natural resource damage portion of the State's Proof of Claim is specifically based on impacts to the groundwater and the drinking water services that it could provide.) Based on the totality of the proposed Settlement Agreement, DEQ and NRDP determined that it was appropriate to enter into this Settlement Agreement. Based on Montana's experience negotiating other CERCLA consent decrees and in other bankruptcies, NRDP and DEQ determined it was best to participate in a cash-out settlement that included the contributing parties to receive as much fundings as possible on behalf of the Montana public. The alternative was to see what could be obtained in the bankruptcy, which is uncertain. Also, the benefits of receiving a stipulated allowed claims rather than having to participate in a future, time and resource-intensive estimation hearing was of benefit to the State. As is the case with all settlement, DEQ and NRDP sought to obtain the best deal for the State of Montana while the debtors and contributing parties sought to minimize payments and concessions made to the State.

Montana's portion of the settlement is fair, reasonable, and in the public interest when compared to the amount in Montana's proof of claim. For ease of explaining the percentages, this response will focus on the natural resource damage claim. Montana will receive about 19% of its natural resource damage claim in cash as well as 56% of the value of its claim as a stipulated allowed claim. Although NRDP recognizes that this amount is much less than the public would like to see, when balanced against the many competing unsecured creditors and the risk, time, and expensive of an estimation hearing, the State continues to believe that the settlement is fair, reasonable, and in the public interest.

Comment 2: Official Committee of Talc Claim Creditors (TCC), May 8, 2026

The TCC submitted a comment to Montana making several claims and raising several objections to the proposed settlement. DEQ and NRDP have organized and numbered the points raised in the letter below (for ease of response) and responded to each one in turn.

Issue 1: The Governmental Environmental Creditors have not explained why they no longer object to the Estate Claims Settlement.

Response 1:

Montana did not object to the Estate Claims Settlement.

Issue 2: The Government Environmental Creditors have never provided their own estimation of the Debtors' environmental liabilities.

Response 2:

Montana has provided its own estimation of the Debtors' environmental liabilities to Montana. See Montana's proof of claim including an evaluation of the natural resource damages and DEQ's cost share and operation and maintenance costs. 121531023233476375800001_1698094175.pdf

Issue 3: The proposed settlement is procedurally unfair under the CERCLA consent decree standard.

The TCC states that the settlement was negotiated through an improper and opaque process calculated to undermine the TCC's litigation of the Estate Claims Settlement. The comment quotes various cases about the requirements of negotiation, including arms-length negotiation between experienced counsel. Further, the TCC objects to receiving no notice of the environmental settlement negotiations, no invitation to participate, and no opportunity to submit views or alternatives before the deal was structured.

The comment also states, "Allowing environmental agencies to trade their legal objections in bankruptcy proceedings for cash—without consultation with the affected creditors and without considering the costs to those creditors—would fundamentally undermine the integrity of both CERCLA's public comment process and the bankruptcy process."

The commenter also expresses concern with the time frame of the negotiation, which was released in April 2026.

Response 3:

Montana did not object to the Estate Claims Settlement; Montana's portion of the negotiation had nothing to do with the Estate Claims Settlement. See Response to Comment 1. As can be shown by discovery provided to the TCC, Montana first started trying to participate in the discussions of the environmental liabilities (which eventually lead to the cash-out settlement) beginning in the fall of 2024. Montana approached this settlement of the environmental liabilities at Lockwood and as part of this bankruptcy very similarly to the approach it has taken during other settlements and in other bankruptcies..

CERCLA settlement negotiations do not typically include invitations to participate except for those statutorily required (e.g., EPA must notify natural resource trustees). Accordingly, governmental parties and potentially responsible parties do not typically invite others to join in the arms-length negotiations, whether to other creditors or to members of the public.

It is also important to note that the Governor of Montana signed the proposed consent decree in December 2025. The release of the proposed settlement in April 2026 was due to the fact that the United States took several months longer to obtain signatures and not because settlement negotiations continued for several more months.

Issue 4: The proposed settlement violates the notice and comment provisions of CERCLA because it does not include the proposed Lockwood trust agreement.

Response 4:

Montana is not required to have the trust agreement in place prior to settlement of the liabilities of the settling defendants. The threshold criteria are whether the settlement itself is fair, reasonable, and in the public interest. (see response to Comment 1). The implementation of the remedy, however, falls to the discretion of the agencies (see Section 75-10-701(20) Mont Code Ann.). In this case, rather than taking a direct cash payment from the settling parties, as well as requiring the state to take ownership of the Lockwood property, the agencies have determined that a managed environmental trust is the most appropriate way to address the future cleanup of the site. The cleanup of the site itself is found in the site Record of Decision (ROD) and any amendments thereto, each with their own public comment and participation process.

The lack of a trust agreement at this point in time is reasonable given that the settlement of liabilities is not certain, as further supported by the commentor's comments here and parallel pursuit of discovery in this matter in support of its potential objections to the settlement. Given these uncertainties it is not in the public interest to spend public funds at this time on the negotiation of a separate trust as well as the costs of selecting and retaining a trustee to oversee the settlement funds and property. Further, the eventual allocation by the bankruptcy court of debtor bankruptcy funds will inform the government agencies at the Lockwood site as to the structure and goals of the eventual environmental trust and its trustee. In any event, the settlement is clear that settlement funds must be used to remediate the Lockwood OU2 site.

CERCLA itself identifies the federal and state funding obligations should there be no settlement dollars or viable responsible parties to bear the costs of remediation. As outlined in the State's proof of claim, the State of Montana would be responsible for 10% of remedial action costs and 100% of long-term Operations and Maintenance costs. These funding obligations are precisely why the State considered and ultimately agreed to and supported lodging this proposed settlement with the bankruptcy court.

The commentor states that the Lockwood settlement fails to provide, "the instrument that will govern the actual remediation obligations, funding mechanisms, trustee powers, and oversight framework for a perpetual-treatment site—until after the close of the public comment period, the notice and comment process is rendered illusory." The commentor incorrectly identifies the trust and trustee as governing how the remedy will be carried out at Lockwood OU2. These duties, under both CERCLA and CECRA, fall solely to the agencies. In this case, the EPA serves as the lead agency enforcing CERCLA at the site. The settlement agreement does nothing to change this. The EPA, in consultation with DEQ, will continue to oversee and direct the cleanup at the site, following the public participation process found in CERCLA.

The State has met its obligations under Section 75-10-713, Mont. Code Annotated to provide "a notice and brief description of the proposed order or decree in a daily newspaper of general circulation in the area affected and make copies of the proposal available to the public . . . ." The fact that the settlement calls for settlement funds to be placed in a trust, rather than in settlement accounts held by the governments, is well within the governments' discretion in carrying out the remedial action at the site.

Issue 5: The settlement is arbitrary and capricious under the Administrative Procedures Act.

The comment states that the settlement has not provided any independent valuation or adequate explanation of the amount of the proposed settlement of direct claims against Soco West.

The comment also objects to the settlement not considering the comparative fault of the contributing parties.

The comment objects to the allocation of the $16.5 million payment to the governmental creditors without a specific explanation.

The commenter also notes that Montana did not consult with any tribes about the remedy at Lockwood site or the proposed Settlement Agreement.

Response 5:

Montana does not have to comply with the Administrative Procedures Act. That being said, DEQ and NRDP have reviewed the proposed settlement in light of these comments and believe that it is fair, reasonable, and in the public interest.

Montana has provided its own estimation of the Debtors' environmental liabilities to Montana. See Montana's proof of claim including an evaluation of the natural resource damages and DEQ's cost share and operation and maintenance costs. 1215310232334763758000001_1698094175.pdf

Montana is also under no obligation to determine the comparative fault of the settling parties; this settlement is consistent with CERCLA, which has a statutory framework that includes joint and several liability and contribution actions, precisely so that a government does not need to determine the exact amount of liability of each potentially responsible party.

The Commenter correctly notes that Montana did not consult with any tribes regarding the proposed Settlement Agreement. NRDP consults with tribal natural resource trustees where there is a potential for joint jurisdiction over an injured natural resource, such as potential injuries to a natural resource where a tribe has treaty rights over the resource. In this case, the natural resource damage claim is based solely on injured groundwater; Montana is the only natural resource trustee with jurisdiction over groundwater. Because no other natural resource trustee has jurisdiction over the groundwater, Montana did not consult with any other natural resource trustees (whether tribal or federal). The CERCLA citations provided do not apply to DEQ's role as a consultative agency at Lockwood.

See Response to Comment 1.

Issue 6: The proposed settlement is unfair to non-settling parties because of the contribution protection.

Response 6:

DEQ and NRDP are not aware of another potentially responsible party at Operable Unit 2 of the Lockwood Solvent Ground Water Plume Superfund Site, which is what Montana would be settling in the proposed settlement.

Issue 7: The proposed settlement did not consider other enforcement mechanisms under CERCLA

Response 7:

CERCLA does not require that the lead agency exhaust all other enforcement mechanisms prior to settlement. Rather, CERCLA encourages the settlement of environmental claims, when possible, to avoid increased costs to litigating liability, resulting in less funds available for cleanup. Ultimately, the lead agency has discretion whether to pursue cleanup through enforcement (e.g., unilateral orders), or settlement for funds, guarantees of work, or both.

Further, the natural resource damage portion of Montana's portion of the settlement cannot be addressed through the other options proposed by the commenter.

Issue 8: The proposed settlement did not consider the impact on talc claimants and other creditors

Response 8:

Montana's obligation is to enter into a settlement of the environmental claims that is fair, reasonable, and in the public interest. NRDP and DEQ understands that the talc claimants and other creditors feel that Montana and the other environmental creditors received too large of a settlement. However, this is not the standard for a court to enter a settlement under CERCLA. See Response to Issue 3.

Public Comments Received

From: WILLIAM G ENRIGHT <wgenright@msn.com> Sent: Wednesday, April 15, 2026 10:59 AM
To: DEQ FSCB <DEQFSCB@mt.gov>
Subject: [EXTERNAL] Lockwood superfund site

I strongly disagree that any party should be relieved of their responsibility in this matter. Lockwood's wells were severely impacted by this spill and had to install costly improvements to their water treatment plant and portions of their distribution system. Those responsible should continue to pay for this environmental disaster.

Get Outlook for iOS [aka.ms]

The Official Committee of Talc Claimants
of Whittaker, Clark & Daniels, Inc., *et al*.

Via Email

May 8, 2026

Montana Natural Resource Damage Program
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620
DEQFSCB@mt.gov

Subject: *In re: Whittaker, Clark & Daniels, Inc., et al*., Case No.: 23–13575 (MBK), D.J. Ref. No. 90–11–3–12869.

Dear Sir or Madam:

The Official Committee of Talc Claimants (the "TCC") of Whittaker, Clark & Daniels, Inc. and its affiliated debtors (collectively, the "Debtors") in the above-referenced chapter 11 cases (the "Chapter 11 Cases"), by and through its undersigned counsel, submits these comments and objections during the public comment period in response to the proposed Consent Decree and Environmental Settlement Agreement (the "CDESA") filed in the Chapter 11 Cases at Docket No. 2626 and published at 91 Fed. Reg. 18484. The TCC represents the interests of thousands of individuals who have been diagnosed with mesothelioma and other asbestos-related diseases as a result of exposure to talc- and asbestos (a hazardous material under 40 C.F.R § 302.4)-containing products historically distributed by the Debtors.

The CDESA proposes to resolve all environmental liabilities of the Debtors under federal and state laws to the State of Montana through the Montana Natural Resource Damage Program and the Montana Department of Environmental Quality ("Montana") and the other Government Environmental Creditors[1] as well as all related liabilities of the non-Debtor Settling Parties[2] in exchange for, among other things, (a) a $57 million general unsecured claim against one of the Debtors' estates, and (b) a $16.5 million direct cash payment from National Indemnity Company ("NICO"), the Debtors' ultimate parent and an affiliate of Berkshire Hathaway. But as set forth in detail below, neither Montana nor any of the other Government Environmental Creditors have put

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1 "Government Environmental Creditors" mean, collectively: (a) the United States on behalf of the Environmental Protection Agency (the "EPA," or the "United States"); (b) Montana; (c) the State of California Department of Toxic Substances Control (the "DTSC"); (d) the California State Water Resources Control Board (the "State Water Board") and California Regional Water Quality Control Board, Los Angeles Region (the "Los Angeles Water Board," and together with the State Water Board, the "California Water Boards"); and (e) the Orange County Water District (the "OCWD").

2 "Settling Parties" means, the "Berkshire Entities," "Brenntag," and "DBUS Entities" all as defined in the CDESA.

forth any basis to evaluate the CDESA nor have they met their burden to show that providing their consent to the CDESA in its current form is in the public interest. Accordingly, the TCC respectfully submits that the CDESA is unlawful, arbitrary and capricious, and must be rejected.

I. RELEVANT BACKGROUND

The Debtors filed for chapter 11 protection in April 2023, facing billions of dollars in asbestos-related liabilities. Crucially, several non-Debtors, including the Berkshire Entities, the DBUS Entities, and Brenntag, are potentially liable for the Debtors' tort and environmental liability under successor liability theories and through the functioning of historical indemnification obligations.

Without the involvement of the TCC or tort creditors it represents, the Debtors negotiated a $535 million settlement with NICO and the other Settling Parties to resolve all such successor liability claims (the "Estate Claims Settlement"). The Estate Claims Settlement remains pending before the Bankruptcy Court and would settle personal injury tort claims against the non-Debtors for a fraction of their true value without the consent of the tort creditors. The TCC opposed the Estate Claims Settlement, as did the EPA, the State Water Board, DTSC, and OCWD.

In March 2025, the Bankruptcy Court conducted a trial on the Estate Claims Settlement (the "Estate Claims Settlement Trial"). During the Estate Claims Settlement Trial, several Government Environmental Creditors, along with the TCC, put forth substantial evidence disproving the tort liability estimates of the Debtor's valuation expert David L. McKnight ("McKnight"). The United States identified multiple fundamental flaws in the Estate Claims Settlement, including McKnight's estimation of environmental liabilities. *See, e.g.*, Trial Tr. Day 2 PM Session (Mar. 4, 2025) at 34:12–38:1 (failure to account for EPA oversight or indirect costs); 38:11–23 (failure to account for claims by Montana); 42:10–47:15 (failure to use accepted cost estimation methods); 58:21–60:7 (failure to appropriate discount rate). DTSC's opposition to the Estate Claims Settlement argued that it was not "fair and equitable" under Third Circuit law. The objects to the Estate Claims Settlement filed by the EPA, the State Water Board, DTSC, and OCWD, as well as the EPA's motion in limine with respect to McKnight's testimony, are attached hereto as Appendix A–E.[3]

The objecting Government Environmental Creditors abandoned their opposition on the last day of the Estate Claims Settlement Trial. On the morning of closing arguments, the Debtors' counsel announced that they and the Government Environmental Creditors had reached the contours of a settlement "in the wee hours." Trial Tr. Day 4 (Mar. 6, 2025) at 6:2–3. The CDESA, made public over a year later, is that deal.

Through the CDESA, the objecting Government Environmental Creditors agree to drop their oppositions to the Estate Claims Settlement's treatment of all successor liability claims in return for, among other things, a settlement of all direct liability claims against one of the Debtors, Soco West, Inc. ("Soco West"), as well as settlement of any potential claims under CERCLA

[3] Exhibits filed with each of the foregoing are voluminous and not included in Appendix A–E due to their size, but can be accessed on the website maintained by the Debtors' claims and noticing agent: https://cases.stretto.com/whittaker.

§ 107(a)(2), 42 U.S.C. § 9607(a)(2) pursuant to *United States v. Bestfoods*, 524 U.S. 51 (1998) and equivalent claims under state environmental law asserting that NICO and/or the other Settling Parties are responsible for the environmental liabilities of the Debtors.

The CDESA provides no explanation, and the Government Environmental Creditors have provided no reasoned account, for how the CDESA resolves the Government Environmental Creditors' objections to the Estate Claims Settlement. Indeed, the CDESA does not explain what consideration, if any, is provided in return for the Government Environmental Creditors' agreement to the Estate Claims Settlement. And to this day, the Government Environmental Creditors have never provided their own estimation of the Debtors' environmental liabilities.

II. THE CDESA IS PROCEDURALLY UNFAIR UNDER THE CERCLA CONSENT DECREE STANDARD

Procedural fairness in a CERCLA consent decree requires that settlement negotiations embody "candor, openness and bargaining balance." *In re Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 207 (3d Cir. 2003) (internal quotation marks omitted); *see also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990) (finding procedural fairness satisfied when parties negotiated at arm's length among experienced counsel, allowed non-settlors to participate in the negotiations, and operated in good faith); *United States v. Grand Rapids, Michigan*, 166 F. Supp. 2d 1213, 1220 (W.D. Mich. 2000) (intervenors invited to participate in settlement negotiations by EPA).[4] The CDESA has none of these salutary qualities. It was negotiated through an improper and opaque process calculated to undermine the TCC's litigation of the Estate Claims Settlement.

The deal was struck on the last day of contested litigation, during the trial on the Estate Claims Settlement. The CDESA term sheet was announced by Debtors' counsel on the morning of closing arguments as having been reached just hours before. Trial Tr. Day 4 (Mar. 6, 2025) at 6:2–3. The EPA, the State Water Board, DTSC, and OCWD were, prior to that moment, active objectors to the Estate Claims Settlement. EPA counsel confirmed it was "extremely late-breaking" such that she had not been able "to obtain the necessary approvals." Trial Tr. Day 4 (Mar. 6, 2025) at 6:18–20. The announcement of the settlement on the last day of trial appears calculated to undermine the TCC's litigation position, despite the fact that EPA approval of a settlement had not actually been reached.

This is not a scenario suggesting arm's-length, carefully deliberated administrative decision-making. Unlike the open, group-based process upheld in *Grand Rapids* and *Cannons*, the TCC was given no notice of the environmental settlement negotiations, no invitation to participate, and no opportunity to submit views or alternatives before the deal was structured. The TCC immediately requested the term sheet, but the EPA objected on the grounds that the term sheet was "non-final." Trial Tr. Day 4 (Mar. 6, 2025) at 12:17–13:4. The TCC was denied access to it for over a year.

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[4] Montana has enacted companion legislation that adopts CERCLA's regulatory framework. Mont. Code Ann. § 75-10-701, *et seq*. (the "CECRA" statute); *see Pac. Hide & Fur Depot v. Great Am. Ins. Co.*, 23 F.Supp.3d 1208, 1216–17 (D. Mont. 2014) (comparing CECRA to CERCLA). To the extent that the CDESA violates CERCLA,

Over the course of the next ten months, the Debtors and Government Environmental Creditors returned to the Bankruptcy Court eight times to extend the Government Environmental Creditors' claims bar date, each time citing the need for more time to finalize the CDESA. At no point during this entire period was the TCC given information about the substance of the negotiations, invited to participate, consulted on the terms being developed, or provided with any draft of the CDESA. There is nothing in the administrative record to prove, let alone suggest, that the Debtors and the Government Environmental Creditors were indeed engaged in arms'-length negotiations during this period. When the CDESA was finally filed on April 3, 2026, it arrived as a fully-formed, fully-executed agreement—the product of over a year of negotiations from which the TCC was entirely excluded.

The process is especially troubling given the TCC's unique stake in the outcome. Unlike typical non-settling potentially responsible parties ("PRPs") in CERCLA cases—who are excluded from negotiations because they are potential defendants—the TCC represents thousands of individuals who are personally impacted by the Estate Claims Settlement and plan support provisions of the CDESA. Their exclusion cannot be excused as typical of CERCLA negotiations; it appears to have been a deliberate choice that enabled the parties to negotiate a deal that could potentially shift value away from asbestos and talc claimants to the settling environmental parties.

Moreover, the CDESA's core structure—settlement of some environmental claims in return for agreement not to object to a settlement primarily concerning tort victims of asbestos and talc exposure—does not follow the pattern of a typical CERCLA environmental remediation negotiation that impacts only the rights of the parties thereto. This is a resolution of a bankruptcy dispute in which the environmental settlement and the talc/asbestos settlement appear to have been traded against each other. Courts reviewing CERCLA consent decrees have always assumed the environmental settlement was negotiated on its own merits; here it was negotiated as part of a package deal with unaccounted-for externalities. This violates the standards of procedural fairness required by CERCLA." *See, e.g.*, *Cannons Eng'g Corp.*, 899 F.2d at 87 (finding procedural fairness satisfied when parties negotiated at arm's length among experienced counsel, allowed non-settlors to participate in the negotiations, and operated in good faith).

Allowing environmental agencies to trade their legal objections in bankruptcy proceedings for cash—without consultation with the affected creditors and without considering the costs to those creditors—would fundamentally undermine the integrity of both CERCLA's public comment process and the bankruptcy process. The TCC urges the Government Environmental Creditors to reconsider the CDESA, or at minimum to restructure it to eliminate the plan support and Estate Claims Settlement objection withdrawal provisions.

If the CDESA is permitted to stand in its current form, it will establish a template that well-resourced debtors and their corporate parents can use in future mass tort bankruptcies: pay environmental agencies just enough to secure their support for a below-market tort settlement, and eliminate credible objectors in the process. This outcome would corrupt CERCLA's enforcement mission and betray the public interest in both environmental remediation and fair compensation for individual tort victims.

III. THE CDESA VIOLATES CERCLA'S NOTICE AND COMMENT REQUIREMENTS

A substantial proportion of the Debtors' environmental liabilities derives from the Lockwood Solvent Site, in Billings Montana. The EPA bears the responsibility for the remediation efforts at the Lockwood Solvent Site, which will be required in perpetuity, resulting in significant coordination efforts and related costs and expenses. *See* Trial Tr. Day 3 PM Session (Mar. 5, 2025) at 157:17–22. Under the CDESA, a trust would be established to undertake the remediation efforts at the Lockwood Solvent Site. *See* CDESA ¶ 1(bb) (defining the "Lockwood Environmental Response Trust"). Yet the details of the trust agreement (the "Lockwood Trust Agreement") are left entirely undefined in the CDESA. *Id.* The CDESA merely provides that the Lockwood Trust Agreement "shall (a) be in a form mutually agreed (not to be unreasonably withheld, conditioned, or delayed) by the Debtors, the United States, on behalf of EPA, and Montana, on behalf of the Montana Department of Environmental Quality, (b) be filed with any motion contemplated by Paragraph 15 of [the CDESA]." *Id.* This is no more than an agreement to agree about the future disposition of the Lockwood Solvent Site.

Under the CDESA, the Lockwood Trust Agreement will not be negotiated or drafted until *after* the Effective Date of the CDESA—that is, after the public notice and comment period. The CDESA provides that the Debtors shall file a motion to establish the Lockwood Environmental Response Trust within 120 days of the Effective Date, with the Effective Date being the date on which the CDESA is approved by order of the Bankruptcy Court. Thus, there is no opportunity for notice and comment on the Lockwood Trust Agreement itself—the document that will actually define the governance structure, trustee powers, funding mechanisms, reporting requirements, and oversight framework for a perpetual-treatment site—which the CDESA contemplates being negotiated privately between the Debtors and United States, on behalf of EPA, and Montana, on behalf of the Montana Department of Environmental Quality, after the CDESA is approved by the Bankruptcy Court.

The record contains no independent cost estimate for the remediation of the Lockwood Solvent Site that could serve as a benchmark against which to measure the adequacy of the Lockwood Environmental Response Trust's funding. The only cost estimate in the record—McKnight's calculation—was repudiated by the Government's own expert as "faulty" and reflective of someone who "doesn't understand how to do environmental cost estimation." Trial Tr. Day 3 PM Session (Mar. 5, 2025) at 147:3–9.

And, the CDESA contains no mechanism to address a funding shortfall in the Lockwood Environmental Response Trust, nor does the administrative record reflect any analysis of the probability or consequences of such a shortfall. For a site requiring perpetual treatment, the absence of any contingency planning or reopener provision tied to trust adequacy is a material deficiency that neither the EPA, Montana, nor any other of the Government Environmental Creditors have explained or justified.

This structure is unlawful under CERCLA. Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), requires that a proposed consent decree be made available for public notice and comment before it is entered. The purpose of this requirement is to afford the public a meaningful opportunity to evaluate the terms of the proposed settlement and to submit informed comments.

Where, as here, the CDESA defers the negotiation and drafting of the Lockwood Trust Agreement—the instrument that will govern the actual remediation obligations, funding mechanisms, trustee powers, and oversight framework for a perpetual-treatment site—until after the close of the public comment period, the notice and comment process is rendered illusory. The public cannot meaningfully evaluate a settlement whose operative terms do not yet exist. The failure of the EPA, Montana, and the other Government Environmental Creditors to ensure that the Lockwood Trust Agreement—or, at minimum, its material terms—was available for public review during the comment period independently renders the CDESA unlawful.

IV. THE CDESA IS ARBITRARY AND CAPRICIOUS UNDER CERCLA § 113(j) AND THE APA

Substantive fairness requires that 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 Eng'g Corp.*, 899 F.2d at 87.

Moreover, a settlement, like any agency action, is arbitrary and capricious under 5 U.S.C. § 706 if, among other things, the agency (a) failed to consider an important aspect of the problem, (b) failed to consider obvious alternatives, (c) failed to consider the relevant costs of its action, or (d) did not support its action with substantial evidence. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983); *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999); *Michigan v. E.P.A.*, 576 U.S. 743 (2015); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020). The CDESA falls short of these standards.

First, the Government Environmental Creditors have not provided any independent valuation or adequate explanation of the amount of the proposed settlement of direct claims against Soco West. The Bankruptcy Court record reflects the fact that the valuation of these environmental liabilities is highly contested, including by the Government Environmental Creditors themselves. Without further explanation, the public cannot judge whether the proposed direct claims settlement is in the public interest. *See United States v. Montrose Chem. Corp.*, 50 F.3d 741, 747 (9th Cir. 1995) (reversing the approval of a consent decree given that record had "no evidence of the governments' estimate—preliminary or otherwise—of total natural resource damages").

Second, compounding this failure, the Government Environmental Creditors do not explain or consider the comparative fault of each Settling Party at each Site. The CDESA contains broad covenants not to sue the Berkshire Entities, the DBUS Entities, and Brenntag, yet the public record contains no assessment of: (a) any of their comparative fault at any of the sites; (b) the relative volumetric contributions of hazardous substances attributable to each as against Soco West; (c) the duration or nature of each of their operational control at the covered sites; (d) the relative strength of the Government Environmental Creditors' *Bestfoods* claims against each party; or (e) any other factor that would explain why those parties' aggregate exposure was resolved for the amounts set forth in the CDESA.

Even more troubling, the CDESA provides that all of the $16.5 million settlement will be provided by NICO, without any explanation of that allocation. Without considering the comparative fault of each Settling Party, it is not possible for the public to understand why *all four* Settling Parties received the same degree of a permanent injunction blocking future legal action nor why only *one* Settling Party, NICO, will pay all of the consideration to settle these liabilities. The failure to consider or explain this comparative fault is arbitrary and capricious. *See Montrose Chem. Corp.*, 50 F.3d at 747 (9th Cir. 1995) (reversing the approval of a consent decree in part because the record included no information about the settling parties' comparative fault).

Third, the $16.5 million NICO payment is allocated among the Government Environmental Creditors and the Lockwood Environmental Response Trust by fixed percentages. Yet, the CDESA does not explain how those percentages were derived. There is no volumetric formula, no site-specific comparative fault data, and no methodology of any kind identified or explained. The allocation of payment among sites is an important aspect of the CDESA yet it is entirely unexplained and unsupported by evidence.

Fourth, the Estate Claims Settlement proposed to release not just derivative talc liability, but also derivative environmental liability. The environmental liability—$13 million on account of Soco West and $13 million on account of Debtors Brilliant National Services, Inc. and L. A. Terminals, Inc., *see* Estate Claims Settlement Motion ¶ 62—was folded into the $535 million consideration without any separate accounting in the CDESA for how the Government Environmental Creditors' derivative claims were valued, released, or distinguished from the direct claims being resolved under the CDESA. The failure to consider, explain, or account for this full scope of what the Government Environmental Creditors surrendered under the CDESA constitutes a failure to consider an important aspect of the settlement.

This failure is particularly acute because the Government Environmental Creditors, excluding Montana, previously opposed the very provisions of the Estate Claims Settlement which they now agree to support. This abrupt change of position by governmental agencies is problematic and requires an explanation. The fact that the Government Environmental Creditors have agreed to change their position is not an adequate explanation of *why* that agreement to change position is in the public interest.

Fifth, Approval of the CDESA would trigger contribution protection for all settling parties, barring any person from seeking contribution from the Berkshire Entities, the DBUS Entities, or Brenntag for "matters addressed" in the settlement. 42 U.S.C. § 9613(f)(2). The public record contains no analysis of the scope of this contribution bar or its impact on non-settling PRPs who may have viable contribution claims against these entities at the covered sites. Under *Cannons*, the government bears the burden of demonstrating that a proposed consent decree is fair not only to the settling parties but also to non-settling parties who will be affected by the contribution bar. *Cannons Eng'g Corp.,* 899 F.2d 79 at 92. The record is devoid of any assessment of whether non-settling PRPs at the covered sites will retain viable claims against other responsible parties, or whether the contribution bar will leave them bearing a disproportionate share of remediation costs.

The record likewise does not identify the universe of PRPs at each covered site, their respective shares of liability, or the extent to which the contribution bar would foreclose their ability to seek reimbursement from the settling parties. Without this threshold analysis, it is impossible to evaluate whether the CDESA's contribution protection provisions are fair to non-settlers as required by CERCLA and the applicable caselaw.

Sixth, the record contains no evidence that the Government Environmental Creditors evaluated site-specific remediation alternatives—such as direct-action cleanup orders, unilateral administrative orders under CERCLA § 106, or phased remediation plans—before agreeing to resolve all covered sites through a single omnibus settlement. The record is devoid of any site-specific cost-benefit analysis comparing the remediation outcomes achievable under the CDESA against those achievable through alternative enforcement mechanisms. Without such analysis, there is no basis to conclude that the CDESA's approach to any individual covered site represents a rational selection among available options. By bundling eight geographically and environmentally distinct sites into a single settlement instrument, the Government Environmental Creditors foreclosed the possibility of pursuing more favorable terms at individual sites where the government's leverage or the responsible parties' exposure may have warranted a different approach. The administrative record does not reflect that this trade-off was considered.

Seventh, the record contains no evidence that the substantial costs to victims of asbestos and talc exposure were considered. In *Michigan v. EPA*, the Supreme Court held that an agency "must consider cost" when relevant. 576 U.S. 743, 759 (2015). The CDESA's Estate Claims Settlement and plan support provisions imposes enormous costs on non-party talc and asbestos claimants. These claimants were injured by exposure to talc and asbestos—a product considered a hazardous substance by the EPA. *See* 40 C.F.R § 302.4.

Specifically, the CDESA requires the Government Environmental Creditors to: (a) file a joint statement of support for the Estate Claims Settlement; (b) withdraw their prior objections to that settlement; and (c) support the Agreed Plan Provisions. CDESA ¶¶ 51–52, 54. These commitments were made in exchange for a cash payment from NICO and a $57 million general unsecured claim against the Debtor Soco West. The Government Environmental Creditors thus traded their litigation positions (as objectors to a settlement that directly affects thousands of asbestos and talc claimants) for money. This part of the CDESA is not an environmental remediation agreement; it is a political settlement that uses CERCLA obligations as currency. There is no indication in the administrative record or otherwise that the Government Environmental Creditors considered this cost.

"In order to meet APA standards, an agency must consider the alternatives that are within the ambit of the existing policy." *Nat'l Urb. League v. Ross*, 489 F. Supp. 3d 939, 993 (N.D. Cal. 2020) (citation modified) (citing *Regents*, 591 U.S. at 33). The obvious alternative here was to negotiate a settlement agreement that settled only the environmental claims, without conditioning the settlement on (1) the government's withdrawal of its objections to the Estate Claims Settlement or (2) commitment to support the Estate Claims Settlement.

There is no evidence that this alternative was considered. The administrative record does not reflect that the Government Environmental Creditors evaluated whether the CDESA could be structured to avoid the "horse-trading" that disadvantages talc and asbestos claimants. The failure to consider this alternative is itself grounds to find the CDESA arbitrary and capricious. Even if some method of linking the CDESA to the Estate Claims Settlement were deemed necessary, the

Government Environmental Creditors could have sought an environmental settlement that was neutral with respect to the Estate Claims Settlement—neither supporting nor opposing it. The administrative record does not reflect any consideration of this narrower alternative.

Another alternative was negotiating a settlement that did not provide the Government Environmental Creditors a general unsecured claim against the Debtors at all, which would not dilute the recovery of the TCC's constituents. Berkshire Hathaway, through NICO, is ultimately financially responsible for the Debtors' environmental liabilities. The Government Environmental Creditors could have conditioned the environmental settlement on direct capitalization of a multi-site remediation trust or direct payment by Berkshire or NICO, rather than accepting a general unsecured claim against Soco West, the recovery on which depends entirely on pro-rata distribution alongside \$3.3–5.3 billion in talc/asbestos tort claims. The administrative record contains no explanation for why the Government Environmental Creditors accepted that structure rather than insisting on direct trust capitalization.

Eighth, the record contains no evidence that the Government Environmental Creditors considered the cost imposed on talc creditors when the Government Environmental Creditors agreed in the CDESA, in connection with a Chapter 11 plan of the Debtors, to "reserve the right to seek reimbursement to which they may be entitled from any insurer of Soco or Soco Predecessors-in-Interest that may have issued an insurance policy." CDESA ¶ 20. The TCC understands that there are asbestos claims asserted against Soco West that may trigger the same insurance assets to which CDESA appears to provide the Government Environmental Creditors with unfair priority access by purporting to preserve direct action rights, potentially allowing them to recover 100% of the available coverage without sharing with the remaining creditors.

For at least these eight reasons, approval of the CDESA would be arbitrary and capricious, and, accordingly, the CDESA should be rejected.[5]

VI. CONCLUSION

There are important considerations relevant to whether the proposed CDESA is in the public interest that Montana and the other Government Environmental Creditors may not have considered and which are not adequately supported by the record. Based on the foregoing, the TCC requests that Montana and the other Government Environmental Creditors reject the CDESA.

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[5] In addition, although not directly relevant to the TCC, under CERCLA, Indian tribes "shall be afforded substantially the same treatment as a State with respect to the provisions of section 9603(a) of this title (regarding notification of releases), [and] section 9604(c)(2) of this title (regarding consultation on remedial actions)," among other things. 42 U.S.C. § 9626(a). This requires (1) notification with respect to released substances, under which "[t]he National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State," 42 U.S.C. § 9603(a); and (2) that the EPA "shall consult with the affected State or States *before* determining any appropriate remedial action," 42 U.S.C. § 9604(c)(2) (emphasis added). The administrative record contains no evidence that the EPA or Montana ever notified or consulted with the Crow Nation, the Northern Cheyenne, or any other potentially affected tribal nation regarding the remediation of the Lockwood Solvent Site or the terms of the CDESA. This omission is not a procedural technicality. CERCLA's tribal consultation requirement reflects Congress's recognition that Indian tribes have sovereign interests in the natural resources of their treaty territories, interests that cannot be waived by negotiating parties in a private bankruptcy settlement.

The TCC reserves all rights, remedies, and arguments in connection with this Public Comment and the issues raised and positions taken herein, including without limitation, the right (a) to modify, amend, revise, and/or supplement any statement made or any position taken herein in connection with any future public comment to the CDESA, including any public comment submitted to the United States or DTSC, or any filing, motion, objection, or proceeding before the Bankruptcy Court; (b) to respond before the Bankruptcy Court or in any other forum to any additional facts or arguments raised in any responses to this Public Comment; (c) to take any and all actions in the Bankruptcy Court or any other forum in connection with the CDESA, including without limitation, seeking discovery into procedural and substantive deficiencies of the CDESA, objecting to the CDESA, and seeking other appropriate relief.

Sincerely,

Cullen Speckhart

Cullen Speckhart
Cooley LLP
T: +1 202 776 2052
cspeckhart@cooley.com

Appendix A

United States' Objection to the Settlement Agreement Between Debtors and Contributing Parties

[Docket No. 1625]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Jeanne T. Cohn
Natalie G. Harrison
Conner R. Huggins
Alan S. Tenenbaum
Environment & Natural Resources Division
U.S. Department of Justice
150 M St NE
Washington, DC 20002
Tel: (202) 514-5409
Email: Jeanne.Cohn@usdoj.gov
Natalie.G.Harrison@usdoj.gov
Conner.Huggins@usdoj.gov
Alan.Tenenbaum@usdoj.gov
Counsel for United States on behalf of EPA

In re: WHITTAKER, CLARK & DANIELS, INC., *et al.*, Debtors.	Chapter 11 Case No. 23-13575 (MBK) (Jointly Administered) Honorable Michael B. Kaplan, U.S.B.J., Chief

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UNITED STATES' OBJECTION TO THE SETTLEMENT AGREEMENT BETWEEN DEBTORS AND CONTRIBUTING PARTIES

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TABLE OF AUTHORITIES

Cases

Statutes

The United States of America ("United States"), on behalf of the U.S. Environmental Protection Agency ("EPA"), hereby objects to Debtors' Motion for Approval of the Settlement Agreement Between the Debtors and the Contributing Parties ("Settlement Agreement") and related relief (Dkt. No. 1297) ("Motion"). In support of its objection, the United States asserts as follows:

SUMMARY OF ARGUMENT

1. The Settlement Agreement should not be approved as filed because it is premised on a significant undervaluation of Debtors'[1] environmental liabilities. As explained more fully in the United States' companion *Daubert* motion, Debtors selected an unqualified expert to opine on the magnitude of the environmental liabilities. Moreover, this expert was merely a rubber stamp for Debtors' outdated and inaccurate books and records and old documents and he did not try to update his estimate for more recent information. Debtors' expert significantly modified his original estimate as set forth in his Declaration in support of the Settlement Agreement, but Debtors did not increase the settlement amount as a result. His revised estimate still has numerous defects. As such the Settlement Agreement does not meet the requirements for approval of bankruptcy settlements, particularly under the heightened scrutiny standard for settlements with insiders. The Settlement Agreement would leave significant shortfalls for the cleanup of numerous sites contaminated by the Debtors. Nor should Debtors be permitted to manipulate corporate transactions or utilize other corporate gymnastics in combination with bankruptcy law to evade their responsibilities under environmental laws. Finally, the Settlement Agreement and proposed Order have certain defects that could be contended by the settlors to be

[1] The Debtors in these chapter 11 cases are Whittaker, Clark & Daniels; Brilliant National Services, Inc.; L.A. Terminals, Inc.; and Soco West. *See* Motion n.1.

contrary to the settlors' portrayal in Debtors' motion and agreements with counsel and therefore should not be approved without clarification.

BACKGROUND

2. The United States, through EPA, is charged with regulatory responsibility to oversee the protection of public health and the environment under several environmental statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.*, Oil Pollution Act (OPA), 33 U.S.C. §§ 2701 *et seq.*, Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, and Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 *et seq*. State environmental agencies also oversee the protection of public health and safety under these statutes and state statutes.

3. Debtors originated from a conglomerate of companies owned by Stinnes Corporation and its parent, Deutsche Bahn, which operated a chemical business for more than 100 years, resulting in significant environmental and tort liability. Motion at 8–10.

4. Under CERCLA, subject to certain defenses that are not relevant here, any entity that owns, operates, and/or arranges for disposal of hazardous substances at a facility is liable for the government's costs that are not inconsistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(1)–(3). Debtor Soco West owns and previously operated the Lockwood Solvent Site in Billings, Montana.[2] Soco West is also liable under CERCLA as an arranger for the Cooper Drum and Omega Sites in South Gate and Whittier, California.[3] The United States expects to file a proof of claim for these sites prior to the March 26, 2025, government bar date that has been set in this case, Dkt. No. 1588, as well as an administrative expense application for the

[2] TCC Ex. 99, Report of David McKnight, Oct. 25, 2024, Dkt. No 1601-1 (McKnight Report), p.47, Table 11.
[3] McKnight Report, p.47, Table 11.

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Lockwood, Montana site. In addition, Debtors have significant environmental liabilities in California and elsewhere where state agencies are the oversight lead.[4]

5. In 2004, Bain Capital and Brenntag-named affiliates purchased the valuable operating subsidiaries and assets of the conglomerate and sought to separate out the legacy environmental and tort liabilities to minimize the purchasers' exposure. Debtor Soco West took ownership of the Lockwood Solvent Site in Montana. In 2007, the Berkshire Hathaway conglomerate of companies acquired the Debtors as an investment through a Stock Purchase Agreement ("2007 Agreement").[5] The 2004 and 2007 transactions included complex indemnification provisions among the various parties including Debtors. *See generally* Motion at 8–16; Official Committee of Talc Claimants' Objection to Settlement Agreement at 3–10. Dkt. No. 1606 ("TCC Objection").

6. On April 26, 2023, Debtors filed their petitions for bankruptcy relief. On August 23, 2024, the Court ruled that certain successor liability and alter ego claims of tort creditors against the Brenntag entities,[6] NICO, and DB US (Settling Non-Debtors) were property of Debtors' bankruptcy estates. *In re Whittaker, Clark & Daniels*, 663 B.R. 1 (Bankr. D.N.J. 2024).[7]

7. On September 3, 2024, Debtors filed the Motion seeking approval of the Settlement Agreement that would resolve all Estate Causes of Action against the Settling Non-Debtors including all Successor Liability Claims (as defined in the Adversary Proceeding). Settlement Agreement at 4. Under the Settlement Agreement and proposed Order, the United

[4] *See* McKnight Report, p.47, Table 11.
[5] *See* Exhibit 14 to Declaration of Gavin C.P. Campbell, Dkt. No. 1301-1.
[6] *See* Motion n.4
[7] The Court's ruling was issued in Adv. Pro No. 23-01245. EPA was not a party to that Adversary Proceeding, having been voluntarily dismissed as a defendant early in the case. Adv. Pro. Dkt. No. 105.

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States would be enjoined from asserting such causes of action against Settling Non-Debtors. Proposed Order ¶ 11. Under the Settlement Agreement, Debtors' estates would receive $535 million less up to $50 million payable under the DIP Order (Dkt. No. 1410) as well as any indemnification required to litigate with creditors over whether a claim was an Estate Cause of Action. Settlement Agreement ¶¶ 3, 19.

8. The Motion does not seek to allocate the consideration to be received under the Settlement Agreement among the different creditor constituencies. The Plan and Disclosure Statement filed by the Debtors on October 28, 2024, likewise do not provide for any allocation of the consideration among creditor constituencies. Dkt. Nos. 1468, 1469. Counsel for Debtors have stated to counsel for the United States that approval of the Settlement Agreement would be without prejudice to allocation of the consideration under Plan proceedings.

STANDARD OF REVIEW

9. The Court should not approve the Settlement Agreement unless Debtors meet their burden of proving the settlement as fair and reasonable to creditors. *In re Martin*, 91 F.3d 389 (3d Cir. 1996); *In re Nationwide Sports Distribs., Inc.*, 227 B.R. 455, 460 (Bankr. E.D. Pa. 1998); *In re Bell & Beckwith*, 87 B.R. 472, 474 (N.D. Ohio 1987).

10. Moreover, the Settlement Agreement here is with insiders, which requires heightened scrutiny in reviewing the fairness of a proposed settlement. *In re Steel Wheels Transp., LLC*, No. 06-15377, 2011 WL 59000958, at *7 (Bankr. D.N.J. Oct. 28, 2011) ("Courts routinely subject transactions by and among insiders and fiduciaries to more exacting review.") (citations omitted); *In re Chassix Holdings, Inc.*, 533 B.R. 64, 70 (Bankr. S.D.N.Y. 2015); *see also In re Adelphia Commc'ns Corp.*, 323 B.R. 345, 385 (Bankr. S.D.N.Y. 2005).

11. Debtors contend that the fact that their "independent" directors negotiated and approved the settlement means that the Settlement Agreement should be given greater deference. To the contrary, the independent directors testified that they did not interview the Brattle Group, the firm that employs Debtors' expert, David McKnight, and relied on other advisors to select the Brattle Group.[8] As to Debtors' environmental claims, the directors relied on Debtors' outdated and inaccurate books and records, as handled by one of the Settling Non-Debtors, NICO, and some old remediation documents.[9] Thus, the directors clearly failed to exercise any independence in this regard. Indeed, some of the Settling Non-Debtors themselves provided services to the debtors in connection with the debtors' cleanup activities. Debtors have not explained what Settling Non-Debtors' role was in connection with Debtors' inaccurate books and records that Debtors rely on in support of the Settlement Agreement. Heightened scrutiny of the fairness of the settlement is required.

ARGUMENT

I. The Debtors Have Not Proven That the Settlement Agreement Is Fair Given That It Is Based on a Materially Low Estimate of Environmental Liabilities of Debtors

12. Debtors' Motion states that the settlement is based on a net present value of Debtors' environmental liabilities of $37 million by their expert, Mr. McKnight. Motion at 32–33. However, as discussed in the United States' accompanying *Daubert* motion, Mr. McKnight is not qualified to opine on the magnitude of environmental liabilities. His original estimate was merely a rubber stamp for debtors' inaccurate books and records and old documents that he did not try to update with more recent information. Approximately, eight weeks later, Mr. McKnight

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[8] Ex. 8, Pohl Depo. 234:7–20; Ex. 9, Aronzon Depo. 164:3-9.

[9] Mr. Aronzon testified that NICO handled the books, records, accounts, and other services that were provided to the companies during the hiring process for the independent directors. Aronzon Depo. 112:6–12.

significantly modified his original opinion in support of the Settlement Agreement—adjusting the range of Debtors' environmental liabilities to a net present value of $50 million to $71 million—and yet Debtors have not adjusted the settlement amount.[10]

13. Even if the Court admits Mr. McKnight's testimony, his revised estimate of environmental liabilities still has numerous defects resulting in a significant undervaluation of environmental liabilities.[11]

14. First, Mr. McKnight used a discount rate he derived from average returns on investments from trusts established for individual claims for asbestos exposure.[12] This average rate was 6.69%.[13] However, EPA usually can only invest money recovered under CERCLA in U.S. market-based securities, which are considered risk-free, but generally have a much lower return rate.[14] The MK note rate for fiscal year 2024 is 3.46%.[15] Because there is an inverse relationship between the discount rate and the estimated cost of future environmental remediation, Mr. McKnight's higher discount rate results in a lower estimation of Debtors' environmental liabilities.[16] Had he used a discount rate that was based on a risk-free rate—which is what experienced environmental estimators typically use for environmental settlements with the government—his estimation of Debtors' environmental liabilities would have been higher.[17]

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[10] McKnight Report at pp. 10–11, Tables 3 and 4.
[11] The United States expects to provide a more precise estimate in advance of either claims adjudication and/or confirmation of the Debtors' Plan. The United States also notes that the bar date for government entities has not yet passed. Because the Court is not deciding allocation in this Motion, a more precise estimation is not necessary at this time, but in any case, Debtors' estimate of their environmental liabilities is unsupported and plainly too low.
[12] McKnight Report ¶¶ 107–11.
[13] McKnight Report ¶ 111.
[14] Declaration of Gayle Schlea Koch, Ex. 3, ¶ 7; *see also United States v. Cornell Dubilier Elecs., Inc.*, Civ. Act. No. 12-5407 (JLL), 2014 WL 4978635, at *12 (D.N.J. Oct. 3, 2014).
[15] Koch Decl. ¶ 7.
[16] Koch Decl. ¶¶ 5–7.
[17] *See* Koch Decl. ¶ 7.

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15. Second, Mr. McKnight failed to include EPA's indirect rates as part of his analysis of Debtors' environmental liabilities.[18] He appears to misunderstand how EPA incurs indirect costs and applies indirect rates. He testified that he understood that when a potentially responsible party (PRP) performs remediation at a site, that PRP incurs indirect costs itself; therefore, he believed it was not necessary for him to account for EPA's indirect rates in his analysis.[19] However, EPA incurs costs, including indirect costs, throughout the remediation process, regardless of what entity performs the cleanup.[20]

16. Mr. McKnight's "unique" methodology is primarily based on outdated costs in remedial plans and is inconsistent with standard practice and guidance documents. Mr. McKnight used a methodology to evaluate Debtors' environmental liabilities that he described as "unique to this case."[21] Mr. McKnight and his team searched for publicly available remedial plans (EPA's Records of Decision, or RODs, and state Remedial Action Plans, or RAPs), along with publicly available ROD amendments or Explanations of Significant Differences (ESDs).[22] He apparently assumed that if significant cost estimate increases were identified, they would be made public via an ESD or ROD amendment.[23] However, there are multiple assumptions with this methodology that lead to underestimation:

a. First, cost estimates of environmental remediation frequently increase without EPA issuing a ROD amendment or an ESD.[24] Therefore, searching for ROD

[18] Ex. 1, Deposition of David McKnight, Vol. II, In re Whittaker, Clark & Daniels, Ch. 11, Case No. 23-13575 (MBK), United States Bankruptcy Court, 358:12–16.
[19] McKnight Depo. 358:12–360:10.
[20] Koch Decl. ¶ 15.
[21] McKnight Depo. 313:21–22.
[22] McKnight Report, ¶¶ 96–99; McKnight Depo. 325:5–326:3, 289:20–290:16.
[23] McKnight Depo. 331:23–25.
[24] Koch Decl. ¶ 9.

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Amendments or ESDs alone is unlikely to identify all relevant, up-to-date cost information for a given site.[25]

b. Second, the cost estimates in remedial plans are not intended to be used to project the budget for future costs of environmental cleanup. Instead, EPA prepares these estimates primarily to compare alternatives during the remedy selection process. EPA-issued guidance, which Mr. McKnight cited to, states that the cost estimates in remedial plans are not intended "for establishing project budgets or negotiating Superfund enforcement settlements."[26] Similarly, an industry standard text warns against using cost estimates in remedial plans as a basis to estimate future costs of remediation.[27] These remedial plans often make certain simplifying assumptions, such as excluding costs for elements that are the same across all alternatives and truncating operation & maintenance at 30 years, despite the fact that in reality, many sites may require operation and maintenance for a much longer time period.[28] Mr. McKnight's failure to recognize these assumptions and account for these missing data causes him to underestimate Debtors' environmental liabilities.[29]

c. Third, the cost estimates in the remedial plans themselves contain inaccurate cost information because the cost estimates are often a few years old, thus already

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[25] *See* Koch Decl. ¶ 9.
[26] McKnight Report nn. 89–91; Ex. 4, A Guide to Developing and Documenting Cost Estimates During the Feasibility Study, US Army Corps of Engineers & EPA, July 2000 (EPA Guide) at 1-2.
[27] Ex. 5, ASTM International Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters, 2024, at 5.3.10 and p.12 X1.7. The United States files U.S. Exhibit 5 under seal because it is a proprietary document that the United States treats as Confidential Material under Paragraph 7(a) of the Second Amended Confidentiality Stipulation and Protective Order, entered by the Court on September 26, 2024, Dkt. No. 1361.
[28] Koch Decl. ¶ 12.
[29] Koch Decl. ¶ 28.

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affected by inflation, and biased low.[30] The cost estimates provided in the remedial plans can range significantly, from -50%/+100% to -30%+50%.[31] This range narrows as EPA and/or potentially responsible parties (PRPs) gather more information during later stages of the remedial process, including the remedial design[32] process, which generates more accurate cost estimates. Mr. McKnight's failure to confirm when these remedial plan cost estimates were prepared, or recognize these other assumptions leads to underestimation.

17. Mr. McKnight limited his estimation of Debtors' environmental liabilities to the date that Debtors filed their petition for Chapter 11 bankruptcy in April 2023 assuming that the Debtors had not filed for bankruptcy.[33] Regardless of whether this assumption was appropriate in assessing Debtors' tort liabilities, it is not a common assumption made when assessing environmental liabilities, where parties regularly provide updated cost information.[34] Applying this assumption to Debtors' environmental liabilities further devalues them for at least three reasons. First, by limiting the valuation of Debtors' environmental liabilities to the petition date—now nearly two years ago—Mr. McKnight ignores the passage of time and discounts Debtors' environmental liabilities further back in time, resulting in an artificially low estimate.[35] Second, he overlooks costs that are likely to continue accruing, such as temporary shut down or transition costs or EPA's oversight costs, for which Debtors are still potentially liable.[36] Third,

[30] Koch Decl. ¶ 13.
[31] Ex. 4, EPA Guide at 2-4–2-5 ("The screening-level accuracy range of -50% to +100% means that, for an estimate of $100,000, the actual cost of an alternative is expected to be between $50,000 and $200,000."); Koch Decl. ¶ 13.
[32] Mr. McKnight testified that he did not know whether he or his team searched for documents related to remedial designs for Debtors' sites and that he thought the remedial design occurred before the ROD. McKnight Depo. 290:17–291:4.
[33] McKnight Depo. 358:18–22, 375:21–376:2, 382:8–12, 393:19–394:7, 400:15–18.
[34] *Compare* McKnight Report ¶ 23 *with* Koch Decl. ¶ 20.
[35] Koch Decl. ¶ 20.
[36] Koch Decl. ¶ 21.

he overlooks the likelihood that in the bankruptcy context, EPA will take over the remediation of sites which are solely owned and/or operated by Debtors resulting in significantly increased costs associated with the remediation.

18. Mr. McKnight assumed that Debtors' books and records were accurate, reliable, and complete.[37] However, experienced evaluators understand that companies often underestimate the book values of their environmental liabilities and such evaluators therefore approach those books and records more skeptically.[38] Mr. McKnight's assumption is even more troubling where Debtors' independent directors did not interview Mr. McKnight's firm, were not familiar with claims evaluations themselves, and were not involved in selecting the books and records that Mr. McKnight later relied upon.[39] One of the directors, Paul Aronzon, testified that "[Brattle] provided us with information, you know, decks and things that showed us how they did it, but if something was missing, I wouldn't know."[40]

19. Mr. McKnight also failed to investigate for natural resource damage estimations, other than at the Lockwood Solvent Site, claiming that it would have been speculative for him to do so.[41] However, natural resource damage claims often lag behind site remediation investigations and plans because the natural resource trustees need additional time to collect data necessary to evaluate their claims.[42] Additionally, the bar date for government entities to file such claims is in March 2025, so it was incumbent of Mr. McKnight and Debtors to seek out information related to such claims, rather than reject such claims as "speculative."

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[37] McKnight Depo. 373:7–12, 412:18–413:6.
[38] Koch Decl. ¶ 17.
[39] Aronzon Depo. 112:6–12, 164:3–9; Pohl Depo. 234:1–235:8.
[40] Aronzon Depo. 226:7–12.
[41] McKnight Depo. 415:13–416:4.
[42] Koch Decl. ¶ 19.

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20. The flaws in Mr. McKnight's methodology are apparent in the example of the Lockwood Solvent site in Montana owned by Debtor Soco West. Prior to the bankruptcy, Debtors, through their technical consultant(s), had been performing the remediation at that Site; after the bankruptcy, it is likely that EPA, in coordination with the Montana Department of Environmental Quality, will complete remediation that is expected to last in perpetuity due to the nature of the required relief.[43]

a. EPA's ROD for the Lockwood Solvent Site was published in 2005.[44] There is no ESD or ROD amendment for this Site; however, in preparing his report, Mr. McKnight was not aware that Debtors' technical consultant had prepared a remedial design pilot test work plan in 2015 which contained updated information about the remediation and that was available on EPA's public website.[45]

b. Mr. McKnight also excluded EPA's indirect costs. Should EPA complete remediation at the Lockwood Solvent Site, the current indirect rate that is applicable to all costs is approximately 56.34%.[46]

21. Nor did Debtors seek input from the Governments as to the scope of Debtors' environmental liabilities in shaping their proposed Settlement. Indeed, the United States did not even know that Debtors were negotiating a settlement with the Settling Non-Debtors. Had the Governments' input been sought, some of the concerns highlighted above in Mr. McKnight's methodology might have been avoided and his estimate for environmental liabilities would have

[43] Koch Decl. ¶ 12.
[44] Ex. 10, Record of Decision, Lockwood Solvent Groundwater Plume Site, Billings Montana, Montana Dep't of Envt'l Quality & EPA, Aug. 2005.
[45] McKnight Depo. 349:11–354:4.
[46] Koch Decl. ¶ 15.

been more accurate and higher, resulting in a settlement amount that would have been significantly higher.

II. The Debtors Have Not Proven That the Settlement Agreement Is Fair Given That Debtors' Lead Negotiator Failed to Consider the Estates' Direct Claims for Indemnification Against Purchaser in the 2007 Stock Purchase Transaction

22. The unfairness of the settlement is further demonstrated by the fact that Debtors' lead negotiator, Director Tim Pohl, was not familiar with a key indemnification provision of the 2007 Stock Purchase Agreement ("2007 SPA") nor had he read the 2007 SPA itself.[47] Nor does Debtors' Motion discuss or analyze this key indemnification provision in the 2007 SPA.

23. Under Section 8.03(f) of the 2007 SPA, in return for consideration provided, the Purchaser agreed to indemnify the Seller and its Affiliates (now Debtors) for numerous environmental liabilities.[48] Although the indemnities are undoubtedly complex and have numerous exceptions and complicated defined terms, it is evident that Debtors' lead negotiator was not familiar with the indemnity provisions and failed to consider them in negotiating the consideration to be paid under the Settlement Agreement.

24. Nor does Debtors' Motion provide any explanation or basis demonstrating that the value of the estate's indemnification claim under the 2007 SPA was included in the proposed settlement amount under the Settlement Agreement.

25. If the cause of action for indemnification under Section 8.03(f) had been properly considered, the settlement amount would have been significantly higher.

[47] *See* Pohl Deposition Transcript at 362:25–371:20. The Stock Purchase Agreement may be found at Exhibit 14 to Declaration of Gavin C.P. Campbell, Dkt. No. 1301-1, at 465–524.
[48] 2007 SPA at 43, Exhibit 14, Docket No. 1301-1, at 513.

III. The Debtors Have Not Proven That the Settlement Agreement Is Fair Because Debtors Have Underestimated the Strength of Successor Liability Claims Under Environmental Law

26. The claims for environmental liability against successors here have significant value because the Third Circuit has long recognized that CERCLA successor liability requires the application of uniform federal law. *United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294, 298 (3d Cir. 2005) (citing *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) and *Landsford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993)). Similarly, there are four well-recognized exceptions under which a successor entity may be liable for the acts of its predecessor: (1) where the successor expressly assumes the predecessor's liability; (2) where the transaction is a de facto merger; (3) where the purchaser is a mere continuation of the predecessor; and (4) where the transaction is fraudulent and intended to provide an escape from liability. *Gen. Battery*, 423 F.3d at 305 (citations omitted).

27. The fraudulent transaction exemption is well-recognized under federal environmental law. *See, e.g.*, *In re Tronox Inc.*, 503 B.R. 239 (Bankr. S.D.N.Y. 2013) (finding actual and constructive fraudulent conveyance to avoid environmental liabilities); *United States v. White-Sun Cleaners Corp.*, No. 09-CV-2484 (ARR)(JO), 2011 WL 1322266, at *12 (E.D.N.Y. Mar. 9, 2011) (finding entity liable as successor because it was created via fraudulent transaction to avoid prior obligations under environmental settlement with EPA); *see also United States v. Fed. Res. Corp.*, 525 B.R. 759 (D. Idaho 2015) (noting that claims under CERCLA and the Federal Debt Collection Procedures Act fell within § 362(b)(4)'s police or regulatory powers exception to the automatic stay of the bankruptcy court).

28. The mere continuation theory is stronger under environmental law than Debtors may recognize. Because Congress enacted CERCLA to ensure that responsible parties account

for their environmental liabilities, courts will flexibly analyze the mere continuation doctrine of successor liability by looking at several different factors: (1) retention of employees; (2) retention of supervisory personnel; (3) retention of same production facilities in the same location(s); (4) retention of name; (5) product retention; (6) asset retention; (7) continuation of general business operations; and (8) generally holding itself out as the continuation of the previous enterprise. *See, e.g.*, *Gould, Inc. v. A&M Battery & Tire Serv.*, 950 F. Supp. 653, 657 (M.D. Pa. 1997) (citing *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992)). "In the CERCLA context, the imposition of successor liability under the continuity of enterprise theory is justified by a showing that in substance, if not in form, the successor is a responsible party." *Id.* at 660 (quoting *United States v. Mex. Feed & Seed Co., Inc.*, 980 F.2d 478, 488 (8th Cir. 1992) (brackets omitted)).

29. Thus, although the 2004 transactions to acquire Debtors' assets excluded Debtors' stock, see TCC Objection ¶ 10, successor liability claims against Brenntag under a mere continuation theory in the CERCLA context likely would hinge less on a continued link of stock ownership, but instead on the other factors indicating that various Brenntag entities conducted their predecessors' operations in essentially the same fashion. *Gould*, 950 F. Supp. at 657; *see Pub. Serv. Elec. & Gas Co. v. Cooper Indus., LLC*, 678 F. Supp. 3d 611, 622–26 (D.N.J. 2023) (finding successor liability despite the lack of continuity of shareholders) (citations omitted); *Action Mfg. Co., Inc. v. Simon Wrecking Co.*, 428 F. Supp. 2d 288, 335 (E.D. Pa. 2006) (finding *de facto* merger had occurred where (1) successor acquired most of the predecessor's physical assets and common stock; (2) successor retained same employees, management, and ownership; and (3) parties made representations to the IRS regarding the reorganization).

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30. Debtors and Settling Non-Debtors should not be permitted to utilize corporate manipulations and bankruptcy to evade their environmental liabilities. *See Mex. Feed & Seed Co.*, 980 F.2d at 487 ("When including corporations within that set of entities which must bear the cost of cleaning up the hazardous conditions they have created, Congress could not have intended that those corporations be enabled to evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities.").

31. The environmental creditors in this case are also victims of Debtors' fraudulent actions directed against tort creditors. The Debtors' and Settling Non-Debtors' corporate manipulations relating to tort creditors resulted in the Debtors being unable to pay for their environmental liabilities.[49]

IV. The Settlement Agreement Is Unfair to the Extent That the Non-Debtors Seek to Utilize Settlement Proceeds to Diminish Their Own Non-Derivative Liabilities

32. The Settlement Agreement and Debtors' expert report appear to contemplate that some of the consideration being provided will be used to fund cleanup liabilities of certain Settling Non-Debtors for certain so-called Brilliant sites. Motion at 33; McKnight Report at p.47, Table 11. The liable parties at various of the Brilliant sites are certain Brenntag entities that are wholly owned operating subsidiaries of Brenntag North America, Inc. ("Brenntag North America"), which purchased these operating entities from Debtors or their predecessors. These wholly owned subsidiaries are the original liable parties under environmental laws. Their liability under environmental law is not based on successor liability or any other theory of liability that is derivative of Debtor-liability. Any liability of Debtors and various Settling Non-Debtors for these sites arise solely by voluntary agreements to provide indemnification. These

[49] It should be noted that successor liability claims for environmental liability were generally not yet asserted by the Government because Debtors were paying their bills and thus such pursuit of such claims was not yet necessary.

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non-debtor wholly owned subsidiaries are the liable entities in their own right independent of any actions by Debtors.

33. For example, Brenntag Northeast, Inc. (formerly known as Textile Chemical Co.), a wholly owned subsidiary of Brenntag North America, is a PRP by virtue of its own disposal of hazardous waste at the Martin Aaron Superfund Site located in Camden County, New Jersey. Pursuant to the Consent Decree for Performance of Phase 1 of the Remedial Action for the Martin Aaron Superfund Site, dated August 7, 2008, by and among the United States, the State of New Jersey and a number of PRPs, Brenntag Northeast, Inc. is a settling defendant, a liable entity in its own right. *United States v. American Standard Inc., et al.*, Civ. No. 07-cv-5334 (D.N.J. Nov. 6. 2007), Dkt. No. 1 (LEXIS CourtLink).

34. There is no possible legal basis to enjoin the Government from pursuing such liable parties (or a pending order to them by a District Court). Nor is this any basis to provide any of the \$535 million settlement proceeds back to the contributing parties or their affiliates in support of their independent indemnification agreements, rather than to Debtors' creditors as represented in Debtors' Motion. It should be made clear that the Court will not permit this to happen if this settlement or any version thereof is ever approved. Otherwise, the settlement is not a \$535 million settlement as has been represented to the Court and parties. Some of the Settling Non-Debtor would be diverting consideration that was supposed to be paid to the Debtors' creditors. This is also contrary to language in the Settlement Agreement under which they are supposedly waiving any such claims against Debtors' estates.[50] Any approval of the settlement should provide that the proceeds go to creditors, not to benefit the non-debtor signatories to the Settlement Agreement or their affiliates.

[50] *See, e.g.,* Settlement Agreement ¶ 6.

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V. Any Approval of the Settlement Agreement Should Clearly State That Approval Is Without Prejudice to Allocation of Settlement Proceeds

35. Any approval of the settlement should expressly provide that approval is entirely without prejudice to allocation of proceeds among creditors; the inclusion of the Plan Term Sheet as an exhibit to the settlement agreement should be without prejudice to any plan objections.

VI. Any Approval of the Settlement Agreement Should Clearly State That the Governments' Causes of Action Under Environmental Law Against Non-Debtor Owners or Operators of Property Are Not Enjoined or Subject to the Jurisdiction of the Bankruptcy Court

36. The definitions of Estate Causes of Action and Successor Liability Claims under the Settlement Agreement may be contended to be ambiguous or overbroad relating to governmental causes of action under environmental law against Settling Non-Debtors under the Settlement Agreement who now own or operate properties that used to be owned or operated by Debtors. It is well-established that anyone who owns or operates property acquired from a debtor must comply with environmental law. No one is entitled to ignore hazards or disregard laws that protect the public and the environment.[51] This liability under environmental law is the current owner or operator's own liability as a present owner or operator regardless of how the contamination originated and is separately provided for by most environmental laws.[52] It is very

[51] *See, e.g.*, *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) ("[A]nyone in possession of [a] site . . . must comply with . . . environmental laws . . . . Plainly that person . . . may not maintain a nuisance, pollute the waters . . . [,] or refuse to remove the source of such conditions."); *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992) (a reorganized debtor that owns property that was contaminated prior to confirmation is liable to EPA as the present owner of the property); *In re Gen. Motors Corp.*, 407 B.R. 463, 508 (S.D.N.Y. 2009) (a free and clear purchaser "would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer's responsibility").

[52] *See, e.g.*, CERCLA §107(a)(1), 42 U.S.C. § 9607(a)(1) (providing separately for the liability of the current "owner and operator" of a facility).

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different from what is commonly thought of as "successor liability" under the case law.[53]

37. At the commencement of discovery on this matter, counsel for the United States raised the issue with counsel for the other parties as to whether they were improperly seeking to sweep the liability of the Settling Non-Debtors for their contaminated property into the Settlement Agreement and injunction against the Government. Counsel for the United States indicated that if they were, discovery would be necessary to understand and bring to the Court's attention the threats to public health and safety that would be posed by trying to limit the Settling Non-Debtors' liability even though they had not submitted their assets to the bankruptcy process.

Counsel agreed that this was not their intent and language was finalized on October 8, 2024 to reflect this agreement of the parties and avoid the need for discovery on this issue. Any order approving the Settlement Agreement should include the agreed upon language. The agreed upon language was:[54]

> Nothing in this Order or the Settlement Agreement releases, nullifies, precludes, or enjoins the enforcement of any police or regulatory liability to a governmental unit that any entity would be subject to as the owner or operator of property after the date of the transfer of property from any Debtor. For the avoidance of doubt, this Paragraph 14 does not preserve or expand any liability that a party would not otherwise have as an owner or operator of property after the date of the transfer of property from any Debtor. For the further avoidance of doubt, nothing in this Paragraph 14 shall be construed to mean that the Settlement Agreement does not resolve any and all alleged liability (environmental or otherwise) of Non-Debtor Released Parties (a) as alter egos of the Debtors, and (b) in connection with allegations that the Non-Debtor Released Parties (1) expressly or impliedly agreed to assume the Debtors' liabilities; (2) engaged in a de facto merger; (3) were a mere continuation of the Debtors' businesses; (4) continued one or more Debtors' enterprise; (5) fraudulently avoided liability of any of the Debtors; or (6) continued one or more product lines of the Debtors. Nothing in this Order divests any tribunal of any jurisdiction it may have under police or regulatory law to interpret this Order or to adjudicate any defense asserted under this Order.

[53] *See Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006); *United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005).
[54] This agreement was without prejudice to other objections of the Governments to the Settlement Agreement.

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38. Finally, Debtors' Motion says that direct claims of the creditors are not affected or enjoined as a result of the Settlement Agreement. Motion at 4. But Debtors' proposed Order and Settlement agreement do not clearly so state and the definitions of Estate Causes of Action and Successor Liability may be ambiguous in this regard. Any order approving the Settlement Agreement should therefore have language providing that: "The Settlement Agreement does not prohibit claimants from pursuing direct claims that they may have against the Contributing Parties," as represented in the Motion at 4.

VII. Any Approval of the Settlement Agreement Should Strike the Indemnification Provision of Paragraph 19 of the Settlement Agreement as Unfair

39. Paragraph 19 of the Settlement Agreement provides that the Debtors and any Plan Administrator "shall indemnify and defend, and seek, at its sole cost and expense, the dismissal of any litigation asserting a Debtor Released Estate Cause of Action against Non-Debtor Released Parties."

40. This indemnification and defense requirement should be stricken as unfair and unreasonable. Creditors should not bear the expense of other creditors' violations of the Agreement or of any settling contributing parties' unreasonable positions as to whether direct or other causes of actions are Estate Causes of Action. This indemnification and defense requirement may significantly reduce the amount of consideration available to innocent creditors. All parties should bear their own attorney's fees and costs as is the general rule in the United States,[55] rather than seek to burden such costs on innocent creditors.

[55] *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015) ("Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."); *Garza v. Citigroup Inc.*, 881 F.3d 277, 281 (3d Cir. 2018) (noting "bedrock principle known as the American Rule . . . [that] [e]ach litigant pays its own attorneys' fees.").

CONCLUSION

41. Debtors have given consistently short shrift to their environmental liabilities. Their independent directors did not participate in hiring an expert, who is not qualified to evaluate their environmental liabilities. His estimate that Debtors' environmental liabilities have a net present value of between $50 to $71 million is a significant underestimation. Debtors have failed to recognize how the unique aspects of environmental law may increase their liability and affect claims for successor liability. This failure alone merits denial of Debtors' Motion.

42. The settlement is additionally unfair for separate reasons. Debtors' independent directors failed to understand a potentially valuable indemnification provision against Settling Non-Debtors. As structured, it may permit the Settling Non-Debtors to benefit from the settlement proceeds that should be allocated to creditors. The Debtors have failed to show that the settlement is fair and reasonable, and the Court should reject it.

FOR THE UNITED STATES OF AMERICA

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

/s/ Natalie G. Harrison
Natalie G. Harrison
Jeanne T. Cohn
Conner R. Huggins
Alan S. Tenenbaum
Environment & Natural Resources Division
U.S. Department of Justice
150 M St NE
Washington, DC 20002
(202)
Email: Jeanne.Cohn@usdoj.gov
Natalie.G.Harrison@usdoj.gov
Conner.Huggins@usdoj.gov
Alan.Tenenbaum@usdoj.gov

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In accordance with D.N.J. LBR 9013-1(a)(1), I hereby certify that the Declarations of Meghan Jones and Gayle Koch, filed with this Objection, along with the documents referred to herein, contain the facts supporting this Objection in compliance with Local Bankruptcy Rule 7007-1.

/s/ Natalie G. Harrison
NATALIE G. HARRISON

Counsel for the United States on behalf of EPA

Appendix B

Joinder of the California State Water Resources Control Board and Regional Water Quality Control Board, Los Angeles Region, to (1) The Official Committee of Talc Claimants' Objection to the Debtors' Motion for Entry of an Order (I) Approving the Settlement Agreement Between the Debtors and the Contributing Parties, (II) Authorizing the Debtors to Perform All of Their Obligations Thereunder, and (III) Granting Related Relief and (2) United States' Objection to the Settlement Agreement Between Debtors and Contributing Parties

[Docket No. 1627]

CALIFORNIA DEPARTMENT OF JUSTICE
ROB BONTA
Attorney General of California
ANNADEL A. ALMENDRAS
ANDREA M. KENDRICK (admitted *pro hac vice*)
Deputy Attorneys General
PETER J. LUCCA, JR. (NJ Attorney ID: 019181998)
Deputy Attorney General
600 W. Broadway, Suite 1800
San Diego, CA 92101-3375
Telephone: (619) 738-9158
Email: PJ.Lucca@doj.ca.gov
Andrea.Kendrick@doj.ca.gov
Counsel for California State Water Resources Control Board and Los Angeles Regional Water Quality Control Board

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: WHITTAKER, CLARK & DANIELS, INC., *et al.,* Debtors.[1]	Chapter 11 Case No.: 23-13575 (MBK) (Jointly Administered) Honorable Michael B. Kaplan, U.S.B.J., Chief

JOINDER OF THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD AND REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, TO (1) THE OFFICIAL COMMITTEE OF TALC CLAIMANTS' OBJECTION TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE DEBTORS AND THE CONTRIBUTING PARTIES, (II) AUTHORIZING THE DEBTORS TO PERFORM ALL OF THEIR OBLIGATIONS THEREUNDER, AND (III) GRANTING RELATED RELIEF AND (2) UNITED STATES' OBJECTION TO THE SETTLEMENT AGREEMENT BETWEEN DEBTORS AND CONTRIBUTING PARTIES

[1] The Debtors in these chapter 11 cases, along with the last four digits of the Debtors' federal tax identification number, are Whittaker, Clark & Daniels, Inc. (4760), Brilliant National Services, Inc. (2113); L. A. Terminals, Inc, (6800); and Soco West, Inc. (3400).

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The California State Water Resource Control Board (State Water Board) and Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board), by and through their undersigned counsel, hereby submit this joinder to (1) *The Official Committee of Talc Claimants' Objection to the Debtors' Motion for Entry of an Order (I) Approving the Settlement Agreement Between the Debtors and the Contributing Parties, (II) Authorizing the Debtors to Perform All of Their Obligations Thereunder, and (III) Granting Related Relief* [Docket No. 1606] ("TCC Objection") and (2) *United States' Objection to the Settlement Agreement Between Debtors and Contributing Parties* ("US Objection"). The State Water Board and Los Angeles Water Board join in, adopt, and support the arguments contained in the TCC Objection and US Objection to the Debtors' Settlement Motion as if fully set forth herein.[2] The State Water Board and Los Angeles Water Board also explain below their interests and why the proposed settlement should be rejected because it is based on obsolete, inaccurate, and incomplete information regarding the Debtors' environmental liabilities.

PRELIMINARY STATEMENT

1. The Debtors have environmental liabilities and obligations at contaminated sites in Los Angeles County, California, over which the State Water Board and Los Angeles Water Board have regulatory authority. The Debtors' environmental liabilities and obligations are included in the proposed settlement addressed in *Debtors' Motion for Entry of an Order (I) Approving the Settlement Agreement Between the Debtors and the Contributing Parties, (II) Authorizing the Debtors to Perform All of Their Obligations Thereunder, and (III) Granting Related Relief* [Docket No. 1297] ("Settlement Motion"). In addition to the objections and

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[2] In support of this Joinder, the State Water Board and Los Angeles Water Board also submit the *Declaration of Peter J. Lucca, Jr. in Support of Joinder of the California State Water Resources Control Board and Regional Water Quality Control Board, Los Angeles Region, to (1) the Official Committee of Talc Claimants' Objection to the Debtors' Motion for Entry of an Order (I) Approving the Settlement Agreement Between the Debtors and the Contributing Parties, (II) Authorizing the Debtors to Perform All of Their Obligations Thereunder, and (III) Granting Related Relief and (2) United States' Objection to the Settlement Agreement Between Debtors and Contributing Parties.* The State and Los Angeles Water Boards also file a Request for Judicial Notice, seeking judicial notice of documents available in the State Water Board's GeoTracker database.

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arguments raised in the TCC Objection and US Objection, the State Water Board and Los Angeles Water Board also object because the proposed settlement between the Debtors and contributing parties as it relates to the Debtors' environmental obligations and liabilities, including those at the La Mirada site in Los Angeles County, is based on data and information that does not accurately and adequately address the Debtors' environmental obligations and liabilities.

2. Specifically, the Debtors' expert, David McKnight, has opined that the net present value of the Debtors' environmental liabilities is between $50 million and $71 million. Of that amount, Mr. McKnight concluded that the Debtors' liability for contamination at the La Mirada site, a site over which the State Water Board and Los Angeles Water Board have regulatory authority, is $8.3 million as of the petition date, with a net present value of $6.5 million. However, Mr. McKnight's conclusions regarding the Debtors' environmental liabilities and obligations, including those associated with the environmental contamination at the La Mirada site, are based on obsolete, incomplete, inaccurate, and unsubstantiated data and information and are therefore faulty. The State Water Board and Los Angeles Water Board object to the Settlement Motion because the proposed settlement is based on unreliable expert opinions and conclusions and thus is not fair, equitable, and in the best interests of the estate.

BACKGROUND

I. REGULATORY AUTHORITY OF THE STATE WATER BOARD AND REGIONAL WATER QUALITY CONTROL BOARDS

3. The State Water Board and the nine Regional Water Quality Control Boards (Regional Water Boards) are jointly responsible for ensuring the highest reasonable quality of California's waters to protect beneficial uses, by administering the Porter-Cologne Water Quality Control Act (Porter-Cologne) and the federal Clean Water Act.[3] Cal. Water Code §§ 13000-13001, 13020, 13200, 13225. The State and Regional Water Boards are the principal state agencies with primary responsibility for the coordination and control of water quality in

[3] "About the Water Board." California Water Resources Control Board, available at https://www.waterboards.ca.gov/about_us/

California under the California Environmental Protection Agency (CalEPA). Cal. Water Code §§ 13001, 13100 (as modified by Governor's Reorganization Plan No. 1 of 1991).

4. The State Water Board sets statewide policy and provides guidance and oversight to the Regional Water Boards through review of the Regional Water Boards' decisions. See Cal. Water Code §§ 13140, 13142, 13164, 13170, 13245, 13320. While the State and Regional Water Boards share joint authority to enforce laws protecting water quality, in practice each Regional Water Board takes the lead role within its regional boundaries to administer Porter-Cologne, making critical water quality decisions for that region, including setting water quality and discharge standards and evaluating and enforcing compliance with those standards. The natural boundaries of individual watersheds determine the jurisdiction for each Regional Water Board, as codified in California Water Code section 13200. The Los Angeles Region includes the coastal watersheds of Los Angeles and Ventura Counties, along with very small portions of Kern and Santa Barbara Counties.[4] *See* Cal. Water Code § 13200(d).

5. Under Porter-Cologne, the State Water Board and Regional Water Board have police power authority over the cleanup and/or remediation of California's waters when they become contaminated and authority to prevent contamination originating from land impacting waters in the first instance. To this end, California Water Code section 13267 grants Regional Water Boards the authority to investigate the quality of State waters. The State and Regional Water Boards' coordinated programmatic effort to fulfill these responsibilities is known as the "Site Cleanup Program." Through the Site Cleanup Program, the State and Regional Water Boards conduct and/or oversee the investigation, assessment, monitoring, cleanup, and/or remediation of contamination at non-federally-owned sites.

6. When a person or entity (termed a "responsible party") has caused or permitted waste to be discharged or deposited into waters of the State that create or threaten to create pollution or nuisance impacting beneficial uses of water, human health, or the environment, the

[4] About Us: Los Angeles Regional Board, available at: https://www.waterboards.ca.gov/losangeles/about_us/

Regional or State Water Board issues a Cleanup and Abatement Order (CAO) to "clean up or abate" a condition of pollution or nuisance pursuant to their police power authority under California Water Code section 13304. A CAO is enforceable administratively or through a lawsuit brought on behalf of the Regional or State Water Board. A CAO also provides a basis for reimbursement by the responsible party of the State and Regional Water Boards' costs of overseeing or directly conducting investigation, assessment, monitoring, cleanup and/or remediation operations if the responsible party fails to comply with the CAO, or in addition to operations conducted by a responsible party pursuant to a CAO. Cal. Water Code §§ 13304, 13350, and 13365.

7. The State Water Board maintains an internet accessible public data management system called GeoTracker for sites that impact, or have the potential to impact, water quality in California.[5] GeoTracker includes records for non-federally owned sites that are regulated under the Water Boards' Site Cleanup Program and/or similar programs conducted by each of the nine Regional Water Boards and require cleanup. GeoTracker consists of a relational database, on-line compliance reporting features, a geographical information system (GIS) interface and other features that are utilized by the State Water Board, Regional Water Boards, local agencies, regulated industry and the public to input, manage, or access compliance and regulatory tracking data. In particular, GeoTracker includes reports and correspondence submitted by responsible parties or on their behalf to the Water Boards as well as correspondence and orders issued by the Water Boards.

II. LOS ANGELES WATER BOARD AND ITS REGULATION OF THE LA MIRADA SITE

8. The Los Angeles Water Board is the lead agency overseeing the environmental investigation of the La Mirada site under the authority of Porter-Cologne and other applicable laws and regulations. The La Mirada site is located at 14650 East Firestone Boulevard in La Mirada, Los Angeles County, California. The La Mirada site is a Cleanup Program site, and

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[5] The State Water Board's GeoTracker may be accessed at https://geotracker.waterboards.ca.gov/.

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regulatory activities information regarding the site are available on GeoTracker.[6]

9. From approximately 1972 to 1981, Western Chemical, a predecessor of Debtor Soco West, operated at the La Mirada site. Western Chemical's operations at La Mirada included reclaiming chlorinated solvents and volatile organic compounds (VOCs) such as methylene chloride, perchloroethylene (PCE), trichloroethylene (TCE), and 1, 1, 1-trichloroethane (1, 1, 1-TCA). Chlorinated solvents have been identified in soil, soil gas, and groundwater beneath the La Mirada site, and VOCs have been detected in the groundwater.

10. Since at least 1973, state and local agencies have conducted several rounds of environmental investigations at the La Mirada site.[7] Groundwater monitoring and sampling at the La Mirada site began in April 2001.[8] A 2007 soil and ground water investigation report by Soco West's environmental consultants indicated 46 contaminants detected in the soil at the La Mirada site.[9] A 2008 report by Soco West's environmental consultants indicated 27 contaminants detected in groundwater samples at the La Mirada site.[10] On September 3, 2008, the Los Angeles Water Board issued a CAO to Debtor Soco West in which the Board found the extent of soil vapor, soil matrix, and groundwater contamination had not been fully defined.[11] The Los Angeles Water Board's order required Soco West to prepare and submit investigation reports and work plans to address and mitigate soil contamination and VOC vapors in indoor breathing spaces, and for the additional off-site assessment of soil, soil gas, and groundwater to

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[6] Regulatory information regarding the La Mirada site may be accessed on GeoTracker at https://geotracker.waterboards.ca.gov/profile_report?global_id=SL204CA2325. Although La Mirada site information is identified as "All-Tex Inks Corporation" in GeoTracker, site information can be found through an address search.

[7] **Exhibit 1** to Lucca Declaration, California Water Code Section 13267 Order - to Submit Technical Documents, to Complete Off-Site Subsurface Investigation, and to Complete Off-Site Indoor Air Surveys and California Water Code Section 13304 Order to Cleanup and Abate On-Site Subsurface Volatile Organic Compound Contamination, issued to Soco West, Inc., September 3, 2008. https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/6050931632/0909%20CWC%2013267%20&%2013304%20to%20Submit%20Technical%20Documents%20090308.pdf.

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

[11] *Ibid.*

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fully delineate VOCs in these media.[12] Pursuant to California Water Code section 13304, the Los Angeles Water Board also ordered Soco West to clean up and abate the condition of soil and groundwater pollution and threatened pollution caused by the release of VOCs.[13] Soco West was ordered to submit an Interim Remedial Action Plan (IRAP) for the remediation of contaminated soil and groundwater at the La Mirada site.[14] Soco West's environmental consultants submitted an IRAP to the Los Angeles Water Board on October 30, 2008.[15]

11. Since the submission of the 2008 IRAP, Soco West's consultants have submitted an Alternative Interim Remedial Action Plan[16] and conducted additional investigations and tests. The Los Angeles Water Board also issued a CAO on July 30, 2010, naming additional responsible parties for the La Mirada site[17], and an Amended CAO on November 30, 2021.[18] The November 2021 Amended CAO included a revised time schedule for the completion of required actions and submission of work plans, including Remedial Action Plans.[19] Until Soco West filed its bankruptcy petition, investigations and remediation work had been ongoing at the La Mirada site. However, Soco West had not submitted an updated Remedial Action Plan by the time it filed its bankruptcy petition.

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[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] **Exhibit 2** to Lucca Declaration, Interim Remedial Action Plan, Former Western Chemical Facility, 14650 E. Firestone Boulevard, La Mirada, California; Prepared for California Regional Water Quality Control Board, Los Angeles Region, on behalf of Soco West, Inc., by JPR Technical Services, Inc., 30 October 2008, Volume I of II. https://documents.geotracker.waterboards.ca.gov/esi/uploads/geo_report/7298827230/SL204CA2325.PDF.

[16] **Exhibit 3** to Lucca Declaration, Alternative Interim Remedial Action Plan (AIRAP), Former Western Chemical Facility, 14650 E. Firestone Boulevard, La Mirada, California, September 10, 2010. https://documents.geotracker.waterboards.ca.gov/esi/uploads/geo_report/8105256438/SL204CA2325.PDF.

[17] *See* **Exhibit 4** to Lucca Declaration, July 30, 2010, CAO No. R4-2010-0044. https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/4594380021/0909%20CAO%20R4-2010-0044.pdf.

[18] *See* **Exhibit 5** to Lucca Declaration, November 30, 2021, Amended CAO No. R4-2010-0044-A01. https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/4267850577/SCP5_MN_All-Tex%20Draft%20Amended%20CAO%20R4-2010-0044-A01.pdf.

[19] *Ibid.*

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ARGUMENT

I. The Expert Opinions Supporting the Proposed Settlement Between the Debtors and Contributing Parties Are Based on Obsolete and Incomplete Environmental Records

12. The proposed settlement between the Debtors and contributing parties is not fair, equitable, or in the best interests of the state because the expert opinions and conclusions the Debtors rely on to support the proposed settlement are based on obsolete and incomplete environmental records and are thus unreliable.[20] In addition to the defects of Mr. McKnight's expert report and conclusions addressed in the US Objection, the State Water Board and Los Angeles Water Board identify here the reasons why Mr. McKnight's opinions and conclusions regarding the La Mirada site are unreliable.

13. Regarding the La Mirada site, Mr. McKnight acknowledges in his report that "significant remediation work remains uncompleted, as reflected in the Debtors' books and records."[21] However, Mr. McKnight cites to only one document as his source for "the Debtors' booked value of $8.3 million in remaining costs" for the La Mirada site.[22] That document, cited in footnote 99 in the McKnight Report, is a Brilliant National Services, Inc., Confidential Information Memorandum titled "Project Brilliant" and dated February 2023.[23] However, a later version of the "Project Brilliant" document was prepared in April 2023, and this April 2023 document is not cited in Mr. McKnight's report or included in his workpapers.[24] A comparison of the two documents shows that the April 2023 version has other information that the February 2023 does not have. During his deposition, Mr. McKnight testified that he was not aware that the "Project Brilliant" document had been updated and did not recall seeing a later version of the "Project Brilliant" document dated April 2023.[25] Mr. McKnight's conclusions regarding the La Mirada site are unreliable because they are based on a February 2023 document that became

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[20] A copy of the October 25, 2024, Expert Report of David McKnight (McKnight Report) was submitted **Exhibit 99** to the TCC Objection.

[21] McKnight Report ¶ 105.b.

[22] *Ibid*.

[23] *See* p. 30 of **Exhibit 6** to Lucca Declaration; *see also* McKnight Depo. 434:23 – 439:19.

[24] *See* **Exhibit 7** to Lucca Declaration.

[25] **Exhibit 8** to Lucca Declaration, McKnight Depo. 439:2–19.

obsolete when it had been replaced by a later, updated version in April 2023.

14. Even if the February 2023 "Project Brilliant" document had not been replaced by a later version, Mr. McKnight's reliance on it to conclude that the remaining costs for remediation work at La Mirada is $8.3 million is still faulty. The "Project Brilliant" document does not cite to any source materials substantiating the anticipated costs for remediating the La Mirada site.[26] Mr. McKnight also testified that he does not know what source documents were used to develop the "Project Brilliant" document.[27] Mr. McKnight further testified he did not speak with the Brilliant National Services management who prepared the "Project Brilliant" documents, and he is not aware of anyone on his team at the Brattle Group speaking with the Brilliant National Services management.[28] Without substantiating any of the information in the February 2023 "Project Brilliant" document, Mr. McKnight cited to this document in his report to opine and conclude that the Debtors' environmental liabilities at the La Mirada site total $8.3 million. Because the information in the "Project Brilliant" document is unsubstantiated, Mr. McKnight's opinions and conclusions regarding the La Mirada site are unreliable.

15. Mr. McKnight also testified that he believes he and his team identified a remedial action plan for the La Mirada site, but he could not say specifically which documents he and his team found and used in the analysis for the La Mirada site.[29] Section B.6 in Appendix B to Mr. McKnight's report lists the Interim Remedial Plan, Former Western Chemical Facility, prepared for California Regional Water Quality Control Board Los Angeles Region on behalf of Soco West, Inc. by JPR Technical Services, Inc., Vol. I of II, October 30, 2008, as one of the remediation action plans he and his team considered. Although Mr. McKnight could not recall whether this October 30, 2008, Interim Remedial Plan was the remedial action plan for the La Mirada site,[30] information on the State Water Board's GeoTracker confirms that the Debtors' environmental consultants submitted this report to the Los Angeles Water Board in October 2008

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[26] *See* **Exhibit 6** to Lucca Declaration.
[27] **Exhibit 8** to Lucca Declaration, McKnight Depo. 438:13-25.
[28] **Exhibit 8** to Lucca Declaration, McKnight Depo. 439:20 – 440:17.
[29] **Exhibit 8** to Lucca Declaration, McKnight Depo. 436:13 – 437:23.
[30] **Exhibit 8** to Lucca Declaration, McKnight Depo. 432:4 – 433:6.

for review and approval.[31] Besides Mr. McKnight's citation to the February 2023 "Project Brilliant" document and the listing of the October 30, 2008, IRAP for the La Mirada site, Mr. McKnight's report does not cite to any other documents to support his opinions and conclusions regarding the Debtors' environmental obligations and liabilities at the La Mirada site.

16. Like his reliance on the February 2023 "Project Brilliant" document, Mr. McKnight's reliance on the October 30, 2008, IRAP is also faulty because the 2008 IRAP is obsolete. Soco West's environmental consultants have conducted significant investigation and tests at the La Mirada site since 2008. On September 10, 2010, Soco West's environmental consultants submitted an Alternative Interim Remedial Action Plan for the La Mirada site.[32] And based on post-2008 investigations and tests at the La Mirada site, the Los Angeles Water Board issued its November 30, 2021, Amended CAO and ordered Soco West and other responsible parties to submit Remedial Action Plans.[33] Neither the 2021 Amended CAO nor any of the information regarding post-2008 investigations and tests at the La Mirada site are cited in Mr. McKnight's report. Thus, Mr. McKnight's conclusions regarding the La Mirada site are questionable and unreliable because they are not based on complete and accurate data and information.

17. Substantial data and other information regarding the La Mirada site from 2006 to the present are publicly available in the State Water Board's GeoTracker database and would have provided Mr. McKnight and his team with information necessary to determine Debtors' environmental liabilities at the site.[34] Mr. McKnight, however, testified that he is not specifically aware of or familiar with GeoTracker, and he does not know whether anyone on his

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[31] *See* **Exhibit 2** to Lucca Declaration; *see also* https://documents.geotracker.waterboards.ca.gov/esi/uploads/geo_report/7298827230/SL204CA2325.PDF.

[32] *See* **Exhibit 3** to Lucca Declaration; *see also* https://documents.geotracker.waterboards.ca.gov/esi/uploads/geo_report/8105256438/SL204CA2325.PDF.

[33] *See* **Exhibit 5** to Lucca Declaration; see also https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/4267850577/SCP5_MN_All-Tex%20Draft%20Amended%20CAO%20R4-2010-0044-A01.pdf.

[34] *See* https://geotracker.waterboards.ca.gov/profile_report?global_id=SL204CA2325.

team reviewed GeoTracker for information regarding the La Mirada site.[35] Mr. McKnight also testified that he and his team did not speak with the Debtors' environmental consultants regarding the La Mirada site.[36] Although substantial information from the Debtors' environmental consultants is available on GeoTracker for the La Mirada site, including their investigation and monitoring reports, speaking with the environmental consultants would have provided Mr. McKnight with reliable information to accurately determine the anticipated remediation costs for the site. As discussed in the US Objection, Mr. McKnight does not have expertise in evaluating environmental liabilities. Because Mr. McKnight failed to review GeoTracker and failed to speak with the Debtors' environmental consultants, his opinions and conclusions regarding the Debtors' environmental obligations and liabilities at the La Mirada site are based on incomplete information and thus unreliable.

RESERVATION OF RIGHTS

18. The State Water Board and Los Angeles Water Board reserve the right to amend this Joinder and to join any other objection to the Debtors' Motion and Proposed Settlement that may be filed.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the TCC Objection and US Objection, the State Water Board and Los Angeles Water Board respectfully request that the Court sustain the objections to the Debtors' Settlement Motion and deny the motion.

Dated: January 7, 2025
San Diego, California

PETER J. LUCCA, JR.
California Department of Justice

/s/ *Peter J. Lucca, Jr.*
Attorney for the California State Water Resources Control Board and the Los Angeles Regional Water Quality Control Board

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[35] **Exhibit 8** to Lucca Declaration, McKnight Depo. 437:24 – 438:12.
[36] **Exhibit 8** to Lucca Declaration, McKnight Depo. 433:7–22.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served via the Court's Electronic Filing System on all parties requesting notice in this proceeding on January 7, 2025.

/s/ *Peter J. Lucca, Jr.*
Peter J. Lucca, Jr.

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Appendix C

United States of America's Motion *in Limine* to Exclude the Testimony of Debtors' Expert David McKnight

[Docket No. 1628]

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Jeanne T. Cohn Natalie G. Harrison Conner R. Huggins Alan S. Tenenbaum Environment & Natural Resources Division U.S. Department of Justice 150 M St NE Washington, DC 20002 Tel: (202) 514-5409 Email: Jeanne.Cohn@usdoj.gov Natalie.G.Harrison@usdoj.gov Conner.Huggins@usdoj.gov Alan.Tenenbaum@usdoj.gov *Counsel for United States on behalf of EPA*	
In re: WHITTAKER, CLARK & DANIELS, INC., *et al.*, Debtors.	Chapter 11 Case No. 23-13575 (MBK) (Jointly Administered) Honorable Michael B. Kaplan, U.S.B.J., Chief

UNITED STATES OF AMERICA'S MOTION *IN LIMINE* TO EXCLUDE THE TESTIMONY OF DEBTORS' EXPERT DAVID MCKNIGHT

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The United States of America, on behalf of the U.S. Environmental Protection Agency ("EPA") submits this memorandum in support of its motion in limine for an order excluding the testimony of David McKnight, regarding his estimation of Debtors' environmental liabilities, pursuant to Federal Rule of Evidence 702. Mr. McKnight is not qualified to be an expert on environmental liabilities, his testimony is not reliable, and his testimony does not fit the case. Accordingly, the Court should exclude his testimony valuing Debtors' environmental liabilities.

BACKGROUND

A. Mr. McKnight's Qualifications

1. Mr. McKnight has limited qualifications. The Debtors retained Mr. McKnight to "estimate […] the net present value, as of the Petition Date… of all pending and future Asbestos Claims, Talc Claims, and Environmental Liabilities." TCC Ex. 99, David McKnight, Expert Report of David McKnight ("McKnight Report") ¶ 11 (Oct. 25, 2024), ECF 1601-1. He has an M.B.A., M.S. in Mathematics, and a B.A. in Mathematics. *Id*. at ¶ 2. He is a principal in the Securities Group of The Brattle Group, Inc. ("Brattle") and has over 25 years of experience consulting in mass tort litigations, providing valuations, claims data analysis, estimating settlement amounts, and forecasting future claims. *Id*. at ¶¶ 1–2. While he states that other environmental principals at Brattle advised him, he himself has worked on teams evaluating environmental liabilities only four other times in the course of his 25-year career and very little of this work involved estimates concerning Superfund sites. Ex. 1, Depo. of David McKnight Vol. II ("McKnight Depo."), 277:19–281:4, 281:18–287:10, 309:2–311:22, 418:3–420:13 (Nov. 26, 2024). Furthermore, none of even this limited experience involved assessing the types of anticipated costs of environmental remediation at issue here, and he has never been qualified as an expert in evaluating environmental remediation costs or environmental liabilities. *Id.* at 281:18–25.

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B. Mr. McKnight's Testimony Estimating Debtor's Environmental Liabilities

2. In his report, Mr. McKnight identifies 27 sites where a Debtor may be liable for a share of environmental remediation costs. McKnight Report at ¶ 95. Where a Record of Decision ("ROD") or a Remediation Action Plan ("RAP") existed for a site, he uses the cost estimates included therein and inflates the costs based on the Consumer Price Index ("CPI") to get the nominal cost of the projects.[1] *Id*. at ¶¶ 98–100. He acknowledges that the forecasted spending on a site is not the same as the actual spending on the site but attempts to remedy the discrepancy by scaling future payment estimates with a ratio "of the Debtors' expenditures to date to those predicted based on the ROD." *Id*. at ¶101.

3. For sites where he could not find approved remedy plans, he uses "the book value of environmental liabilities recorded by the Debtors and estimate[s] the net present value of those amounts." *Id*. at ¶ 102. When using the book values, he does not review the process the Debtors underwent in creating the books and records. McKnight Depo. at 291:13–293:11. He relies on them "as they were presented." *Id*. For six of the sites without identified approved remediation plans, he treats the environmental liabilities as arising in 2023 and for two other sites he spreads the book value evenly over the expected project lengths. McKnight Report at ¶ 103. McKnight uses the same discount rate for the tort claims and the environmental liabilities. *Id*. at ¶ 107. He computes the discount rate by finding the expected weighted average return of the trusts' investment portfolios, which are asbestos liability trusts. *Id*. at ¶ 108. This calculation results in a discount rate of 6.69%. *Id*. at ¶ 109. McKnight's initial declaration in September 2024 estimated the net present value of Debtor's liabilities at $37 million. Decl. of David McKnight ¶ 21 (Sept.

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[1] A ROD is the official document detailing the EPA selected remedy. McKnight Report at ¶ 97; *see also* Ex. 2, A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Documents, § 6.1.1 at 6-1. A RAP is an analogous document created by state agencies for sites overseen by their respective departments or agencies. McKnight Report at ¶ 97.

3, 2024), ECF 1300. McKnight's final report in October 2024 introduces a range and almost doubles his estimate at the high end, finding the net present value of the Debtors' environmental liabilities at anywhere between $49,658,731 and $71,270,018. McKnight Report at ¶ 106.

STANDARD OF REVIEW

4. To admit expert testimony, a trial judge acts as gatekeeper and ensures: (1) the witness is qualified as an expert; (2) the proposed testimony is reliable and relates to matters requiring scientific, technical, or specialized knowledge; and (3) the testimony is adequately tied to the facts of the case so that it "fits" and will assist the trier of fact. *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 591 (1993); Fed. R. Evid. 702. This gatekeeping function applies to not only scientific, but also non-scientific testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999). Rule 702 applies regardless of whether the trier of fact is a judge or a jury. *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832 (3d Cir. 2020). The proponent of the evidence has the burden of establishing the admissibility of the expert's testimony by a preponderance of the evidence. Fed. R. Evid. 702; *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).

ARGUMENT

5. Although Mr. McKnight has 25 years of experience consulting on mass tort litigation, Debtors cannot show that his proposed testimony regarding his evaluation of Debtors' environmental liabilities is admissible. Mr. McKnight's testimony is not reliable because he does not employ widely acceptable methods, and his methodologies rely on speculation. Further, his testimony does not fit with the relevant proceedings because he does not include all the necessary facts and data; he uses an inapplicable discount rate; and the majority of the data he uses is outdated or incomplete. Thus, he is not qualified to instruct the Court about this subject and his testimony should not be admitted.

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I. Mr. McKnight Is Not a Qualified Expert in Environmental Liabilities Because He Lacks the Requisite Background and Experience.

6. To be qualified as an expert, a witness must possess knowledge, skill, experience, training, or education that will help the trier of fact determine a fact in issue in the specific case. Fed. R. Evid. 702. The key criterion is that the expert must possess genuine expertise in the field and "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. at 152. While an expert may be qualified to testify about specific topics, he may still lack the requisite qualification to testify about areas outside of his expertise. *Calhoun v. Yamaha Motor Corp., U.S.*, 350 F.3d 316, 322 (3d Cir. 2003).

7. Mr. McKnight is not qualified to be an expert regarding the evaluation of environmental liabilities. Mr. McKnight's education in mathematics and 25 years' experience consulting on mass tort litigation[2] does not reach the distinct area of estimating environmental liabilities. He has no education or training in any relevant scientific or technical disciplines. McKnight Depo. at 274:25–277:18. Mr. McKnight also lacks experience in the field of environmental liability cost estimation. Mr. McKnight's prior experience specifically related to environmental valuation includes:

1) Coauthoring an expert report that assessed the costs of installing and maintaining various pollution controls at a client's facility;

2) Serving as "a member of a team working on a case where [Brattle]… estimated environmental liabilities, and … some of those sites were Superfund sites.";[3]

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[2] The United States takes no position as to Mr. McKnight's qualifications as an expert evaluating the Debtors' tort liabilities or avoided defense costs.

[3] Mr. McKnight could not recall how long ago or for how long he worked on that matter. McKnight Depo. 309:13–17.

3) Helping oversee Brattle analysts that were supporting another expert, where Brattle's role involved multiple analyses, including estimating environmental liabilities associated with perfluoralkyl substances ("PFAS") exposures; and

4) Computing damages to houses affected by a plume of chemical contamination more than ten years ago.

McKnight Depo. at 277:19–281:4; 309:2–311:23; 418:3–420:13. These prior experiences reveal Mr. McKnight's minimal experience in estimating environmental liabilities. None of these experiences involved Mr. McKnight specifically assessing an entity's anticipated future costs of environmental remediation as required by the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*, as amended, ("CERCLA"), or any equivalent state law, which is one of the subjects that the Debtors seek to proffer Mr. McKnight as an expert to this Court. He has never been qualified by a court as an expert in evaluating environmental liabilities or environmental remediation costs. *Id*. at 281:18–25. He could not recall if he had seen the widely used and generally accepted American Society for Testing Materials International Standard[4] for Estimating Monetary Costs and Liabilities for Environmental Matters (ASTM Standard), at the time he had prepared his report, and he does not cite it in his report. *Id*. at 295:8–296:6.

8. Mr. McKnight cannot be qualified as an expert in this field. He lacks the necessary education and experience as an expert in environmental liability cost estimation. Thus, the Court should exclude his testimony.

II. Mr. McKnight's Testimony Is Not Reliable Because His Methods Are Not Generally Accepted and Rely on Speculation.

[4] ASTM International is a major international standard-setting organization that has developed over 12,000 best-practice standards in areas ranging from metals, plastics, advanced materials, medical devices, and construction to energy and the environment. *See* Ex. 3, Decl. of Gayle Koch at ¶ 4.

9. An expert's testimony must result from reliable principles and methods. Fed. R. Evid. 702. The expert must disclose his reasoning and methodology in his report. Fed. R. Civ. P. 26(a)(2)(B). To meet Rule 702's reliability requirement, the expert cannot base his testimony on "subjective belief and unsupported speculation." *UGI Sunbury LLC*, 949 F.3d at 833–34. While the expert's opinion does not need to have the "best methodology or unassailable research," he still must support his testimony with "good grounds." *Id*. at 834. In determining whether an expert's testimony is supported by "good grounds" a trial court considers factors such as:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Id. None of these factors are dispositive, but the court must analyze them before admitting an expert's testimony. *Id*.

10. Mr. McKnight's testimony is not supported by good grounds. He does not know whether his methodology is used by other experts in this field. McKnight Depo. 315:18–320:22. Instead, he uses a methodology to assess Debtors' environmental liabilities that prior to this matter, he had not used. The methodology he previously used in other cases was not "exactly this analysis as described." McKnight Depo. at 311:23–312:9.

11. The methodology that McKnight describes as "unique to this case" consistently underestimates the costs. *Id.* at 313:18–22. First, he starts his estimates using decades old cost estimates from RODs, RAPs, or other similar documents. McKnight Report at ¶¶ 98–99. He does not analyze whether relevant developments occurred more recently at any of the sites or seek more updated information from the Debtors' consultants who worked on some of the environmental remediation until the Debtors filed for bankruptcy. McKnight Report at ¶¶ 98–99;

McKnight Depo. at 348:8–350:2. By taking the costs directly from the RODs or RAPs, he defies the ASTM Standard and EPA's cost estimate guidance. *See* Ex. 4, U.S. ARMY CORPS OF ENG'RS & EPA, A GUIDE TO DEVELOPING AND DOCUMENTING COST ESTIMATES DURING THE FEASIBILITY STUDY, 2-4 (July 2000), *available at* https://semspub.epa.gov/work/HQ/174890.pdf. EPA's cost estimate guidance, which Mr. McKnight cited in his report, explains that cost estimates developed during the feasibility study allow EPA to compare remedial alternatives; but those estimates are not sufficiently detailed to establish project budgets or negotiate Superfund settlements. *Id.* at 1-2; *see* 40 C.F.R. § 300.430(e)(iii) (requiring federal agencies to consider the costs of remedial alternatives in a feasibility study). When asked whether he had read this limitation in the EPA Cost Estimate Guide, Mr. McKnight testified that he did not believe that he did and that he did not believe it was relevant because the Guide was focused on feasibility studies, an earlier remedial phase. McKnight Depo. at 334:5–335:21.

12. This testimony reveals his misunderstanding of the relationship between feasibility studies, RODs, and environmental remediation under CERCLA. Although the feasibility study occurs before the ROD, the National Contingency Plan makes clear that the remedial investigation and feasibility study are critical steps that immediately precede the selection of the remedy in the ROD. *See* 40 C.F.R. § 300.430 (titled "Remedial investigation/feasibility study and selection of remedy"). 40 C.F.R. Section 300.430(e) details the requirements for a feasibility study. After completing the remedial investigation and feasibility study, the agency then selects a remedy in a two-step process under 40 C.F.R. § 300.430(f). Specifically, the agency proposes a preferred alternative, elicits public comments, and reviews any comments before selecting the final remedy documented in the ROD. *Id.* at 40 C.F.R. § 300.430(f)(1)(ii). The ROD must discuss "significant changes and the response to comments"

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received, but there is no mandate or expectation to document cost changes between the feasibility study and the ROD. *See id.* at § 300.430(f)(5)(iii)(B); *see also* Ex. 2, A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Documents, § 6.3.10 at 6-29 ("[T]his section of the ROD should summarize the comparative analysis of alternatives presented in the detailed analysis of the [Remedial Investigation/Feasibility Study] Report."). Thus, Mr. McKnight ignores the warning in the EPA Cost Estimate Guide at his peril.

13. The ASTM Standard also warns against using the costs from these plans because of its "several significant shortcomings," including the limited intended purpose to compare remedial alternatives; the use of inappropriate inflation and discounting assumptions; the general limitation of remedy duration to thirty years; the exclusion of significant costs; and the potential for project failure or changes in cleanup standards. Ex. 5, Am. Soc'y for Testing Materials Int'l, Standard Guide for Estimating Monetary Costs and Liabs. for Env't Matters, 11 (2024). Additionally, the EPA Cost Estimate Guide acknowledges that the cost estimates generally have a low bias, and that uncertainty in these costs range anywhere from -50%/+100% to -30%/+50%. EPA Cost Estimate Guide at 2-4. His methodology compounds the underestimation and ignores settled industry standards by estimating costs for a duration of only 30 years. McKnight Report at ¶ 98. Both the ASTM Standard and the EPA Cost Estimate Guide advise against this approach. Ex. 5, Am. Soc'y for Testing Materials Int'l, at 7; Ex. 4, U.S. Army Corps, at 4-2. He further disregards the accepted methodology used by experts in this field by failing to include Superfund indirect costs, which includes any administrative and overhead costs EPA incurs. McKnight Depo. at 357:7–358:16; *United States v. W.R. Grace*, 429 F.3d 1224, 1250 (9th Cir. 2005) (affirming district court finding that EPA was entitled to recover

indirect costs); *see also United States v. Atlas Minerals Chemicals, Inc.*, 797 F. Supp. 411, 422 & n.14 (E.D. Pa. 1992). This necessarily underestimates the cost estimates because costs are missing from his calculus.

14. Mr. McKnight's testimony fails the test of reliability because his testimony is not supported by good grounds. While his method does not have to be unassailable, "good grounds" requires there be some basis for the court to find it reliable. Here there is none. His method deviates from the industry's standard practices and does not heed the warnings of trusted authorities in the environmental liabilities field. Using unverified costs estimates, underinflating costs, and failing to include necessary expenses, he systematically underestimates the Debtors' environmental liabilities. Thus, the Court should exclude his testimony.

III. Mr. McKnight's Testimony Does Not Fit the Proceedings Because He Failed to Include Necessary Data and Relied on Inaccurate or Inapplicable Data.

15. An expert's opinion must result from a reliable application of methods to the specific facts of the case. Fed. R. Evid. 702. As gatekeeper, the trial judge ensures that the expert's testimony "fits" the dispute. *Daubert*, 509 U.S. at 591. An expert's testimony "fits" the proceedings when the Court determines that it will assist the trier of fact in understanding the evidence or determining a fact in issue. *UGI Sunbury LLC*, 949 F.3d at 835. While a method may be valid for one purpose, it is not necessarily valid for another. *Id*. Fit is ultimately a question of whether a method applies to the particular facts of a case, and if it has been applied properly. *Kumho Tire Co.*, 526 U.S. at 156-57.

16. First, Mr. McKnight's method of using cost estimates from years old site plans does not fit because it excludes necessary information. As noted above, cost estimates in RODs do not include a myriad of necessary expenses, including agency oversight costs, operation and maintenance costs that will run longer than 30 years, community relations costs, certain

institutional controls, and indirect costs. Mr. McKnight also failed to seek information about environmental remediation work from the Debtors' environmental consultant that performed work at one of the sites since that site's ROD had been published. McKnight Depo. at 349:19–350:2. This results in an underestimation of site costs and does not represent a fair or accurate estimation of the costs. *See Shure Inc. v. Clearone Inc.*, Civ. Act. No. 19-1434-RGA-CJB, 2021 WL 4748744, at *1–2 (D. Del. Oct. 8, 2021) (striking portions of expert opinion where expert failed to include foundational information). Therefore, McKnight's cost estimates do not fit because they do not assist the Court in determining an accurate estimation of the site costs.

17. Additionally, Mr. McKnight's discount rate cannot be applied to environmental liabilities. He uses the same discount rate for the environmental liabilities as the tort claims, 6.69%, without demonstrating why it is appropriate to do so. McKnight Report at ¶¶ 107, 111. He calculates the discount rate by finding the expected average rate of return on a mix of investment portfolios of seven large asbestos trusts. *Id*. at ¶ 108. However, Mr. McKnight testified that he did not know if these asbestos trusts paid for environmental remediation. McKnight Depo. at 388:10–13.[5] EPA cannot invest funds that it receives for environmental remediation in such investment trusts, but may only invest such funds in U.S. Market Based Securities. *See United States v. Cornell Dubilier Elecs., Inc.*, Civ. Act. No. 12-5407 (JLL), 2014 WL 4978635, at *12 (D.N.J. Oct. 3, 2015) (recognizing that a risk-free discount rate is appropriate because the government has certain restrictions when investing Superfund money). These rates are generally much lower than the one McKnight used. For example, the interest

[5] Mr. McKnight testified that he chose the asbestos trusts because their investment portfolio "represents a conservative investment portfolio, a safe investment portfolio. From that perspective, and given that the environmental liabilities also have long tails, it was appropriate to use the investment returns from an asbestos trust and apply it to all of the liabilities here." McKnight Depo. 388:22–389:8.

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rates from fiscal years 2019–2024 are 1.75%, 2.22%, 0.10%, 0.10%, 3.01% and 3.46%, respectively. *Superfund Interest Rates*, EPA, https://www.epa.gov/superfund/superfund-interest-rates, (last visited Dec. 12, 2024). Using a higher discount rate of 6.69% leads to a significant underestimation of Debtors' environmental liabilities because discount rates are inversely correlated to the costs of environmental remediation. Ex. 3, Koch Decl. ¶ 5. When asked about the limits of EPA's investment of funds received for remediation, Mr. McKnight did not disagree with the statement that the Superfund trust fund invests only in non-marketable government securities but testified that it was not relevant to his analysis. McKnight Depo. at 393:4–394:7.

18. Mr. McKnight's testimony does not fit the proceedings because it will not assist the Court in accurately estimating the cost of the Debtors' environmental liabilities and is irrelevant. *See Summit Elec. Supply Co., Inc. v. Int'l Bus. Machines Corp.*, No. Civ-07-431 MCA/DJS, 2010 WL 11414471, at *9 (D.N.M. Sept. 30, 2010) (striking expert opinion that failed to include important conditions as irrelevant and unhelpful). Though his methods may be valid when applied to tort claims, they cannot be used for environmental liabilities because it excludes necessary costs and relies on inapplicable data. Therefore, the Court should exclude his testimony.

CONCLUSION

19. Mr. McKnight originally estimated that the net present value of Debtors' environmental liability in this matter was valued at $37 million. Approximately six weeks later, his report estimated that the net present value of Debtors' environmental liability ranged from $49.6 million to $71 million. He lacks both any education relevant to environmental remediation and previous experience evaluating the future costs of environmental remediation and liabilities. His lack of experience reflects in his methodology used to estimate Debtors' environmental liability here: he admits that this methodology was one he had not previously used before; he

ignores critical data; and he concludes that key standards and principles in this field are not relevant to his opinion. Therefore, the United States respectfully asks this Court to exclude Mr. McKnight's testimony regarding Debtor's environmental liabilities from consideration in this case.

Respectfully submitted,

/s/ Conner R. Huggins
Jeanne T. Cohn
Natalie G. Harrison
Conner R. Huggins
Alan S. Tenenbaum
Environment & Natural Resources Division
U.S. Department of Justice
150 M St NE
Washington, DC 20002
Tel: (202) 514-5409
Email: Jeanne.Cohn@usdoj.gov
Natalie.G.Harrison@usdoj.gov
Conner.Huggins@usdoj.gov
Alan.Tenenbaum@usdoj.gov

In accordance with D.N.J. LBR 9013-1(a)(1), I hereby certify that the Declarations of Meghan Jones and Gayle Koch, filed with the United States' Objection to the settlement Agreement Between Debtors and Contributing Parties on January 7, 2025, along with the documents referred to therein, contain the facts supporting the relief requested in this Motion in compliance with Local Bankruptcy Rule 7007-1.

Date: January 7, 2025

/s/ Conner R. Huggins
Conner R. Huggins

Counsel for the United States
on behalf of EPA

Appendix D

State of California Department of Toxic Substances Control's Objection to the Debtors' Motion for Entry of an Order Approving the Settlement Agreement Between the Debtors and the Contributing Parties

[Docket No. 1635]

*
CALIFORNIA DEPARTMENT OF JUSTICE
Peter Joseph Lucca, Jr. (NJ Attorney ID: 019181998)
James R. Potter (admitted *pro hac vice*)
600 W. Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 738-9158
PJ.Lucca@doj.ca.gov
James.Potter@doj.ca.gov
Counsel for
California Department of Toxic Substances Control

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW JERSEY

In re: WHITTAKER, CLARK & DANIELS, INC., *et al.,* Debtors.[1]	Chapter 11 Case No. 23-13575 (MBK) (Jointly Administered)

STATE OF CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL'S OBJECTION TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE DEBTORS AND THE CONTRIBUTING PARTIES

[1] The Debtors in these chapter 11 cases, along with the last four digits of the Debtors' federal tax identification number, are Whittaker, Clark & Daniels, Inc. (4760); Brilliant National Services, Inc. (2113); L. A. Terminals, Inc, (6800); and Soco West, Inc. (3400). The location of Debtors' principal place of business and the Debtors' service address in these chapter 11 cases is 100 First Stamford Place, Stamford, Connecticut.

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The California Department of Toxic Substances Control ("DTSC") hereby objects to the Debtors' Motion for the Court to approve Debtors' settlement ("Proposed Settlement") with the Contributing Parties: NICO, Brenntag and DB US.[2] [Dkt. No. 1297] (the "Motion" or "Settlement Motion"). The proposed settlement is not "fair and equitable" and should not be approved under Third Circuit Law. DTSC respectfully urges the Court to deny the Motion.

I. Summary of Argument

1. In the Motion, Debtors argue that the proposed $535 million payment from the Contributing Parties is a fair settlement of Debtors' derivative liability claims—principally successor liability and alter ego claims—against the Contributing Parties. The Tort Claimants Committee ("TCC") and United States of America ("United States") have each filed persuasive objections (the "TCC Objection" [Dkt. No. 1606] and the "United States Objection" respectively) contending that the Proposed Settlement is not fair. In this objection ("Objection"), DTSC strives to supplement rather than repeat arguments in the TCC or United States Objections.

2. In the Third Circuit, courts evaluate the fairness of a bankruptcy estate's settlement of its claims against third parties using the *Martin* factors. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996).[3] DTSC herein identifies three shortcomings in the Motion that undermine Debtors' claim that they have met their burden of showing that the Proposed Settlement is fair and equitable. These shortcomings go primarily to the first *Martin* factor: the "probability of success in the litigation." i.e., wh"ether the proposed settlement amount is greater than what Debtors would likely receive in litigation.

3. First, Debtors' valuation expert, Mr. David McKnight, attempted to estimate Debtors' environmental liability at the Service Chemical Site in Santa Ana, California ("Service Chemical Site"), but failed to account for the costs resulting from Debtor's ongoing refusal to

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[2] The terms "Contributing Parties," "NICO," "Brenntag," and "DB US" have the same meaning in this Objection as in the Motion. *See* Motion, footnotes 4, 5, 6. The Objection uses the names Berkshire and NICO interchangeably.
[3] The factors are listed in the Motion, ¶ and the TCC Objection, ¶ .

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commence cleanup activities at the Site. Consequently, Mr. McKnight underestimated both Debtors' liability at the Service Chemical Site and the value of Debtors' derivative liability claims against the Contributing Parties. Further, the United States, in its Objection and companion *Daubert* motion, identifies additional flaws in Mr. McKnight's methodology for estimating Debtors' environmental liabilities. Those flaws are magnified by the specific circumstances at Service Chemical Site.

4. Second, the Motion misrepresents and exaggerates the "hurdles" Debtors would face prosecuting an alter ego case against the Berkshire entities for environmental liabilities. To the contrary, Debtors have a strong case that NICO is liable as Soco West's alter ego with respect to environmental liabilities. Further, the "timing mismatch" that the Motion identifies as the principal hurdle to an alter ego case applies to asbestos liabilities only, not to environmental liabilities.[4]

5. Third, the Motion likewise underestimates the strength of Debtors' claim that Brenntag Pacfic is the mere continuation of Debtor Soco West, in part because Debtors apply the wrong law.

II. SUPPLEMENTAL STATEMENT OF FACTS

6. DTSC is the California state agency responsible for responding to releases or threatened releases of hazardous substances into the environment and for determining the actions to be taken in response. DTSC's authority to address hazardous substances contamination is specified in the California Hazardous Substances Account Act ("HSAA"), California Health and Safety Code Section 79650. DTSC also enforces portions of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 42 U.S.C. § 9601.

7. In light of the Court's familiarity with this matter and the detailed background in the TCC Objection, DTSC addresses here only the history most relevant to its claims and interests.

[4] *See* Motion, ¶ 48

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A. While Active, Debtors Distributed a Wide Range of Solvents and other Hazardous Chemicals.

8. Debtors operated chemical handling, manufacturing, distribution, and recycling facilities for many decades before 2004, when those operations were absorbed into the current Brenntag Entities.[5] The asbestos and talc activities described in the TCC's objection were part of Debtors' operations, but they were only part. In Debtors' words, "[f]rom the time of their formation until substantially all of the Debtors' operational assets were sold, the Debtors' businesses consisted of storage, and distribution of minerals and pigments, including talc, industrial chemicals, and solvents."[6]

9. In years leading up to the 2004 acquisition, Debtors avidly expanded their chemical handling and distribution businesses. Debtor Soco West, for example, "was built by combining—over more than twenty years—multiple distributors with connections to California (Western Chemical & Manufacturing, A.J. Lynch, and Crown Chemical) with two entities (Dyce Chemical and Holchem) acquired from the Holland Chemical group (which was brought into the Stinnes corporate family around 2000)."[7] Similarly, Debtor Brilliant was founded in 1977 and eventually owned the equity of multiple separate chemical distribution businesses.[8]

10. Notably, despite having been created in 2004, the current Brenntag companies claim this corporate history as their own.[9]

B. Debtors' Operations Caused Lasting Environmental Contamination in California.

11. The extent and consequences of Debtors' chemical handling operations are evident even in this bankruptcy. The McKnight report identifies over 30 sites around the nation where Debtors left a legacy of hazardous substances contamination; nine of the 27 contaminated

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[5] Motion, ¶¶ 17, 20.
[6] ECF No. 5, at ¶ 16.
[7] Motion, ¶ 19.
[8] *Id.*, ¶ *17.*
[9] *See* section VI.C, *infra.*

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sites identified in the McKnight Report are in California; no other State comes close to having as many sites contaminated by Debtors.[10]

12. Debtor Soco West and its predecessors operated many of those sites. Western Chemical & Manufacturing Co. operated a chlorinated solvent recycling and reclamation business at the La Mirada site in La Mirada, California from 1971 until 1979.[11] From 1944 to 2000, Western also operated a chemical storage, blending and distribution facility in Vernon, California.[12] Soco West and its predecessors also sent hazardous wastes they generated to disposal facilities that themselves required remediation to protect public health and safety.[13]

13. Holchem Inc. operated at two Southern California sites: it distributed chemicals and recycled solvents at the Service Chemical Site in Santa Ana and operated a chemical distribution business in Pacoima.[14] Both of these sites required substantial remediation.[15]

C. Soco West's Recalcitrance at the Former Service Chemical Site Halted Remediation Activities There.

14. In 1985, Soco West, through its predecessor Holchem, purchased the facility and operations of Service Chemical's existing hazardous waste solvent recycling and treatment facility.[16] At the Site, Holchem recycled, treated and stored hazardous substances such as tetrachloroethene ("PCE") and trichloroacetic acid ("TCA").[17] Holchem ceased operations at the

[10] McKnight Affirmative Report ¶ 95, table 11.
[11] Declaration Of James Potter In Support Of State Of California Department Of Toxic Substances Control's Objection To The Debtors' Motion For Entry Of An Order Approving The Settlement Agreement Between The Debtors And The Contributing Parties, (Potter Decl.), Ex. A BERKGOV0001354 ("Project Brilliant Presentation") at 1366.
Cleanup of the La Mirada site is overseen by a different state agency, the California Regional Water Quality Control Board, Los Angeles (the "Regional Board"). The Regional Board is also overseeing cleanup operations at a chemical storage and distribution terminal near Los Angeles, previously operated by Debtor LAT.
[12] *Id.*
[13] Project Brilliant Declaration, at 1363.
[14] *Id.*
[15] *Id.*, see also Section IV.A. *infra*
[16] Potter Decl., Ex. B., Statement of Decision on Phase Two Trial, Orange County Water District v. Sabic Innovative Plastics US, LLC, et al., Case No. 30-2008-00078246 ("Statement of Decision"), at 48.
Neither Holchem nor Soco West owned the real property at the Service Chemical Site.
[17] Potter Decl., Ex. C, Geosyntec Consultants, Feasibility Study and Remedial Action Plan, July 14, 2015 ("2015 FS RAP"), at 4-5.

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Service Chemical Site in 1991, but left a significant legacy of soil and groundwater contamination, including TCA, PCE, and 1,4 dioxane, also carcinogenic. [18]

15. In 1987, Holchem notified DTSC's predecessor of the contamination at the Site, "leading to a long history between Holchem (and its successors) and DTSC and its predecessors."[19] "Between 1987 and 2009, Soco West [Holchem's successor] implemented extensive interim remediation of the on-property contamination. . . . [and utilized] soil vapor extraction and high volume dual phase extraction" to remove large volumes of solvents and treat large volumes of contaminated groundwater.[20]

16. Berkshire's 2007 purchase of Debtors led to significant changes at the Service Chemical Site. Mr. Raj Mehta, a long-time Berkshire employee and a vice president of NICO Inc., became president of Soco West and the sole decision maker for operations at the Service Chemical Site.[21] Soco then began a number of procedural disputes with DTSC, with the net effect of slowing down remediation activities at the Service Chemical Site.

17. In 2010, Soco West sued DTSC to compel it to regulate the site under DTSC's site cleanup authorities rather than its waste management authorities. *Soco W., Inc. v. California Env't Prot. Agency*, 213 Cal. App. 4th 1511, 153 Cal. Rptr. 3d 440 (2013), as modified on denial of reh'g (Mar. 27, 2013). Soco West prevailed in that action and the court directed DTSC to take corrective action against Soco West under DTSC's site cleanup authorities. 213 Cal.App 4th 1520.

18. In 2014, DTSC issued a Corrective Action Order ("Corrective Action Order") again ordering Soco West to prepare and implement a remedial action plan for the Site.[22] Thereafter, Soco West and DTSC negotiated the provisions of a Feasibility Study/Remedial

[18] *Id.* at 17; See Office of Health Hazard Assessment's March 19, 2021 list of chemicals known to the State to cause cancer or reproductive toxicity, i.e., Proposition 65 List, available at: https://oehha.ca.gov/media/downloads/proposition-65//p65chemicalslistsinglelisttable2021p.pdf.
[19] Statement of Decision, at 51
[20] *Id.*
[21] Deposition Transcript of Raj Mehta, 10/23/24 ("Mehta 2024 Dep. Tr.") at 227:1-20; 287:1-8
[22] Statement of Decision, at 51.

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Action Plan ("2015 RAP"), which DTSC approved on July 23, 2015.[23] The 2015 RAP required Soco West to conduct on-site in-situ treatment, to install slurry walls and reactive barrier gates around the perimeter of the site and to cap the entire property.[24] To ensure that the remediation is effective, there would need to be continuing groundwater monitoring.[25] In 2015, the projected cost of implementing the 2015 RAP was $14,360,000.[26]

19. But in 2018, Soco West again found reason not to proceed.[27] This time Soco claimed it could not implement the 2015 RAP as required by the Corrective Action Order because the Orange County Water District might issue conflicting requirements.[28] In 2018, Soco West again filed suit against DTSC. This time Soco West filed a cross-complaint against DTSC in already pending litigation. DTSC in turn filed a cross-complaint against Soco.[29]

20. On this occasion, the court ruled firmly against Soco West. The court ordered the company to perform the 2015 RAP in compliance with the Corrective Action Order and held that (1) Soco was in violation of the Corrective Action Order and (2) Soco lacked sufficient cause to cease performance of the 2015 RAP.[30] In response to Soco West's request for declaratory relief, the court noted that "the fact that [Soco West] seeks to 'pause' implementation of the DTSC-approved RAP 'pending resolution of the claims and threatened actions of the [Orange County Water] District' is particularly concerning." [31] "[Additional litigation could continue] for at least three more years. In the meantime, contamination from the Sites goes unchecked."[32]

21. Finally, the court concluded that Soco West's non-compliance with DTSC's cleanup Order "warranted" a civil penalty. The amount of the civil penalty, up to $25,000 per day, was to be determined in a separate trial.[33]

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[23] *Id.* at 51-52.
[24] *Id.*.
[25] *Id.*.
[26] *Id.*
[27] Mehta 2024 Depo. Tr. At 304:23-305:5.
[28] *Id* 306:1-16.
[29] Statement of Decision at 47-48.
[30] *Id.*, at 74-75.
[31] *Id.* at 72.
[32] *Id.* at 72.
[33] *Id.* at 72-73.

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III. Standard of Review: the Court Should Apply the Heightened Scrutiny Applicable to Insider Transactions

22. As noted above, the Court should evaluate the fairness of Debtors' Proposed Settlement of their claims against the Contributing Parties with the *Martin* factors. The Proposed Settlement was negotiated among insiders: between the four Debtors and the very corporate parent that directed the Debtors to file for bankruptcy protection. In this circumstance "it is proper to apply 'heightened scrutiny and some skepticism' in considering the settlement terms." *In re Chassix Holdings, Inc.*, 533 B.R. 64, 70 (Bankr. S.D.N.Y. 2015) (citation omitted).

23. Further, as discussed by the TCC and the United States, although Debtors' two "independent directors" participated in the negotiations," they provided no independent scrutiny of the transaction and did not lessen the need for the Court's independent scrutiny.[34]

IV. Mr. McKnight's Cost Estimate of Debtors' Environmental Liability Does Not Provide Any Basis for the Court to Approve the Settlement.

24. Debtors' Motion virtually ignores Debtors' environmental liability. The Motion's core contention that the $535 million settlement "either exceeds or covers the vast majority of Debtors' tort liabilities," exclusively addressing Debtors' asbestos and talc liabilities.[35] Only in Paragraph 62 do Debtors put a figure on their environmental liability – $37 million.[36] In a settlement supposedly sufficient to pay virtually all their liability, Debtors' choice to give short shrift to the environmental liability is disturbing.

25. The $37 million estimate of Debtors' environmental liability comes from Mr. McKnight's September 9, 2024, Declaration, which Debtors filed in support of the Motion.[37] Disturbingly, just six weeks later, in his October 25, 2024, expert report, Mr. McKnight nearly

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[34] *See* United States Objection, ¶¶ 11, 18, 22, 41-42; TCC Objection, ¶¶ 125-34.

[35] Motion, ¶ 5. McKnight "estimates that the Debtors' asbestos and asbestos-related talc liabilities in the tort system but for these bankruptcies would be between $474 million and $571 million (in present value terms). Thus, the settlement amount either exceeds or covers the vast majority of the Debtors' tort liabilities before necessary adjustments for litigation risks and uncertainties." Mr. McKnight's Report appears as Exhibit 99 of the Berkovitz Declaration.

[36] Motion, ¶ 62. Unless otherwise specified, all cost estimates in this brief are net present value.

[37] ECF No. 1300, ¶¶ 19-20. $37 million was presumably the only estimate of Debtors' environmental liability available to the disinterested directors who allegedly negotiated the settlement.

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doubled his estimate, recognizing that Debtors' environmental liability could be as high as $71 million.[38]

26. In fact, as discussed below, Mr. McKnight's analysis of Debtors' Environmental Liabilities is so deeply flawed, in general and with respect to California's Service Chemical Site in particular, that analysis provides the Court no meaningful information about the scope of Debtors' environmental liability. Without that information, the Court cannot assess the fairness of Debtors' Proposed Settlement.

A. McKnight's Methodology Fails to Account for the Costs Resulting from Debtor's Ongoing Refusal to Commence Cleanup Activities.

27. Mr. McKnight based his cost estimate for the Service Chemical Site on the 2015 RAP, which was by then nearly a decade old and which did not account for material developments that had occurred in the interim.[39] As discussed above, Debtor Soco West never implemented the 2015 RAP.[40] Rather, at the direction of Mr. Raj Mehta, its Nico-appointed president, Soco West both ordered its consultant to stop working at the Site and filed suit against DTSC.[41] In a 2023 decision, a California state court determined that Soco cessation of cleanup activity was unjustified and allowed "contamination from the [Service Chemical] Site [to go] unchecked."[42]

28. With each year that Debtor Soco West, under Nico's direction, failed to implement the 2015 RAP, the underlying data in the 2015 RAP became further out of date.[43] Consequently, McKnight's cost estimate does not include significant costs occasioned by that delay.

[38] See United States Objection, ¶ 1.
[39] McKnight Report, ¶ 105; United States Objection, ¶ 16-17.
[40] *See* Section II.C. *supra.*
[41] *Id.*
[42] Statement of Decision, at 72. *See also* ¶ 20 *supra.*
[43] Potter Decl., Ex.E, . Rebuttal Expert Report of Benjamin Stanphill on Behalf of California Department of Toxic Substances Control ("Stanphill Report") ¶¶ 15, 18-25. The limited annual groundwater monitoring that Soco West did continue was not intended as a comprehensive overview of site conditions. *Id.*

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a. A supplemental site survey will be needed to determine if the remedy in the 2015 RAP would still be sufficiently protective.[44]

b. The 2015 RAP assumed that the soil vapor extraction completed in 2009 would be sufficient and further collection and treatment of soil vapor would not be needed. Because Soco West has not implemented the remedy in the 2015 RAP, contaminated groundwater that is a source of the soil gas contamination remains at the site.[45] In recent years, the State of California has implemented more strict limits on soil gas contamination soil vapor intrusion into buildings, making the need for soil vapor extraction even more likely and the cost of that extraction higher.[46] The McKnight report does not include costs for either a soil vapor study or soil vapor intrusion.

c. The 2015 RAP included a contingent plan for treatment of off-site groundwater contamination.[47] It assumed, however, that Soco West would comply with its terms. In fact, however, Soco West has not complied, and its failure to conduct onsite groundwater treatment increased the possibility that contamination would migrate off-site, triggering a need for off-site groundwater treatment. [48] The McKnight Report does not include a cost estimate for contingent offsite groundwater contamination.

B. The Additional Flaws in McKnight's Methodology Further Undermines his Cost Estimate for the Service Chemical Site.

29. The United States, in its objection to the Motion, identifies other flaws in the McKnight Report. These flaws too are present at the Santa Ana site. These include the following.

[44] Stanphill Report, ¶¶ 18-21.
[45] *Id.* ¶ 23.
[46] *Id.* ¶ 24
[47] Statement of Decision, at 52.
[48] Stanphill Report, ¶ 18,

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a. The cost estimate in the 2015 RAP caps operation and maintenance costs after thirty years. In all likelihood, operation and maintenance will be needed at the Service Chemical Site for much longer. [49]

b. In accordance with the 2015 RAP, Mr. McKnight's estimate assumes that Soco West will conduct the remedial actions at the Service Chemical Site. This bankruptcy, however, will end in Soco West's liquidation, transform the Service Chemical Site into an "orphan site" and force DTSC to engage contractors to conduct remediation activities itself .When the government takes over a site it incurs additional costs. [50] Those costs are not included in the McKnight Estimate.

c. Mr. McKnight artificially lowered the present value of Debtors' environmental liabilities by using an inappropriately high discount rate, based on a high interest rate not available to DTSC.[51] Like the United States, to manage risk, DTSC is constrained by law from seeking commercial interest rates.

V. DEBTORS HAVE A STRONG CASE THAT NICO IS THE ALTER EGO OF SOCO WEST.

A. Debtors' Timing Mismatch Argument Does Not Apply to Environmental Liabilities.

30. Debtors downplay any alter ego case against Nico by claiming a "timing mismatch" protects Nico.[52] In their view, a parent can bear alter ego liability only if it owned the subsidiary at the time of the liability-generating act: by 2007, when Nico purchased them, Debtors had long since stopped its business operations.[53] But the business operations are not the sole liability-generating acts. Post-closure environmental management activities can also trigger CERCLA liability. In *Litgo New Jersey, Inc. v. Martin*, for example, the court held that a party

[49] *Id.* ¶ 17.
[50] *Id.* ¶ 16.
[51] United States Objection, ¶ 14.
[52] Motion, ¶¶ 48-49.
[53] *Id.*

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may be liable as an operator of a facility based only on its current engagement in remedial activities, particularly where that parties' "decisions to delay remediation may have increased the threat to the environment and public health." No. 06-2891 AET, 2011 WL 65933, at *3 (D.N.J. Jan. 7, 2011), aff'd sub nom. *Litgo New Jersey Inc. v. Comm'r New Jersey Dep't of Env't Prot.*, 725 F.3d 369, 381 (3d Cir. 2013) (rejecting appellants' argument "that they should not be held liable as current operators because they have only managed remedial activities on the site.")

B. The Specific Connections Between Soco West and NICO Justify Veil Piercing Under Third Circuit Law

31. In the Third Circuit, federal common law governs when corporate veil-piercing is justified under CERCLA. *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993). To determine whether to hold a parent corporation derivatively liable, courts in the Third Circuit look at the "totality of the circumstances." *Trinity Indus., Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 365 (3d Cir. 2018) (applying federal common law to determine whether a parent was derivatively liable for its subsidiary's CERCLA liability). The Third Circuit has identified certain factors, known as the *Pisani* factors, that courts should consider when determining whether "to pierce the corporate veil." *Trustees of Nat. Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188, 194 (3d Cir. 2003), citing *United States v. Pisani*, 646 F.2d 83 (3d Cir. 1981). Those factors include, for example, gross undercapitalization and nonfunctioning of directors and officers, but the Third Circuit "never characterized these 'factors' as elements of a rigid test." *Id.* Further, alter ego liability in the Third Circuit does not require a showing of fraud.[54] *Id.*

32. Rather, the essential inquiry is "whether the debtor corporation is little more than a legal fiction." *Lutyk*, 332 F.3d at 194, quoting *Pearson v. Component Tech. Corp.*, 247 F.3d

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[54] Curiously, Debtors frame their alter ego analysis with the familiar two-part test – there must be (1) significant interconnectedness (sometimes characterized as a unity of interest) between the alleged alter egos and (2) a showing that injustice will result if the veil is not pierced. Motion, ¶¶ 50-52. But the cases Debtors identify are inapposite. They apply New Jersey and Delaware law respectively, rather than federal common law. Motion, fn 51. Debtors do not identify any Third Circuit cases applying the two part test as federal common law and we are not aware of any. Nonetheless, DTSC agrees that the potential for injustice is part of every alter ego analysis.

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471 (3d Cir.2001). "[I]n order to succeed on an alter ego theory of liability, plaintiffs must essentially demonstrate that in all aspects of the business, the two corporations actually functioned as a single entity and should be treated as such." *Trinity Indus., Inc.* 903 F.3d at, 365–66, quoting *Pearson*. It is a high burden, requiring "specific, unusual circumstances" and even then "the basis for piercing the corporate veil must be shown by "clear and convincing evidence" *Id.*

33. Debtors could likely meet that burden and have a much higher probability of success in the litigation than the Motion suggests. The circumstances here are indeed "specific [and] unusual." An insurance conglomerate purchased four former chemical companies for $1.[55] To Berkshire (the conglomerate), Debtors (the former chemical companies) looked like the runoff insurance companies Berkshire routinely bought: baskets of liabilities and cash to pay them.[56] The resemblance was an illusion. With runoff insurance companies, Nico's only obligations were to invest money and settle claims. With Debtors, Nico needed to actively manage environmental risk.

34. This circumstance is unusual in another respect, after Berkshire demanded and received a "purchase price adjustment," DB US had effectively paid Berkshire to take Debtors of its hands.[57]

35. Turning to the "single entity" criteria of veil piercing, deposition testimony by Berkshire employees demonstrate that with respect to Soco West's activities, Soco West and Nico indeed functioned as a single entity. Soco West had no employees, rather its president, and its board members, were all Nico employees.[58] Mr. Mehta, the president, testified that as far as he was concerned, there was no difference between the interests of Nico and the interests of Soco West.[59] The Nico employees who provided services to Soco West were commonly officers at multiple Berkshire subsidiaries and frequently took actions without considering in which role

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[55] Motion, ¶ 24.
[56] Deposition Transcript of Brian Snover, 10/31/2024 ("Snover Dep. Tran."), 69:16-70:17.
[57] Motion, ¶¶ 24, 46 fn.49
[58] Declaration Transcript of John Arendt, 6/13/2024, 202:25-203:15
[59] Mehta 2024 Depo. Tr. at 330:13-332:6

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they were acting.[60] Finally, while Soco West and Nico entered some Shared Services Agreements, Nico would also provide services when there was no such agreements.[61]

36. Debtors argue that, to prove an alter ego relationship between an individual debtor and Nico, they would have to pierce the veil of every intermediate company, but fail to cite any governing law to that effect.[62] Third Circuit federal common law does not appear to address whether alter ego relationships can exist outside of direct parent-subsidiary pair and so it is appropriate to look to state law. *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 98, 111 S. Ct. 1711, 1717, 114 L. Ed. 2d 152 (1991) ("The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.") Here, because California is the situs of the polluting facilities, we look to California law. In California, it is well established under the so-called single-enterprise theory that there can be alter ego relationships between sibling corporations and between other corporations with a common owner. *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1250, 1 Cal. Rptr. 2d 301, 318 (Ct. App. 1991).

37. With respect to the injustice aspect of an alter ego analysis, as discussed above, there is no denying that Soco West, once under Nico's control delayed cleanup activities and likely exacerbated conditions at the Service Chemical Site. *Cf. Litgo New Jersey, Inc. v. Martin*," No. 06-2891 AET, 2011 WL 65933, at *3 (D.N.J. Jan. 7, 2011), aff'd sub nom. *Litgo New Jersey Inc. v. Comm'r New Jersey Dep't of Env't Prot.*, 725 F.3d 369, 381 (3d Cir. 2013) (noting "decisions to delay remediation may have increased the threat to the environment and public health . . . .").

[60] Snover Dep. Tr. , 130:22-132-2; Mehta 2024 Dep. Tr.329:11-16.
[61] Mehta 2024 Dep. Tr 47:18-47-1.
[62] Motion, ¶ 50, fn. 52. Instead the Motion cites to two conflicting bankruptcy court cases. *Id.*

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VI. DEBTORS HAVE A STRONG CASE THAT BRENNTAG IS THE SUCCESSOR TO SOCO WEST UNDER THE MERE CONTINUATION THEORY.

A. Debtors Own Analysis Does Not Justify Their Conclusion That, Under State Law, Their Probability of Proving Brenntag's Successor Liability is Less than 50%.

38. Debtors undersell their successor liability case against Brenntag. The Motion identifies a four-part state-law test for determining whether Brenntag bears successor liability as the mere continuation of Debtors operation.[63] It then applies those factors to this matter. That analysis suggests Debtors *would likely* prevail against Brenntag under state law: Debtors acknowledge that the first and third factors (continuity of management and assumption of ordinary business liabilities) are clearly in their favor; with respect to the second factor (cessation of the seller's business activities and subsequent dissolution of the seller) Debtors weakly suggest that Brenntag might have a slight advantage in that "a court *could well* conclude" that Brenntag had the better argument (emphasis added); and finally suggest that the fourth factor (continuity of ownership) would depend on the choice of law but admit that "a court applying New Jersey law is likely to omit the fourth factor from its analysis altogether."[64] On the whole, Debtors paint a fairly encouraging picture. Yet Debtors conclude that the likelihood of success would be no greater than 50%.[65] Their own analysis suggests a much higher chance of success.

B. Federal Common Law More Strongly Favors Debtors' Case Against Brenntag.

39. In fact, Debtors' analysis is based on the false premise, that the court would apply a state-law analysis of successor liability rather than looking to the more flexible federal common law. As with alter ego liability, in the Third Circuit, successor liability in CERCLA cases is evaluated with federal common law. *United States v. General Battery Corp., Inc.*, 423

[63] Motion, ¶ 56. "[M] most courts consider four factors in determining whether a particular transaction amounts to a de facto consolidation or mere continuation: "(i) continuity of management, personnel, physical location, assets, and general business operations; (ii) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (iii) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (iv) continuity of ownership/shareholders."
[64] *Id.* ¶¶ 56-58.
[65] Motion, ¶ 59.

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F.3d 294, 298 (3d Cir. 2005), citing *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988).

40. When analyzed under federal common law, as it should be, Debtors' have a substantially higher probability of success against Brenntag. In *N. Shore Gas Co. v. Salomon Inc*, the Seventh Circuit applied federal common law to CERCLA:

> "Under federal common law no single factor is supposed to be determinative; instead, courts take a common-sense approach when deciding whether the seller's corporate entity has continued after the sale of assets. This warrants emphasis, since there is a tendency to proceed as if each factor is always as significant as the others, regardless of the unique circumstances of a particular case. But not all corporations are created equal. And depending on the character of the corporations involved in the asset purchase, a factor that appears on the mere continuation laundry list may be utterly unilluminating about the true effect of the asset purchase. The mere continuation exception requires close scrutiny of corporate realities, not mechanical application of a multi-factor test." 152 F.3d 642, 654–55 (7th Cir. 1998), overruled on other grounds by *Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983 (7th Cir. 2010).

41. Under that common-sense standard neither Debtor's failure to dissolve nor the absence of a continuity of shareholders would protect Brenntag from being held Debtors' successor. Debtors emphasize their own failure to dissolve, but a "close scrutiny of corporate realities" would show that Debtors' cessation of all ordinary business activities is the far more significant consideration in this matter.[66] Further, given that the purpose of Debtors' continued existence was to protect Brenntag from Debtors' legacy liabilities,[67] that continued existence is "utterly unilluminating about the true effect of the asset purchase."

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[66] The successor liability case against Brenntag is based on Debtors' pre-2004 activities, whereas the alter ego case against NICO is based on post-2004 activities.
[67] *See* TCC Objection, ¶¶ 8-13.

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42. Likewise, under the "common-sense approach" of federal common law the fact that Debtors and Brenntag have no common shareholders would not be a significant consideration. *Cf. Mickowski v. Visi-Trak Worldwide, LLC*, 321 F. Supp. 2d 885, 891 (N.D. Ohio 2004), aff'd, 415 F.3d 501 (6th Cir. 2005) ("For liability under the mere continuation exception [under Ohio law], the predecessor company and the successor company must have common ownership. The federal common law rule does not impose that requirement.")[68]

C. Brenntag Advertises Itself as Debtors' Successor.

43. For further evidence that Brenntag is the successor to Debtors' environmental liabilities, Debtors can point to Brenntag's own representations. Inside this case, the Brenntag entities are understood to have been created in 2004. In the outside world, Brenntag boasts of having a 150-year history, a history that in truth belongs to Debtors.[69] In short, Brenntag has appropriated Debtors' history, acting like a mere continuation of Debtors

44. Indeed, statements on the Brenntag website are inconsistent with Debtors representations to the Court. In the Motion, Debtors assert that it was Debtor Soco West who acquired subsidiaries Western Chemical and Crown Chemical, in 1980 and 1989 respectively.[70] Yet on Brenntag's website, it was Brenntag, not Debtors, who acquired those companies.[71]

45. Earlier versions of Brenntag's website were even more explicit. In 2005, Brenntag's webpage described Bain Capital as "taking over" the Brenntag Group.[72] The clear implication is that the Brenntag entities maintained their identity under a new owner.

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[68] Outside the CERCLA context, the federal common law of successor liability is even more broad. *See, e.g., E.E.O.C. v. G-K-G, Inc.,* 39 F.3d 740, 748 (7th Cir. 1994) (an employment law case holding that the federal common law doctrine of successor liability has only two conditions: that the successor had notice of the claim before the purchase and that there be "be substantial continuity in the operation of the business before and after the sale.")

[69] Potter Declaration, Ex. G, A pair of screenshots taken from Brenntag's web page, https://corporate.brenntag.com/en/about/history/150th-anniversary/, on January 7, 2025.

[70] Motion, ¶ 19

[71] Potter Declaration

[72] Potter Declaration, Attached as Exhibit I to this declaration is a screenshot taken from the Internet Archive of Brenntag's webpage as it appeared on November 2, 2005, taken on January 7, 2025 https://web.archive.org/web/20051102021734/http://www.brenntag.com/english/brenntagGroup/HISTORY/ab2003/index.html. "In March 2004, a new page is turned in the Brenntag chronicle: US financial investor Bain Capital takes over the Brenntag Group from Deutsche Bahn AG."

46. Under the common sense approach to successor liability taken by federal common law, Brenntag's own representations further bolster Debtors' already strong case that Brenntag bears successor liability as the mere continuation of Debtors.

VII. Conclusion

47. Debtors have not demonstrated that the Proposed Settlement is fair and equitable and indeed it is not fair and equitable. Debtors' analysis of their case against the Contributing Parties underestimates Debtors' own environmental liability, underestimates the strength of its alter ego case against Berkshire and underestimates the strength of its successor liability case against Brenntag. DTSC respectfully urges the Court to reject the Proposed Settlement and deny the Motion.

Dated: January 8, 2025

/s/ James R. Potter
James R. Potter
California Department of Justice
300 S. Spring Street
Los Angeles, CA
Tel:
Email: James.Potter@doj.ca.gov

CERTIFICATE OF SERVICE

Case Name: **In re Whittaker, Clark & Daniels (Soco Bankruptcy)** No. **23-13575**

I hereby certify that on January 7, 2025, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATE OF CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL'S OBJECTION TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE DEBTORS AND THE CONTRIBUTING PARTIES

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 8, 2025, at San Francisco, California.

J. Llorens	*/s/ J. Llorens*
Declarant	Signature

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Appendix E

Creditor Orange County Water District's Memorandum of Law in Support of Objection to Debtors' Motion for Entry of an Order (I) Approving the Settlement Agreement Between the Debtors and the Contributing Parties, (II) Authorizing the Debtors to Perform All of Their Obligations Thereunder, and (III) Granting Related Relief

[Docket No. 1636]

<table>
<tr><td>UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
Caption in Compliance with Order Directing Joint Administration (Doc. No. 72)
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Jeffrey W. Herrmann, Esq.
Alex A. Pisarevsky, Esq.
Attorneys for Orange County Water District
Park 80 West - Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, New Jersey 07663
Telephone: (201)845-9600
jwh@njlawfirm.com
ap@njlawfirm.com</td><td></td></tr>
<tr><td>In Re:

WHITTAKER, CLARK & DANIELS, INC., et al.,

Debtors.[1]</td><td>Chapter 11

Case No. 23-13575 (MBK)

(Jointly Administered)</td></tr>
</table>

CREDITOR ORANGE COUNTY WATER DISTRICT'S MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE DEBTORS AND THE CONTRIBUTING PARTIES, (II) AUTHORIZING THE DEBTORS TO PERFORM ALL OF THEIR OBLIGATIONS THEREUNDER, AND (III) GRANTING RELATED RELIEF

[1] The Debtors in these chapter 11 cases, along with the last four digits of the Debtors' federal tax identification number, are Whittaker, Clark & Daniels, Inc. (4760), Brilliant National Services, Inc. (2113); L.A. Terminals, Inc. (6800); and Soco West, Inc. (3400). The location of Debtors' principal place of business and the Debtors' service address in these chapter 11 cases is 100 First Stamford Place, Stamford, Connecticut 06902.

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CASES

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RULES

Creditor Orange County Water District ("OCWD") submits this memorandum in support of objection to Debtors' Motion for Entry of an Order (I) Approving the Settlement Agreement Between the Debtors and the Contributing Parties, (II) Authorizing the Debtors to Perform All of Their Obligations Thereunder, and (III) Granting Related Relief (the "Motion").

PRELIMINARY STATEMENT

The Official Committee of Talc Claimants ("TCC" or "Committee") and other creditors explain why the Court should deny the Motion. OCWD joins their objections and expands upon them here. As the Court knows, any analysis of this proposed settlement must be rigorous and consider the context in which the settlement arises. The context here is Debtors seek via the proposed settlement (the "Proposed Settlement") to extinguish their tort and environmental liabilities, as well as those of their highly solvent affiliates and successors, in exchange for a small portion of the creditors' estimates of the value of the claims. TCC Objection, ¶¶ 77-81.[2]

It goes without saying that the bankruptcy process requires all stakeholders to compromise when faced with a debtor that lacks the ability to pay, but that is not the situation before the Court. Debtors hold valuable successor liability and alter ego claims against the Contributing Parties, ultimately indemnified by National Indemnity Company ("NICO"), a subsidiary of Berkshire Hathaway, Inc. (collectively, "Berkshire") with reported assets in excess of $420 billion. TCC Objection, ¶ 24. Moreover, as explained herein, Debtors have direct

[2] The TCC values the talc claims at [redacted]. TCC Objection, ¶ 77. The Settlement appears to allocate approximately $300 million, or less than [redacted] of the TCC's valuation, to talc claims. TCC Objection, ¶ 67. According to the same formula that the TCC uses, the Settlement appears to allocate between $22.8 million and $26.7 million, or 4.7% to 5.5%, of the $485 million portion of the settlement designated for the payment of creditor claims to all of the environmental claims ($37 million divided by ($460 million + $14 million + $37 million + 158 million = $669 million total)) or ($37 million divided by ($557 million + $14 million + $37 million + 158 million = $793 million total)). TCC Objection, ¶ 77 n. 139. Yet, OCWD's claim alone is for more than $23 million. Claim No. 54.

indemnification claims against Berkshire for their environmental liabilities.

The Proposed Settlement is Berkshire's hoped-for final act of a shell game it orchestrated to avoid answering for liability it assumed when NICO bought Debtors and Debtors' roughly $200 million in cash for $1 from DB US Holding Corporation ("DB US"). Motion, ¶¶ 22-25 (Doc. No. 1297); TCC Objection, ¶¶ 25-26.[3] DB US has since committed to make a "purchase price adjustment" payment *to* [redacted]. Massey Dec., Ex. 1 [redacted]; Motion, ¶ 24. Berkshire has already been paid roughly [redacted] to do what it tries to avoid in the Motion – cover Debtors' liability.

The fact that Debtors' liability has turned out to be higher than Berkshire anticipated when it made the strategic acquisition of Debtors is Berkshire's problem, not creditors' problem, but the Proposed Settlement improperly makes it creditors' problem. As the TCC explains, as soon as Berkshire's profit play for Debtors threatened Berkshire, Berkshire pushed Debtors into bankruptcy, leading to the Proposed Settlement. When it granted Debtors' motion to control "Successor Liability Claims" against Berkshire's indemnitees, the Court presciently observed:

> Notably, the Committee expresses concern that "Debtors are seeking sole authority to settle Successor Liability Claims in order to obtain Court approval to settle those claims without proper analysis" . . . . The Court takes this opportunity to assure the parties that, prior to approving settlements, the Court carefully considers all the *In re Martin* factors, including "the paramount interest of the creditors." *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996). It will undertake this same process should Debtors in the instant case propose a settlement of the Successor Liability Claims.

Doc. No. 268, pp. 42-43. The time for that process, and rigorous scrutiny, is now.

NICO is liable for, and able to pay, the claims in question. The Proposed Settlement cannot be approved because it falls below the lowest point in the range of reasonableness.

[3] NICO's acquisition of Debtors was a strategic acquisition of "runoff" tort liability by Berkshire's "retroactive reinsurance," or runoff, division. TCC Objection, ¶¶ 20-28.

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

The TCC lays out the troubling timeline in which Berkshire pushed Debtors into bankruptcy through its hand-picked "Bankruptcy Directors" Paul Aronzon and Tim Pohl:

[redacted]

TCC Objection, ¶¶ 45-51.

Three weeks before Debtors entered bankruptcy, the California Superior Court awarded OCWD $793,734 against Debtor Soco West, Inc. ("Soco West") for contamination arising from the Service Chemical site. Claim No. 54. Furthermore, in awarding costs against Soco West, the Superior Court made liability findings that facilitate OCWD's recovery of over $20 million in additional costs, attorneys' fees, and future cleanup costs from Soco West. Ibid.

Pushing Debtors into bankruptcy was the first step of Berkshire's plan. Step two was the hand-picking of a claims valuation expert, David L. McKnight of The Brattle Group, who the Bankruptcy Directors rubber-stamped. TCC Objection, ¶¶ 55-60. McKnight executed step three of the plan, significantly undervaluing the bankruptcy claims against Debtors, paving the way for the low-ball Proposed Settlement.[4] The TCC explains how McKnight undervalued the talc claims. As for the environmental claims, McKnight also significantly undervalued them,

[4] The unreliable nature of McKnight's valuation is illustrated by, for example, the exclusion from his estimate of verdicts and settlements reached after a trial began. TCC Objection, ¶ 87.

including his [redacted] valuation of claims at the Service Chemical site. Massey Dec., Ex. 2 (excerpt of McKnight "[redacted]"); Doc. No. 1300.

McKnight's [redacted] valuation of claims at the Service Chemical site is plainly the valuation Debtors used to negotiate the Proposed Settlement because it is the only valuation Debtors produced with the Motion. See Motion, ¶ 62 (McKnight's claims valuation).

McKnight prepared a subsequent expert report that partially corrected his error – increasing the value of the claims at the Service Chemical site by a factor of [redacted] – resulting in a "high end" net present value ("NPV") of [redacted]. Berkovitz Dec., Ex. 99 (McKnight Expert Report), Tbl. 14. McKnight's "high end" value is the only value that accounts for OCWD's claims against Soco West. See id. at ¶ 105.a.ii. ("[redacted].").

McKnight's post-negotiation valuation cannot cure the undervaluation of claims Debtors used for a Proposed Settlement that purports to satisfy environmental claims based on admittedly incorrect valuations. Even if the undervaluation could be cured, the post-negotiation valuation in McKnight's expert report is unreasonable because he used an unreasonably low inflation rate and unreasonably high discount rate to calculate the NPV of the claims at the Service Chemical site.

ARGUMENT

The Berkshire Settlement falls below the reasonable range for at least three reasons.

First, as described in the objections by the TCC and other creditors, including environmental creditors the State of California and the United States, Berkshire is liable for Debtors' liabilities as a successor and alter ego. OCWD joins those creditors' objections.

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Second, Berkshire is liable, irrespective of successor or alter ego liability, because NICO contractually indemnified Debtors when it "bought" them for $1 from DB US.

Third, Berkshire's hand-picked valuation expert grossly underestimated Debtors' environmental liability, resulting in the low-ball Proposed Settlement.

1. Applicable Legal Standard

Pursuant to Federal Rule of Bankruptcy Procedure 9019, under certain circumstances "the Court may approve a compromise or settlement" of estate-held claims. Fed. R. Bankr. Proc. 9019(a). The Court may only approve a settlement that is "fair and equitable," Protective Comm. for Indep. S'holder of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968); see also In re Nutraquest, Inc., 434 F.3d 639, 644 (3d Cir. 2006) ("Settlements are favored, but the unique nature of the bankruptcy process means that judges must carefully examine settlements before approving them."). Moreover, the party seeking approval bears the burden to show that the settlement is also "in the best interests of the estate and the debtor." In re NJ Affordable Homes Corp., No. 05-60442, 2007 WL 4300153, at *2 (Bankr. D. N.J. Dec. 5, 2007); see also In re Neshaminy Office Bldg. Assocs., 62 B.R. 798, 804 (E.D. Pa. 1986).

When considering a proposed settlement, courts generally "assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal." Myers v. Martin (In re Martin), 91 F.3d 389, 393 (3d Cir. 1996). The Third Circuit recognizes four criteria a bankruptcy court should consider: "(1) the probability of success in the litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." Id. (listing the so-called "*Martin* factors").

In considering these factors, bankruptcy courts must consider all information that is "relevant to a full and fair assessment of the wisdom of the proposed compromise." In re Nieves Ent. Grp., Inc., 222 B.R. 243, 249 (D. Del. 1998). A court must "afford paramount consideration to the interests of creditors, but that consideration should focus particularly on the fairness of a settlement to those parties who did not partake in the settlement." In re Nutritional Sourcing Corp., 398 B.R. 816, 837 (Bankr. D. Del. 2008); Eddy v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. (In re Med. Asset Mgmt., Inc.), 249 B.R. 659, 663 (Bankr. W.D. Pa. 2000); see also In re TCI 2 Holdings, LLC, 428 B.R. 117, 136 (Bankr. D.N.J. 2010) (court should appraise "the fairness of the settlement to other persons, i.e., the parties who did not settle").

Equally important, in applying the In re Martin factors, a court must also apply the appropriate standard of review. The U.S. Supreme Court has instructed that an insider's "dealings with the [Debtor] corporation are subjected to rigorous scrutiny." See Pepper v. Litton, 308 U.S. 295, 306 (1939); accord Schubert v. Lucent (In re Winstar Commc'ns, Inc., 554 F.3d 382, 412 (3d Cir. 2009) ("A claim arising from the dealings between a debtor and an insider is to be rigorously scrutinized by the courts."). The proponent of a conflicted transaction bears the burden of establishing the entire fairness of the transaction. Citicorp Venture Cap., Ltd. v. Comm. of Creditors Holding Unsecured Claims (In re Papercraft Corp.), 211 B.R. 813, 823 (W.D. Pa. 1997) ("[I]nsider transactions are subjected to rigorous scrutiny and when challenged, the burden is on the insider . . . to show the inherent fairness from the viewpoint of the corporation and those with interests therein."). Rigorous scrutiny requires the court to not defer to the proponents' business judgment. In re Chassix Holdings, Inc., 533 B.R. 64, 70 (Bankr. S.D.N.Y. 2015) (courts "apply heightened scrutiny and some skepticism" to settlement with debtor parent).

2. **<u>Berkshire is Liable for Debtors</u>**

Berkshire is liable for Debtors, with or without successor or alter ego liability.

a. **<u>OCWD Joins Creditors' Successor Liability Arguments</u>**

The TCC persuasively argues that Berkshire is liable for Debtors because Berkshire indemnified the "Brenntag entities" and the Brenntag entities are liable to Debtors. *See, e.g.,* TCC Objection, ¶ 2 ("The Debtors have an extremely valuable asset: successor liability claims against Brenntag. Brenntag, in turn, has the right to seek indemnification ultimately from Berkshire."). OCWD joins those arguments, which apply to Soco West and its successor Brenntag Pacific, Inc. ("Brenntag Pacific"), both of which are liable to OCWD.

As the TCC points out, New Jersey (and California) law on successor liability for "de facto merger" or "mere continuation" of businesses by asset purchasers like Brenntag Pacific centers on whether the asset purchaser continued "essentially" the same business by using the same physical facilities, equipment, inventory, customer lists, personnel, marketing material, trade names, or goodwill as the seller, and incorporates three factors to consider:

> (1) The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business,
>
> (2) the successor's ability to assume the original manufacturer's risk-spreading role, and
>
> (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.

<u>Ramirez v. Amsted Indus., Inc.</u>, 431 A.2d 811, 820 (N.J. 1981) (quoting <u>Ray v. Alad Corp.</u>, 560 P.2d 3, 9 (Cal. 1977)). In California:

> As to the third basis for successor liability—where "the purchasing corporation is a mere continuation of the seller"—it has long been

> held that "corporations cannot escape liability by a mere change of name or a shift of assets when and where it is shown that the new corporation is, in reality, but a continuation of the old. Especially is this well settled when actual fraud or the rights of creditors are involved, under which circumstances the courts uniformly hold the new corporation liable for the debts of the former corporation."

Cleveland v. Johnson, 209 Cal.App.4th 1315, 1327 (Cal. App. 2012) (quoting Blank v. Olcovich Shoe Corp., 20 Cal.App.2d 456, 461 (Cal. App. 1937).) "The critical factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation is the same: whether adequate cash consideration was paid for the predecessor corporation's assets." CenterPoint Energy, Inc. v. Superior Court (Cal. App. 2007) 157 Cal.App.4th 1101, 1121 (quoting Franklin v. USX Corp. (Cal. App. 2001) 87 Cal.App.4th 615, 625. In California, a common basis to find "mere continuation" is that "no adequate consideration was given for the predecessor corporations' assets and made available for meeting the claims of unsecured creditors[.]" *Cleveland, supra,* 209 Cal.App.4th, at p. 1327 (citations omitted).

Debtors and the Brenntag entities fit the de facto merger/mere continuation rubric under New Jersey or California law. First, Bain Capital created the Brenntag entities solely for the purpose of splitting Debtors' profitable operating businesses from their environmental (and asbestos) liabilities. TCC Objection, ¶ 105. Debtors' bankruptcy shows this effort succeeded. Creditors' remedies against Debtors have been destroyed, satisfying the first prong of *Ramirez*.

Second, the Brenntag entities are highly solvent and indemnified by Berkshire – the latter of which is more than able, given the over $420 billion capitalization of NICO, to assume Debtors' risk-spreading role. The second prong of *Ramirez* is satisfied.

Finally, it is fair for the Brenntag entities and Berkshire to assume Debtors' liabilities. As with the other Brenntag entities, there is no reasonable dispute that Brenntag Pacific acquired all of Soco West's operating assets and exploited those assets – and the seller's brand name

("Brenntag Pacific" replaced "Brenntag West," which then changed its name to Soco West so Brenntag Pacific could exploit the "Brenntag" name) – to continue "essentially the same" business. Ramirez, supra, 431 A.2d at 825. Brenntag Pacific continued Brenntag West's business unchanged – using Brenntag West's [redacted]. See, e.g., Berkovitz Dec. Ex. 14, p. 1 ("'[redacted]"); TCC Objection, ¶¶ 8-16.

As for the adequacy of the consideration paid for Soco West's assets *and* made available to satisfy the claims of Soco West's unsecured creditors, the overwhelming debts Soco West cites to justify its bankruptcy petition (and the debts set out in creditors' objections to the Proposed Settlement) make clear the $44 million Brenntag Pacific paid for Soco West's assets was inadequate. Indeed, in a portent of the casual abdication to Berkshire of Debtors' management, Ralph Zimbardo, the President of Soco West who signed the asset sale agreement for Soco West, never investigated whether Brenntag Pacific paid a "fair price" for Soco West's assets:

[redacted]

[redacted]

Massey Dec., Ex. 3 (Zimbardo Depo., Feb. 22, 2012), p. 76:11-23; Campbell Dec. ("[redacted]" between Brenntag Pacific and Brenntag West), Ex. 11, p. 5.

Under New Jersey (and California) law, there is little to doubt that the Brenntag entities are liable for Debtors. Ramirez, supra, 431 A.2d at 820; see Nieves v. Bruno Sherman Corp., 431 A.2d 826, 830–31 (N.J. 1981) (purchase of substantially all of a business's assets and use of seller's trade name on product line sufficient to establish successor liability); Bussell v. DeWalt Prods. Corp., 614 A.2d 622, 631 (N.J. Super. Ct. App. Div. 1992) (asset purchaser liable where it used "good will, trademarks, inventory, equipment, and the same manufacturing plant"). Debtors themselves put the odds of proving successor liability at up to 50%. Motion, ¶ 59.

b. Berkshire Contractually Indemnified Debtors

When Berkshire, through NICO, "paid" DB US $1 for Debtors and their roughly $200 million in cash in 2007 – which DB US followed in 2024 with a "purchase price adjustment" of an *additional* [redacted] *to Berkshire* (Massey Dec., Ex. 1 (Kaluzinski Depo., Oct. 22, 2024), p. 246:2-13; Motion, ¶ 24), Berkshire ensured DB US would never again have to answer for Debtors' liabilities by contractually indemnifying DB US *and* the Debtors.

Section 8.03(f) of the 2007 Stock Purchase Agreement ("SPA"), through which Berkshire acquired Debtors for $1, provides that NICO (the "Purchaser") indemnifies the "Seller *and its Affiliates*" for "Claims…seeking to recover, under any theory, that the [Debtors] are liable for Losses…(ii) arising out of the actual or threatened or alleged release, discharge or escape, whether into soil, air or water of any hazardous wastes or substances at (i) Former Sites." Berkovits Dec., Ex. 27, § 8.03(f) (emphasis added). The "Seller" is the Stinnes Corporation ("Stinnes") (n/k/a DB US). Id. at p. 1. Stinnes owned Brenntag, Inc. (n/k/a Brilliant National

Services, Inc.), which owned Brenntag West (n/k/a Soco West). Ibid. "Affiliate" means "with respect to any specified Person, any other Person that directly, or indirectly . . . , controls, is controlled by, or is under common control with, such specified Person." Id. at § 1.01.[5] Soco West is an "Affiliate" of DB US. See also ibid. (defining the "Effective Date" as June 30, 2007 – prior to the SPA "Closing" date, when DB US owned Soco West through Brenntag, Inc.).

Section 10.9 of the 2003 Master Sale and Purchase Agreement ("MSPA"), the umbrella agreement under which Brenntag Pacific bought the assets of Soco West in 2004 and which defines the terms used in the SPA, defines "Former Sites" as "real estate formerly . . . operated or leased by . . . the Retained Companies which is neither . . . operated nor leased by . . . the Retained Companies on the Closing Date." Berkovits Dec., Ex. 1, § 10.9. The "Retained Companies" include Brenntag, Inc. ("Seller 4") and the "Retained Subsidiaries." Id. at § 2.11. The "Retained Subsidiaries" include "Brenntag West, Inc." (n/k/a Soco West). Ibid.

Section 6.1.4 of the MSPA defines "Closing Date" *for the MSPA* as the date when "the Closing Events shall have taken place or have been duly waived," both of which, by definition (because the MSPA was signed in 2003), occurred more than a decade *after* Soco West ceased operating or leasing the Service Chemical site in 1991. See Massey Dec., Ex. 4 (Orange County Water District v. Sabic Innovative Plastics US, LLC, Statement of Decision on Phase Two Trial), p. 47:17-19 ("Soco acknowledges that it is the responsible party for responding to the OCWD's and DTSC's claims as to Holchem's tenancy at the Site from 1985 through 1991."). In short, under the 2007 SPA and the MSPA, Soco West is an "Affiliate" of Stinnes indemnified by Berkshire for its "Former Sites," which includes the Service Chemical site.

[5] "Person" means "any individual, partnership, firm, corporation, limited liability company, association, trust, unincorporated organization or other entity, as well as any syndicate or group that would be deemed to be a person under Section 13(d)(3) of the Securities Exchange Act of 1934, as amended." Berkovits Dec., Ex. 27, § 1.01.

3. **The Berkshire Settlement Fails to Cover Debtors' Liability**

The Proposed Settlement is based on McKnight's undervaluation of the environmental claims against Debtors. Even in his expert report, McKnight calculated the NPV of these claims using an inflation rate of [redacted] and a discount rate (to calculate NPV) of [redacted]:

[redacted]

Berkovitz Dec., Ex. 99, ¶¶ 107-111; see also ibid., ¶ 16 ("[redacted]."); see ibid., ¶ 105.a.ii. ("[redacted].").

Neither of these rates is appropriate for OCWD or other government creditors.

According to McKnight, [redacted]:

[redacted]

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[redacted]

Massey Dec., Ex. 5 (McKnight Depo., Nov. 26, 2024), p. 506:11-17. McKnight used a [redacted] inflation forecast for his [redacted] inflation rate, ignoring the [redacted] in his work papers that McKnight admits shows the [redacted]. Id. at p. 501:17-25, Ex. 27 to McKnight Depo. ([redacted]). McKnight undervalued claims by using a low inflation rate.

According to McKnight, [redacted]:

[redacted]

Massey Dec., Ex. 5 (McKnight Depo., Nov. 26, 2024), p. 497:5-8. McKnight used a "weighted average" return on investment of "[redacted]" to calculate his NPV discount rate of [redacted]. Id. at p. 384:9-23; Berkovitz Dec., Ex. 99 (McKnight Expert Report), ¶ 108. As his process suggests, a discount rate equals the expected rate of return on cash invested upon receipt. Massey Dec., Ex. 5 (McKnight Depo., Nov. 26, 2024), pp. 386:21-387:13.

In setting his discount rate, McKnight [redacted]. Massey Dec., Ex. 5 (McKnight Depo., Nov. 26, 2024), p. 509:9-16; Massey Dec., Ex. 6 (OCWD Admin./Finance Issues Comm. Agenda, Nov. 9, 2023), p. 5 (OCWD Statement of Investment Policy Fiscal Year 2023-2024).

McKnight also did not consider [redacted]

[redacted] Massey Dec., Ex. 7 (Investment Portfolio Holdings Reports); id. at Ex. 8 (average of OCWD's actual rate of return for every month from July 2021-June 2024). McKnight also did not use [redacted]. Massey Dec., Ex. 9 (McKnight Rebuttal Report), p. 1, fn. 3.

By any measure, McKnight's use of an inflation rate that is roughly [redacted] lower than actual inflation over the past 60 years and a discount rate that is [redacted] times a reasonable discount rate for OCWD, depending on whether one uses the default discount rate of [redacted] or the actual 3-year rate of return of [redacted] unreasonably lowered the value of all claims.

CONCLUSION

For the foregoing reasons, OCWD respectfully requests that the Court deny the Motion.

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Respectfully submitted,

/s/Alex A. Pisarevsky
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Jeffrey W. Herrmann, Esq.
Alex A. Pisarevsky, Esq.
Park 80 West - Plaza One
250 Pehle Avenue, Suite 401
Saddle Brook, New Jersey 07663
Email: jwh@njlawfirm.com
Email: ap@njlawfirm.com
Phone: (201)845-9600

Attorneys for Orange County Water District

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MILLER, AXLINE & SAWYER
Attorneys for Orange County Water District
Justin Massey, Esq. (admitted *pro hac vice*)
1050 Fulton Ave., Ste. 100,
Sacramento, CA 95825-4225
Email: jmassey@milleraxline.com
Phone: (916)488-6688