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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RYAN SCHAEFFER, et al.,
Plaintiffs,
v.
PICCOLO PROPERTIES, L.P., et al.,
Defendants.

Case No. 13-cv-04358-JST

**ORDER APPROVING APPLICATION
FOR GOOD FAITH SETTLEMENT
AND DENYING MOTION TO DENY
APPLICATION FOR GOOD FAITH
SETTLEMENT**

Re: ECF Nos. 77, 86

Before the Court is Defendant Piccolo Properties, L.P. (“Piccolo”) and Plaintiffs’ Application for a Good Faith Settlement Determination, and a Motion for an Order Denying Plaintiffs’ Application for Good Faith Settlement filed by Defendants other than Piccolo (“Non-Settling Defendants”). The Court will GRANT the Application for Good Faith Settlement and DENY the Motion for an Order Denying the Application.

I. BACKGROUND

On April 24, 2014, Plaintiffs and Defendant Piccolo filed a Joint Notice of Settlement and Application for Good Faith Settlement Determination. ECF No. 77. Piccolo and Plaintiffs agreed, pursuant to California Code of Civil Procedure § 877.6 and contingent on this Court’s approval, to: (1) a general release of all claims related to Piccolo’s property located at 1521-1529 Contra Costa Boulevard in Pleasant Hill, California (the “Property”); (2) the payment to Plaintiffs by Piccolo of \$6,500; and (3) an assignment to Plaintiffs of any claims that would accrue to Piccolo if it had remained in the action. Id. at 3.

On May 19, 2014, the Non-Settling Defendants filed a Motion for an Order Denying the Application for Good Faith Settlement. See ECF No. 86. The Non-Settling Defendants contend: (1) that Plaintiffs and Piccolo failed to provide adequate evidence supporting the settlement;

1 (2) failed to identify a rough approximation of Non-Settling Defendants’ liability; (3) failed to
2 identify the value of the assigned claims; and (4) that Plaintiffs stated at a February Case
3 Management Conference that their “best day in court” would result in a \$15 million recovery and
4 that the settlement amount—\$6,500—is not reasonably proportionate to \$15 million. Id. at 2.

5 In opposition to the Non-Settling Defendants’ motion, Plaintiffs and Piccolo submitted the
6 declaration of Carmelo Piccolo, the managing partner of Piccolo. See ECF No. 91-1. Mr. Piccolo
7 averred in his declaration that: (1) Piccolo purchased the Property in 1979; (2) he uses the net
8 rental income from the Property, as well as the rental income from a second property, to pay his
9 living expenses as a retiree; (3) the total monthly income from the two properties is less than
10 \$4,000; (3) during the time that he has owned the Property, no service station or dry cleaning
11 operation has been located there,¹ no pollution has been discharged from the Property, and he is
12 not aware that there was any soil or groundwater contamination at the Property at the time he
13 purchased it; (4) his insurance carrier denied coverage of the defense of this action; and (5) the
14 anticipated fees, costs, and expenses associated with the action are likely to exceed Piccolo
15 Properties’ net income. Id.

16 Plaintiffs and Piccolo argue that this evidence supports the application for good-faith
17 settlement, because Plaintiffs will not be able to prove their claims against Piccolo in the absence
18 of sufficient evidence of causation. ECF No. 91 at 7-8. Accordingly, Piccolo’s proportionate
19 share of liability is rightfully substantially less than the Non-Settling Defendants’ liability. Id.
20 Moreover, according to Plaintiffs and Piccolo, Mr. Carmelo’s declaration shows that Piccolo has a
21 limited income and no insurance to cover the defense of this action, let alone any judgment
22 rendered in Plaintiffs’ favor. Id. at 8. Thus, even if Plaintiffs were to prevail against Piccolo, they
23 might have difficulty collecting any judgment.²

24 _____
25 ¹ Plaintiffs allege in their complaint that the site at issue is contaminated with the products of “dry
26 cleaning, silver plating, gun shop, and furniture stripping operations.” ECF No. 1-1 at 4.

27 ² It bears mention that Plaintiffs have not submitted any evidence of Piccolo’s net worth, nor any
28 evidence of the value of the two properties his partnership owns. Also, while Piccolo states that
he uses the income from the two properties to pay his living expenses, he does not state these are
his only sources of income or his only assets. See ECF No. 91-1. In that regard, while he states

1 **II. LEGAL STANDARD**

2 Section 877.6 requires a plaintiff and a settling defendant to have agreed to a good faith
3 settlement.³ “Good faith” is determined by applying the following factors: (1) “a rough
4 approximation of plaintiffs’ total recovery and the settlor’s proportionate liability”; (2) “the
5 amount paid in settlement”; (3) “the allocation of settlement proceeds among plaintiffs”; (4) “a
6 recognition that a settlor should pay less in settlement than he would if he were found liable after
7 trial”; (5) “the financial conditions and insurance policy limits of settling defendants;” and (6) “the
8 existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling
9 defendants.” Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 499 (1985) (citation
10 omitted). The parties seeking denial of the application for good-faith settlement bear the burden of
11 proving “that the settlement is so far ‘out of the ballpark’ in relation to these factors as to be
12 inconsistent with the equitable objectives of the statute.” Tech-Bilt, 38 Cal. 3d at 499-500.

13 **III. ANALYSIS**

14 Non-Settling Defendants argue the Court should deny the settlement application because:
15 (1) Piccolo and Plaintiffs have not set forth adequate evidence to show good faith under Tech-Bilt,
16 and (2) the Tech-Bilt factors show the settlement was not made in good faith. ECF No. 86 at 2.⁴

17 **A. Adequacy of Evidence in Support of Settlement**

18 The Non-Settling Defendants contend that Plaintiffs and Piccolo have not provided
19

20 that “anticipated monthly attorney fees, expert fees and costs are likely to exceed Piccolo
21 Properties’ monthly net income,” id. at 3, he does not state that such costs are likely to exceed his
22 income. Based on this evidence, the Court is unable to conclude that Plaintiffs would have
difficulty satisfying any judgment against Piccolo.

23 ³ Section 877.6 applies to this settlement because state-law claims predominate in the action, see
24 Federal Savings & Loan Insurance Corp. v. Butler, 904 F.2d 505, 511 (9th Cir. 1990) (applying §
877.6 in analogous circumstances), and neither party contests its application.

25 ⁴ Non-Settling Defendants also argue that Plaintiffs and Piccolo failed to address Piccolo’s
26 potential indemnity liability to the Non-Settling Defendants. ECF No. 86 at 5. Non-Settling
27 Defendants cite no authority holding that Plaintiffs and Piccolo must do so in these circumstances.
28 In fact, the very purpose of a motion or application for determination of good faith settlement is to
bar any claims for indemnity by non-settling tortfeasors. Far W. Fin. Corp. v. D & S Co., 46 Cal.
3d 796, 800 (1988).

1 adequate evidence to show the good faith of the settlement, including settlement details. This
2 argument fails for several reasons.

3 First, the Non-Settling Defendants, not the settling parties, bear the burden of proof on the
4 issue of good faith. See Cal. Code Civ. Proc. § 877.6(d) (“The party asserting the lack of good
5 faith shall have the burden of proof on that issue.”).

6 Second, case law does not require settling parties to identify the settling defendant’s
7 percentage share of liability. Instead, the court assigns a rough approximation of plaintiff’s
8 potential recovery and the proportionate share of defendant’s liability. West v. Super Ct., 27 Cal.
9 App. 4th 1625, 1635, 1636 (1994) (“One factor to be considered in determining good faith is the
10 *trial court’s* rough approximation of the plaintiff’s total recovery,” and “the court is called upon to
11 make a ‘rough approximation’ of what the plaintiff would actually recover.”) (citing Tech-Bilt, 38
12 Cal. 3d at 499)) (emphases added); Horton v. Super. Ct., 194 Cal. App. 3d 727, 735 (1987) (“In
13 determining a settling defendant’s equitable proportionate share of liability, the judge does not
14 look to the plaintiff’s claim for damages; rather, the judge tries to determine a ‘rough
15 approximation’ of what the plaintiff would actually recover if the case should go to trial.”) (citing
16 Tech-Bilt, 38 Cal. 3d at 501) (emphases added). Tech-Bilt established factors for courts to use to
17 evaluate whether a settlement is reasonable and entered into in good faith; Plaintiffs and Piccolo
18 did not have to include these numbers in their application for good faith settlement in order to
19 satisfy Tech-Bilt.⁵

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21 ⁵ The Non-Settling Defendants point to Erreca’s v. Superior Court, 19 Cal. App. 4th 1475, 1497
22 (1993), for the proposition that Piccolo and Plaintiffs should have valued, in the settlement, the
23 claims Piccolo assigned to Plaintiffs. ECF No. 92 at 4. Erreca’s is inapposite; the challenge there
24 was to the value the trial court placed on the assigned claims. 19 Cal. App. at 1496. Further, the
25 authorities Erreca’s cites conflict on this point. Compare S. Cal. Gas Co. v. Super. Ct., 8 Cal. App.
26 App. 3d 1030, 1036 (1986) (holding that the assigned claims should either be assigned a value or
27 the court should have provided that Non-Settling Defendants would be credited for any recovery
28 by Plaintiffs as to the assigned claims) with Alcal Roofing & Insulation v. Super. Ct., 8 Cal. App.
4th 1121, 1124-25 (1992) (holding that the parties’ failure to provide the court with the actual
settlement agreement—and thus their failure to identify details that were important to that
settlement, including the value of assigned claims—prevented the court from approving the
settlement). Given the apparent conflict in state law, the absence of a valuation of the assigned
claims does not prevent this Court from approving the settlement. Per Southern California Gas, if
Plaintiffs recover anything on the assigned claims, that amount will be credited to the Non-Settling

1 Third, at this stage of litigation, hard evidence is sometimes difficult to obtain, and
2 “practical considerations obviously require that the evaluation [of the settlement under Tech-Bilt]
3 be made on the basis of information available at the time of settlement.” Abbott Ford, Inc. v.
4 Super. Ct., 43 Cal. 858, 874 (1987). The Court and parties must necessarily speculate somewhat
5 as to the adequacy of the settlement. Tech-Bilt, 38 Cal. 3d at 499 (noting that, in evaluating “bad
6 faith[,] . . . the damages are often speculative, and the probability of legal liability therefor is often
7 uncertain or remote.”) (internal citations and quotations omitted). Given the limited information
8 available at this stage of litigation, Plaintiffs and Piccolo identified adequate facts for each
9 applicable Tech-Bilt factor for the Court to evaluate the settlement.

10 **B. Application of the Tech-Bilt Factors**

11 Certain Tech-Bilt factors are inapplicable here—i.e., the allocation of settlement proceeds
12 among plaintiffs, and the existence of collusion, fraud, or tortious conduct, which the non-settling
13 Defendants have not alleged—but the other factors point to the conclusion that the proposed
14 settlement is reasonable. The first applicable Tech-Bilt factor is “a rough approximation of
15 plaintiffs’ total recovery and the settlor’s proportionate liability.” The non-settling Defendants
16 argue that Plaintiffs’ rough approximation of total recovery is \$15 million. This estimate was
17 provided in response to a question by the Court at a case management conference as to what
18 Plaintiffs’ “best day in court” would be. The figure was, by definition, aspirational. Plaintiffs
19 have stated elsewhere, however, that their expected recovery is in the millions of dollars. See,
20 e.g., ECF No. 1, Ex. A at 40 (\$5 million prayer for relief). And as a percentage of Plaintiffs’
21 anticipated \$5 million recovery, the Piccolo settlement amount is de minimis in relation to
22 Plaintiffs’ projected total recovery.

23 That does not, however, render the settlement inadequate under Tech-Bilt. On the
24 evidence here, it is reasonable to conclude that Piccolo’s liability, if any, is also de minimis.
25 Piccolo avers that no dry cleaning operation or service station has been operated on the Property in
26 the thirty-five years that he has owned it; that no other hazardous wastes have been discharged
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28 Defendants.

1 from the Property during the time he has owned it; and that he had no knowledge of soil or
2 groundwater contamination at the time he purchased the Property. ECF No. 91-1. Moreover, he
3 assigned his claims against the prior owners of the Property—for any contamination of Plaintiffs’
4 property they caused—to Plaintiffs. Given these circumstances, and the lack of any contrary
5 evidence from Non-Settling Defendants, it is reasonable to conclude that Piccolo is responsible for
6 very little, if any, of the alleged harm to Plaintiffs.

7 The second factor is the amount of the settlement—specifically, whether it is in the
8 “ballpark,” given Piccolo’s proportionate share of liability and Plaintiffs’ approximate recovery.
9 As explained above, while Plaintiffs hope to obtain relief in the millions of dollars, and the
10 Piccolo settlement is a small percentage of that amount, the settlement makes sense in light of
11 what appears to be Piccolo’s negligible level of responsibility. Cf. West, 27 Cal. App. 4th at
12 1635-37 (finding a settlement to be made in good faith, despite the disparity between the
13 settlement amount (\$788.20) and the plaintiffs’ projected recovery (\$500,000-\$1,000,000),
14 because the plaintiffs’ claims against the non-settling defendant were likely barred by the statute
15 of limitations and thus of minimal or no value).

16 The third applicable factor—recognition that a settlor should pay less in settlement than
17 after trial—also supports the proposed settlement. See Abbott Ford, 43 Cal. 3d at 875 (“In order
18 to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate
19 share of the anticipated damages.”).

20 Weighing the applicable factors, the settlement is not so “out of the ballpark” as to be
21 unreasonable.⁶

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26 ⁶ Non-settling Defendants also request that the Court adopt the “proportionate share approach” to
27 apportion liability between the parties. See ECF No. 92. The Non-Settling Defendants raised this
28 argument for the first time in their reply brief. “The district court need not consider arguments
raised for the first time in a reply brief.” Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007).

1 **CONCLUSION**

2 For the foregoing reasons, the Application for Good Faith Settlement is GRANTED and
3 the Motion to Deny that application is DENIED.

4 **IT IS SO ORDERED.**

5 Dated: August 26, 2014

6 
7 JON S. TIGAR
8 United States District Judge