UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA RIVER WATCH,

Plaintiffs,

v.

FLUOR CORPORATION,

Defendant.

Case No. 10-cv-05105-WHO (JCS)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ENFORCE SETTLEMENT AGREEMENT

Re: Dkt. No. 309

I. INTRODUCTION

This environmental action was originally brought as a citizen's suit and involved past and present owners of a property ("the TSG Property") that is currently owned by The Shiloh Group ("TSG"). Fluor Corporation ("Fluor") is a former owner and operated a wood products manufacturing and treatment business on the property between 1956 and 1969. On January 14, 2016, Fluor and TSG entered into an agreement settling claims related to the allocation of responsibility for investigating and removing hazardous substances from the property. The parties agreed on the record that the undersigned would retain jurisdiction to decide any disputes that arose in the implementation of the settlement agreement and consented to the jurisdiction of the undersigned magistrate judge in that regard.[1] Presently before the Court is Fluor's Motion to Enforce Settlement Agreement and Enjoin Violations of Release and for Sanctions ("Motion"). A hearing on the Motion was held on March 31, 2017. For the reasons stated below, the Motion is

[1] *See* Docket No. 310-1 at 7 (Transcript of December 15, 2015 proceeding reflecting that the parties agreed that in the case of any disputes relating to the implementation of the settlement agreement, the decision of the undersigned magistrate judge would be "final, binding, and non-appealable").

GRANTED in part and DENIED in part.

II. BACKGROUND

A. Fluor's Operations on the Property and Subsequent Investigation and Remediation Efforts

Between 1956 and 1969, Fluor owned portions of the TSG Property, where it operated a wood products manufacturing and treatment business. Declaration of Thomas M. Donnelly ("Donnelly Decl."), Ex. B (Consent Order) at 3. In 1969, Fluor sold the property and the business to Ecodyne Corporation. *Id*. Subsequent owners included Ecodyne and various Ecodyne subsidiaries. *Id*. at 6-7. TSG acquired the property in 1987 and is the current owner. *Id.* at 7.

In 1989, the California Department of Toxic Substances Control ("DTSC") issued a Consent Order (Docket No. HAS 88/89-027), which was amended in 1991 (together, the "Consent Order"), requiring Fluor to investigate and remediate releases of hazardous substances at a portion of the TSG Property known as "the Pond Site," where Fluor had conducted dip treatment operations using lead, creosote and pentachlorophenol. *Id.* at 1. In response, Fluor investigated conditions at the Pond Site and designed a remedy that eventually was approved by DTSC. *See id*., Ex. C (Remedial Design and Implementation Plan Addendum ("RDIP Addendum")), approved April 19, 2016. Fluor is in the process of implementing the remedy—which involves the excavation and offsite disposal of contaminated soil— and expects the excavation to be complete in the second quarter of 2017.

On July 15, 2015, DTSC and Fluor entered into a Voluntary Cleanup Agreement ("VCA") for the remainder of the TSG Property, excluding the Pond Site and another portion of the property (the "Tower Site") being addressed by Ecodyne under supervision of the North Coast Regional Water Quality Control Board. *Id*., Ex. D (VCA). The purpose of the VCA was "to investigate the release or threatened release of any hazardous substances at or from the Site under the oversight of DTSC." *Id*. at 1. Fluor and TSG agreed that Fluor would perform this investigation in lieu of Fluor serving TSG with a demand for inspection under Federal Rule of Civil Procedure 34(a)(2). *Id*., Ex. I (June 3, 2015 Hearing Tr.) at 3:15-4:2. Among the conditions of the agreement between Fluor and TSG were: 1) that Fluor's work plan for the environmental

assessment would be reviewed and approved by DTSC; 2) that the work plan would be reasonably related to the discovery of hazardous substances on the property; and 3) that TSG would not be permitted to "comment on, or contact the DTSC in any way regarding the investigation or the plan . . . before its completion." *Id.*

The VCA provided that DTSC would review and provide Fluor with "written comments on all of [Fluor's] as described in Exhibit C (Scope of Work) and other documents applicable to the scope of the project." *Id.*, Ex. D (VCA) § 6. Section 6 further provided that Fluor "agrees to perform all the work required by this Agreement." *Id.* Under the VCA's Scope of Work, Fluor was required to conduct, *inter alia*, a Preliminary Endangerment Assessment ("PEA") "to determine whether a release or threatened release of hazardous substances exists at the Site which poses a threat to human health or the environment." *Id.*, Ex. D (VCA) at Exhibit C. As part of the PEA, Fluor was required to complete a PEA Workplan and a PEA Report. *Id.* The PEA Report was required to "document whether a release has occurred or threatened release exists, the threat the Site poses to human health and the environment, and whether further action is necessary." *Id.*

DTSC approved Fluor's PEA Workplan on October 27, 2015. *Id.*, Ex. E (PEA Workplan Approval).

On December 15, 2015, TSG and Fluor entered into a settlement agreement ("Settlement Agreement") in the instant action which became binding when it was placed on the record on that date and was subsequently embodied in a written agreement that was executed on January 14, 2016. *See id.*, Exs. A & J. Under the Settlement Agreement (discussed further below), the parties agreed that in its PEA report to DTSC, which was due on January 29, 2016, Fluor would "describe the work performed and provide the analytical data," but that it would not "characterize that data." *Id.*, Ex. J, § 1.3. The parties further agreed that Fluor would recommend in the PEA report that DTSC not require any further action. *Id.*

Fluor completed its investigation and submitted its PEA Report to DTSC on January 29, 2016. Carter Decl., Ex. 6. DTSC requested revisions in a letter to Fluor dated February 16, 2016. *Id.* At Fluor's invitation, TSG's counsel participated in two conference calls with Fluor and DTSC to address DTSC's request. Carter Decl., Exs. 6 & 7. Fluor submitted a final Revised PEA

Report on May 31, 2016. *Id*., Ex. F (PEA Report). The final Revised PEA Report presented sampling data, documented evidence of releases of hazardous substances at the TSG Property, and evaluated that data against residential and commercial screening levels. *Id*. at 37-42. Based on the sampling results, the fact that site use is commercial and industrial (rather than residential) and the fact that TSG had recorded a deed restriction prohibiting changes in use and extraction of groundwater for potable use, the Report concluded that no further action was necessary, as the parties to the Settlement Agreement had stipulated. *Id*. at 45-46.

DTSC disagreed with Fluor's conclusions, concluding that "the areas with contaminants exceeding both residential and commercial screening levels have not been adequately characterized and the extent of contamination determined." *Id*., Ex. G (September 27, 2016 DTSC Letter). It found that "[f]urther investigation [was] necessary for areas where release of hazardous materials, above the appropriate screening levels, has occurred" and that "[r]emedial action of these areas may also be required." *Id*. Thus, it approved the PEA Report with a number of additional conclusions "related to further site investigation." *Id*. DTSC "invite[d] the potential responsible parties to enter into a new or amended Voluntary Cleanup Agreement" to conduct the additional investigation and stated further that it would consider "possible enforcement actions" if the parties did not enter into such an agreement. *Id.* at 4.

Fluor once again invited TSG to participate in a meeting with DTSC staff and others to address the DTSC's September 27, 2016 Letter. Carter Decl., Ex. 10. Instead, a conference call was held on October 11, 2016 in which both Fluor and DTSC participated. *Id.* Fluor responded to DTSC's Letter on November 21, 2016. *Id*., Ex. H (K. Mignone Letter). Fluor stated that by completing the PEA it had satisfied its obligations under the VCA and further informed DTSC that it did not intend to perform the additional site investigation requested by DTSC because it believed that none of the issues raised by the DTSC related to Fluor's former ownership or operation of the TSG Property. *Id*. at 1. Fluor noted that "[a]t the time [it] entered into the VCA, its counsel and consultant made it clear that it believed that some or all of what might be discovered during the Preliminary Endangerment Assessment process would be unrelated to Fluor's prior ownership or operations." *Id*. Fluor went on to address in detail the specific reasons

for its conclusion that it was not responsible for the problems identified by DTSC when it approved the PEA Report. *Id*.

On November 30, 2016, TSG sent a responsive letter to DTSC challenging Fluor's conclusions both that its obligations under the VCA had been fulfilled and that the additional investigation DTSC required was not related to Fluor's past activities on the TSG Property. *Id*., Ex. K. TSG stated that "certain facts and conclusions stated in [Fluor's November 21, 2016 Letter] are not accurate, and that Fluor's plan to discontinue its investigation under the VCA is not reasonable." *Id*. at 1. Instead, TSG "request[ed] that DTSC require Fluor to address some or all of the matters discussed in the DTSC Letter rather than leave it to TSG or some other party to do so." *Id*. Like Fluor, TSG addressed in detail the reasons for its conclusions.

On December 16, 2016, Fluor responded to TSG's November 30, 2016 Letter, rejecting TSG's contention that Fluor had not fulfilled its obligations under the VCA. *Id*., Ex. L (December 16, 2016 Letter). According to Fluor, "[t]he VCA does not contemplate an open-ended investigation of the TSG Property" but rather, merely "required that Fluor complete the PEA and obtain DTSC approval of the PEA Report, which it has done." *Id*. at 1-2. Fluor went on to address in detail its reasons for concluding that the various hazardous substances that were the source of DTSC's concerns likely did not result from Fluor's activities. *Id*. at 2-5. The letter concluded by stating that "any additional or remediation of TSG's Property, whether under a new VCA or an order, should be completed by TSG, its tenants, or Ecodyne." *Id*. at 5-6.

Fluor also sent a letter directly to TSG on December 16, 2016. *Id*., Ex. M. In that letter, Fluor accused TSG of violating the broad release in the parties' Settlement Agreement and demanded that TSG withdraw its request to DTSC that it require Fluor to conduct further investigation outside of the Pond Site. *Id*.

TSG responded with an additional letter to DTSC, dated January 4, 2017, in which it asserted that Fluor had presented "false and misleading" information and that it should be required to conduct the additional investigation required by DTSC. *Id*., Ex. N. TSG asserted that "[a] decision by DTSC to require TSG to investigate ore remediate . . . would impose significant expense on non-polluter TSG, would leave TSG with un-economical cost recovery claims against

Fluor and/or Ecodyne" and would be "unjust, arbitrary, unsupported by and contrary to the evidence in the record . . . ." *Id.*

B. The Underlying Litigation

Plaintiff California River Watch initially brought this action against former TSG Property owner Ecodyne Corporation ("Ecodyne") and subsequently joined Fluor as a defendant. TSG then intervened to assert claims under CERCLA and state law against Fluor. TSG alleged, *inter alia*, that Fluor is responsible for disposals and releases of hazardous substances, including pentachlorophenol, lead, creosote, dioxin, and polynuclear aromatic hydrocarbons ("PAH"), at the TSG Property as a result of its wood treatment operations in the 1950s and 1960s. Amended Complaint (Docket No. 192) ¶12. Fluor filed a counterclaim against TSG, alleging that current and former TSG tenants are responsible for some of the contamination on the TSG Property, including the Pond Site. Docket No. 202 (Fluor Answer and Counterclaim) ¶¶ 20-21. California River Watch eventually settled its claims against Ecodyne and Fluor. Docket Nos. Nos. 104, 216. TSG voluntarily dismissed its claims against Fluor with prejudice. Docket No. 230. After Fluor and TSG settled Fluor's counterclaims, Fluor and TSG stipulated to dismissal with prejudice of Fluor's counterclaims. Docket Nos. 307, 308. In the dismissal order, the Court stated that "Chief Magistrate Judge Joseph C. Spero (or a successor judge appointed by the Court) shall retain jurisdiction to enforce the terms and conditions of the Settlement Agreement." Docket No. 307 at 1:16-18.

C. Terms of the Settlement Agreement

In the Settlement Agreement, Fluor agreed to complete its remediation of the Pond Site. In particular, Fluor agreed that it would:

1) "[C]omply with all orders … by DTSC pursuant to the Consent Order with regard to the investigation and remediation … at the Pond Site" (§ 1.1);
2) "[C]omplete the DTSC-approved [RDIP] for the . . . Pond Site…which involves excavation, backfilling and proper disposal of soil from the . . . Pond Site containing contaminants in concentrations exceeding unrestricted land use cleanup standards…" (§1.2).

Donnelly Decl. Ex. J (Settlement Agreement). With respect to the second requirement, the parties agreed that the RDIP for the Pond Site would be "deemed 'complete' upon DTSC's issuance of a letter stating DTSC's determination that Fluor has implemented the approved RDIP and no further action is required (or words substantially to that effect)." (§ 1.2).

Fluor also agreed that in the PEA Report, it would "describe the work performed and provide the analytical data," and "recommend … that DTSC not require any further action," but would not "characterize that data." (§1.3).

TSG, in turn, agreed that it would execute a Covenant and Environmental Restriction on Property and Release of Claims that would "restrict use of the TSG Property to commercial and industrial uses and . . . forever prohibit the extraction of groundwater for potable uses." (§ 2.1). The parties agreed that this deed restriction would "run with the land and bind successors in interest in title to or ownership of any portion of the TSG Property to the fullest extent allowed by law." *Id*. Under the Settlement Agreement, Fluor was permitted to refer to this deed restriction in support of its recommendation in the PEA Report that no further action need be taken. *Id*. § 1.3.

TSG also promised to pay Fluor $100,000 immediately and another $250,000 either: 1) within a year of the date when DTSC issues a letter stating that no further remedial action is required on the Pond Site; or 2) [t]he close of an escrow on TSG's sale of any portion of the TSG Property to a third party -- whichever date was earlier. §§ 3.1 & 3.2. Fluor agreed to dismiss its counterclaims with prejudice within five business days after it received "conformed copies of the duly executed, notarized and recorded Deed Restriction and Deed of Trust" and the first $100,000 payment under section 3.1.

Under the Settlement Agreement, TSG also agreed to the following release and waiver of claims and rights ("the Release"):

> Except for the obligations created by this Agreement and the claims reserved in paragraph 5.3 below, TSG, on behalf of itself and its current and former members, managers, partners, officers, directors, shareholders, employees, agents, contractors, consultants, representatives and attorneys, any successor in interest in title to or ownership of any portion of the TSG Property, and all of their respective successors and assigns, hereby releases, waives and forever discharges Fluor and its current and former parent companies, subsidiaries, sister companies, affiliates, partners, joint

> venturers, officers, directors, shareholders, divisions, subdivisions, employees, agents, contractors, consultants, representatives and attorneys, and all of their respective successors and assigns, but not including Ecodyne Corporation . . . , from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorney's fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, arising from or relating to Fluor's or any of its subsidiaries' or affiliates' (but not including Ecodyne Corporation) prior ownership or operation of any portion of the TSG Property, or any alleged presence or release of hazardous substances or pollutants at or emanating from any portion of the TSG Property.

Id. § 5.1. The exception in paragraph 5.3 that is referenced in the Release states as follows:

> The release, waiver and discharge set forth in paragraphs 5.1 and 5.2 above shall not apply if and to the extent that (1) a third party (either a regulatory agency with jurisdiction or a private party under regulatory agency oversight) discovers significant concentrations of dioxin, lead, poly-nuclear aromatic hydrocarbons, creosote or pentachlorophenol requiring response action under applicable law, and establishes that such contaminants are directly attributable to Fluor's prior operations at the TSG Property; or (2) TSG or a third party (either a regulatory agency with jurisdiction or a private party under regulatory agency oversight) discovers that a significant release (requiring response action under applicable law) of a hazardous substance or pollutant has occurred as a result of Fluor's remedial activities during implementation of the RDIP.

Id. § 5.3.

D. The Motion

In the Motion, Fluor contends TSG's November 30, 2016 and January 4, 2017 letters to DTSC violate the terms of the Settlement Agreement, under which it agreed to complete the remediation of the Pond Site in return for $350,000 in monetary contributions for its clean-up work and a broad release from any liability related to hazardous substances found on the remainder of the TSG Property. Fluor asks for an order finding that the letters were in violation of the terms of the Settlement Agreement and (1) requiring TSG to withdraw the letters it submitted to DTSC; (2) directing TSG to withdraw its request to DTSC that it order Fluor to undertake any site investigation or other work at the TSG Property outside the Pond Site; (3) enjoining TSG from further violations of the Release; and (4) awarding Fluor's reasonable fees and costs, including attorneys' and consulting experts' fees, incurred responding to TSG's letters to DTSC and preparing and bringing this Motion.

Fluor relies on the broad language in the Release, barring TSG from making "claims" and "demands" "of any nature whatsoever" against Fluor, and from asserting "any and all manner" of "rights" it might otherwise have had against Fluor. *Id*. at 8. According to Fluor, this language means that it was the parties' "mutual intention that TSG was forgoing any right to compel Fluor in any way to investigate or remediate conditions at the TSG Property outside the Pond Site." *Id*. Further, Fluor asserts, this means that "[t]o the extent that TSG once had the right to petition DTSC for such relief, TSG waived that right by executing the Release." *Id*. (citing *DaimlerChrysler Motors Co. v. Lew Williams, Inc.*, 142 Cal. App. 4th 344, 354 (2006)).

Fluor also argues that the exception to the Release in Section 5.3 of the settlement agreement does not apply because that exception applies only if a third party discovers "significant concentrations of dioxin, lead, poly-nuclear aromatic hydrocarbons, creosote or pentachlorophenol" and "establishes that such contaminants are directly attributable to Fluor's prior operations at the TSG Property." *Id*. at 9. With only one exception, however, the issues raised by DTSC in its September 27, 2016 approval letter do not involve contaminants of concern ("COC") that are listed in Section 5.3. *Id*. (citing Donnelly Decl. Ex. H). Nor has DTSC found that any of the contamination at issue is directly attributable to Fluor's past activities on the Property. *Id*. As to the single issue raised by DTSC that involves COCs that are listed in Section 5.3, "chromium, PCP, and lead in Yard 45," "neither DTSC or any third party has alleged let alone established, that Fluor is directly responsible for the COC's in that area." *Id*.

Fluor argues that it has completed all of its obligations under the VCA and therefore, that it has no further obligations with respect to investigation or remediation. *Id*. at 10. Even if it had any further obligations under the VCA, Fluor contends, it would not have violated the settlement agreement by refusing to perform them because the settlement agreement "does not require Fluor to perform *any* site investigation under the VCA." *Id*. at 11 (emphasis in original).

Finally, Fluor argues that TSG should be required to pay Fluor's costs for responding to TSG's letters and bringing the instant Motion because its violation of the Settlement Agreement was willful.

In its Opposition brief, TSG argues that the Court should divest itself of jurisdiction over

the enforcement of the Settlement Agreement and decline to decide the parties' dispute because the most important obligations imposed on the parties under the Settlement Agreement have already been satisfied. Opposition at 14-15. Alternatively, TSG contends, the Court should find that its continuing jurisdiction does not extend to interfering with a DTSC proceeding. *Id*. at 15. TSG requests that if the Court does intervene, its order should be as narrowly tailored as possible. *Id*.

On the merits, TSG argues that the Release does not waive any rights on TSG's part to "convey to DTSC information that could result in Fluor bearing some additional expense or burden with respect to contamination on the TSG Property." *Id*. at 16. TSG points out that under the Court's previous consent order in this case, the parties agreed that TSG would be prohibited from communicating with DTSC while Fluor was conducting the PEA, showing that the parties were aware that the right to communicate with DTSC could be significant; the fact that no such limitation was included in the Settlement Agreement was because TSG would not have agreed to it, TSG contends. *Id*. at 16. In other words, TSG asserts, it did not waive its right to communicate with DTSC after the submission of the PEA and its letters to DTSC therefore do not violate the terms of the Settlement Agreement. *Id*.

This conclusion is also consistent with the terms of the Release as stated by the parties on December 15, 2015, when the settlement was put on the record, TSG contends. *Id*. at 17. At that time, TSG agreed to "release Fluor from all claims relating to Fluor's prior ownership or operation of the TSG Property." *Id*. (quoting Donnelly Decl., Ex. A (December 15, 2015 Transcript) at 5:11-12). Under either version, TSG argues, it "simply agreed to not sue Fluor for contamination on the TSG Property." *Id*. Moreover, it would be improper to construe the Release as depriving TSG of the right to communicate with DTSC because this is a "fundamental right protected by the 1st Amendment to the U.S. Constitution, the *Noerr-Pennington* doctrine, California Civil Code § 47(b) ('privileged publication' in 'official proceeding'), California Code of Civil Procedure § 425.16 (anti-SLAPP motion), and many other laws." *Id*. at 18.

TSG also argues that the context in which the settlement was reached supports the conclusion that TSG did not waive its right to communicate with DTSC after the earlier

prohibition imposed under the Court's consent order expired. *Id*. at 18. In particular, at the time that the parties entered into the Settlement Agreement TSG knew that the PEA Report had yet to be submitted *and* that the prohibition on TSG's communications with DTSC was set to expire in January 2016. *Id*. Further, TSG had not been involved in the negotiation of the VCA and was thus "on the outside looking in as Fluor and DTSC were dealing with TSG's Property." *Id*. According to TSG, until it received a copy of Fluor's November 21, 2016 letter to DTSC, it was unaware that Fluor had taken the position with DTSC when it entered into the VCA that some or all of what might be discovered as part of the PEA Assessment likely was not related to Fluor's past activities on the Property. *Id*. In addition, TSG asserts, Fluor *knew* that TSG was not aware of these comments. *Id*. Under such circumstances, TSG contends, it would be unreasonable for Fluor to expect that TSG would waive its right to "say anything to DTSC that might cause Fluor to incur additional expense." *Id*. at 19.

TSG further contends Fluor's proposed construction of the Release violates the strong public policy, mandated by statute, encouraging property owners to participate in environmental investigations, both in order to protect the rights of the property owner and to ensure that the regulatory agency receives "full and free communication and information in connection with its decision-making process." *Id*. (citing Cal. Health & Safety Code §§ 25358.7(c), 25355.8(b)).

TSG argues that even if its letters to DTSC constitute a "claim" for the purposes of the Release, it was merely made to enforce Fluor's duties under the Settlement Agreement and therefore was not released. *Id*. at 21. In particular, TSG contends that Fluor's obligation to convey its findings without comment in the PEA Report implies an obligation under the duty of good faith and fair dealing not to *mis*characterize the same information in subsequent communications with DTSC concerning the source of contaminants on the TSG Property. *Id*. Thus, TSG argues, its letters to DTSC do not fall under the Release in Section 5.1 of the Settlement Agreement. *Id*. For the same reasons, TSG argues that Fluor's November 21, 2016 letter to DTSC violated the terms of the Settlement Agreement and forced TSG to mitigate by sending its own letters to DTSC. *Id*. And even if DTSC *does* order Fluor to perform further investigation and/or remediation, Fluor will not be able to prevail on its claim for breach of the

Settlement Agreement because it cannot show that DTSC's decision was proximately caused by TSG's letters, TSG asserts. *Id*. at 22-23.

Finally, TSG argues that Fluor has acted willfully and has violated the terms of the Settlement Agreement and therefore, that if any sanctions are awarded, they should be in favor of TSG. *Id*. at 23. Like Fluor, TSG asks the Court to award the costs it incurred in responding to Fluor's letter to DTSC and to the instant Motion. *Id*.

In its Reply brief, Fluor contends TSG mischararacterizes its letters to DTSC by failing to acknowledge that it affirmatively requested that DTSC should order Fluor to perform investigation and remediation for contamination on the TSG Property as to which TSG has released all claims under the settlement agreement. Reply at 1. TSG did not "merely communicate" with DTSC, Fluor asserts; it petitioned DTSC to use its authority to *compel* Fluor to do what TSG agreed was no longer Fluor's responsibility. *Id*. at 1-2. Fluor further contends TSG is attempting to litigate the merits of the dispute that is before the DTSC – a question that is irrelevant to whether TSG has violated the Release and thus breached the terms of the Settlement Agreement. *Id*. at 2. Fluor rejects TSG's assertion that the Court should not exercise jurisdiction. *Id*. at 2-3.

Fluor argues that TSG's reliance on the statements placed on the record on December 15, 2015 is misplaced because of the integration clause in the written Settlement Agreement, found in Section 6.1, which under California law prohibits parties from relying on a prior agreement to contradict the terms of the written settlement agreement. *Id*. at 3-4 (citing Cal. Code Civ. Proc. § 1856(a)). It also argues that it is clear from the plain language of the Release that the objective intent of the parties was to release more than just lawsuits under Section 5.1. *Id*. at 4 (citing *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc*., 109 Cal. App. 4th 944, 956 (2003) ("California recognizes the objective theory of contracts . . . under which it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation") (internal quotations and citations omitted)). In any event, the terms of the agreement put on the record on December 15, 2015 also support Fluor's interpretation of the Release, it contends. *Id*. at 5. In particular, Fluor argues that the word "claim" is not limited to lawsuits. *Id*. at 5-6. Moreover, Fluor argues, in light

of the broad language of the Release, the fact that TSG was represented by counsel in the settlement negotiations, and the fact that the TSG's principal who signed the agreement, Jared Carter, is himself an accomplished lawyer, TSG's waiver of its rights was knowing and voluntary. *Id*. at 6-7.

Fluor also rejects TSG's public policy argument. *Id*. at 7. Contrary to TSG's assertion that a waiver of the right to communicate with DTSC violates public policy, public policy actually favors settlement between potential polluters, Fluor contends, because such settlements allow the parties to focus on clean-up. *Id*. (*California Dep't of Toxic Substances Control v. Hearthside Residential Corp*., 613 F.3d 910, 915 (9th Cir. 2010) ("Another important purpose of CERCLA is to encourage early settlement between potentially responsible parties and environmental regulators."). Fluor further asserts that while the Ninth Circuit has recognized that there are circumstances where courts may refuse to enforce an otherwise valid waiver due to constitutional concerns that implicate the interests of the public at large, that is not the situation here. *Id*. at 8-9 (citing *Davies v. Grossmont Union High Sch. Dist*., 930 F.2d 1390, 1396 (9th Cir. 1991)).

Fluor rejects TSG's assertion that Fluor violated the terms of the Settlement Agreement by presenting its position as to source of the COCs on the TSG Property in its November 21, 2016 letter. *Id*. at 9-10. According to Fluor, its obligation under the Settlement Agreement was simply to provide the data in the PEA Report without comment, which it did. *Id*. Were the Court to accept TSG's position, Fluor contends, it would amount to reading a new term into the Settlement Agreement requiring that Fluor *never* characterize the data to DTSC, which goes beyond the purpose of the implied covenant of good faith and fair dealing. *Id.* (citing *Avidity Partners, LLC v. State*, 221 Cal. App. 4th 1180, 1204 (2013) ("The implied covenant of good faith and fair dealing does not impose substantive terms and conditions beyond those to which the parties actually agreed.")). Because Fluor did not violate the terms of the Settlement Agreement, TSG was not entitled to mitigate by sending its responsive letters to DTSC, Fluor asserts. *Id*. at 10.

Finally, to the extent TSG argues that Fluor has not established any damages as a result of the alleged breach, Fluor contends TSG has "misse[d] the point" because Fluor seeks only injunctive relief. *Id*. at 10-11.

As discussed further below, at oral argument, the parties agreed to withdraw their requests for sanctions and Fluor narrowed the relief it seeks. In particular, Fluor dropped its request for an order requiring TSG to withdraw the letters it submitted to DTSC in their entirety, limiting the relief it requests to an order requiring that TSG withdraw only the express requests contained in those letters asking DTSC to order Fluor to undertake any site investigation or other work at the TSG Property outside the Pond Site, and order that TSG refrain from making such express requests in the future. The parties agreed on the record that such an order was appropriate and should be entered by the Court.

III. ANALYSIS

A. Whether the Court Should Exercise Jurisdiction Over the Parties' Dispute

The Supreme Court has found that while district courts have no inherent power to enforce settlement agreements entered into by parties litigating before them, they may retain jurisdiction over the settlement contract if both parties agree. *Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 382 (1994). A district court is not required to retain jurisdiction over a settlement agreement, even if the parties agree to request the court's continuing jurisdiction, and it may also terminate its continued jurisdiction over a settlement agreement where it finds that the exercise of such jurisdiction serves no further purpose because the terms of the settlement agreement have been fulfilled. *Arata v. Nu Skin Int'l, Inc*., 96 F.3d 1265, 1269 (9th Cir. 1996).

Here, the parties agreed to the continuing jurisdiction of the undersigned magistrate judge and that condition was adopted by the Court as part of the Settlement Agreement, as discussed above. The dispute before the Court reflects a fundamental divergence in the parties' understanding of their obligations under the Settlement Agreement. With the DTSC proceeding still pending and the likelihood that DTSC will require further investigation and remediation with respect to the COCs found on the TSG Property, this dispute is very much alive and it is not at all clear that the terms of the Settlement Agreement have been carried out. Therefore, the Court concludes that it is appropriate that it continue to retain jurisdiction to resolve the dispute between the parties.

B. Whether TSG Violated the Terms of the Settlement Agreement

"The construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally." *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). Thus, the Court applies California state law to interpret the terms of the settlement agreement in this case. Under California law, "the objective intent, as evidenced by the words of the contract, is controlling." *Lloyd's Underwriters v. Craig & Rush, Inc*., 26 Cal. App. 4th 1194, 1197 (1994). California courts "interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." *Id*. Applying this standard, the Court concludes that TSG has breached the terms of the Release to the extent that it has expressly asked DTSC to compel Fluor to bear the costs of any additional investigation or remediation on the Fluor Property. On the other hand, the Court concludes that the Release did not preclude TSG from providing information to DTSC about the source of the COC's on its property and its belief that Fluor is responsible for those contaminants.

The Release is framed using extremely broad language to cover "any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorney's fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, arising from or relating to Fluor's . . . prior ownership or operation of any portion of the TSG Property." Section 5.1. In requesting that DTSC require Fluor to conduct investigation or remediation, TSG is essentially attempting to enforce an "obligation" against Fluor by way of seeking redress from the DTSC. Such a request falls squarely within the ambit of the Release.

On the other hand, the Court is not persuaded that TSG waived its right to communicate with DTSC about the source of contaminants on its property altogether. To the contrary, with the exception of express requests to DTSC by TSG to *order* Fluor to conduct investigation or remediation , TSG did not waive its right to provide information to DTSC relating to the contaminants on its property or even who is responsible for investigation and remediation. The Court's conclusion is based on the fact that the Settlement Agreement does not explicitly address

(either in Section 5.1 or elsewhere in the agreement) TSG's right to communicate with DTSC in the future or to take a position about the source of any contaminants found on its property. In context, this omission is significant because there is no doubt that both Fluor and TSG were sensitive to the fact that DTSC's involvement was ongoing and that there was no guarantee that it would accept the recommendation agreed to by the parties, namely, no further action need be taken. Indeed, it is quite clear that the parties were aware of the potential harm to their own interests that might result from communications by one or the other with the DTSC. It was for this reason that under the previous consent order TSG was prohibited from communicating with DTSC during the completion of the VCA, and that the parties also agreed in the Settlement Agreement that Fluor would not characterize the data in the PEA Report.

The conclusion that TSG did not waive its right to communicate with DTSC (except with respect to the sort of express requests discussed above) finds further support in the exclusion of Section 5.3. There, the parties agreed to an exception where "a third party," including "a regulatory agency with jurisdiction" such as DTSC, "discovers significant concentrations of dioxin, lead, poly-nuclear aromatic hydrocarbons, creosote or pentachlorophenol requiring response action under applicable law, and establishes that such contaminants are directly attributable to Fluor's prior operations at the TSG Property." Were the Court to read the Settlement Agreement as Fluor proposes, this exclusion would be of questionable value to TSG because DTSC would be limited to Fluor's version of the facts and TSG would have no ability to protect its interests with respect to DTSC's findings.[2]

C. Whether the Court Should Award Sanctions Against TSG or Fluor

The Court has inherent power to impose sanctions, including an award of attorneys' fees

[2] Similarly, the Court rejects TSG's assertion that Fluor violated the Settlement Agreement by presenting its position to DTSC as to the source of the COC's in its November 21, 2016 letter. The Settlement Agreement requires only that Fluor present the data in the PEA Report without characterization; it does not restrict Fluor's ability to communicate with DTSC going forward in connection with any further DTSC involvement. To read such an obligation into the Settlement Agreement stretches the covenant of good faith and fair dealing beyond its purpose of effectuating the obligations of the parties to the contract.

and costs, where a litigant has acted in bad faith. At oral argument, the Court expressed the opinion that both TSG and Fluor genuinely and in good faith believed that their interpretation of the Settlement Agreement was correct. In response, and based on the stipulation of the parties to the relief to which both sides ultimately agreed, both sides agreed to withdraw their requests for the imposition of sanctions.

IV. CONCLUSION

For the reasons stated above, the Motion is GRANTED in part and DENIED in part. As expressly agreed by the parties at the hearing, the Court ORDERS as follows: TSG shall withdraw its request to DTSC, and is prohibited from expressly requesting that DTSC, order Fluor to undertake any site investigation or other work at the TSG Property outside the Pond Site unless expressly permitted under Section 5.3 of the Settlement Agreement.

IT IS SO ORDERED.

Dated: April 3, 2017

JOSEPH C. SPERO
Chief Magistrate Judge

United States District Court
Northern District of California