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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CITIZENS DEVELOPMENT CORPORATION, INC., a California corporation,
Plaintiff,
v.
COUNTY OF SAN DIEGO, a California municipal corporation, CITY OF SAN MARCOS, a California municipal corporation, CITY OF ESCONDIDO, a California municipal corporation, VALLECITOS WATER DISTRICT, a California municipal corporation, HOLLANDIA DAIRY, INC., a California corporation, and DOES 1 through 100, inclusive,
Defendants.

AND RELATED COUNTER-ACTIONS AND CROSS-ACTIONS.

Case No.: 12-CV-334-GPC-KSC

ORDER GRANTING MOTIONS FOR GOOD FAITH SETTLEMENT DETERMINATION AND ESTABLISHMENT OF SAN MARCOS LSM SETTLEMENT TRUST

[ECF Nos. 471, 523, 528]

Before the Court are the Joint Motions for Good Faith Settlement Determination (“Motion”) filed by Plaintiff and Counter-Defendant Citizens Development Corporation, Inc. (“CDC”) and Defendants and Counter-Claimants City of San Marcos (“San Marcos”), City of Escondido (“Escondido”), and the County of San Diego (“County”).

1 ECF Nos. 471, 523, 528. The motions are fully briefed. San Marcos filed its Motion on
2 December 10, 2021. ECF No. 471. Escondido (“Escondido”) filed a Response
3 conditionally opposing San Marcos’s Motion (ECF No. 484), which Defendant County of
4 San Diego (“County”) joined, (ECF No. 485). CDC and San Marcos each filed a Reply.
5 ECF Nos. 486, 487.

6 On August 11, 2022, Escondido filed its Motion. ECF No. 523. The County filed a
7 Response conditionally opposing Escondido’s Motion. ECF No. 525. Escondido filed a
8 Reply. ECF No. 526. On September 8, 2022, Escondido filed a statement of conditional
9 withdrawal of its Opposition to San Marco’s Motion, (ECF No. 471), should the Court
10 grant its Motion for Good Faith Settlement Determination. ECF No. 527.

11 On September 9, 2022, San Diego filed its Motion. ECF No. 528. The Court
12 provided a briefing schedule with Oppositions due on or before September 19, 2022. ECF
13 No. 529. No Oppositions were filed.

14 Because of the similarity between these Motions, the Court rules on them
15 simultaneously. The Court finds these Motions suitable for disposition without oral
16 argument and **VACATES** the hearings on this matter originally set for September 23,
17 2022 (San Marcos and Escondido) and December 9, 2022 (the County) pursuant to Civil
18 Local Rule 7.1(d)(1). After considering the moving papers; declarations of counsel; the
19 Settlement Agreements and Mutual Release (“Settlement Agreement”) reached by CDC
20 and San Marcos, Escondido, and the County; the opposition thereto and supporting
21 declarations; and the record as a whole, the Court hereby finds that the Settlement
22 Agreements were entered into in good faith pursuant to California Code of Civil
23 Procedure (“CCP”) §§ 877 and 877.6, and are fair, reasonable, and consistent with the
24 intent of the Comprehensive Environmental Response, Compensation, and Liability Act
25 (“CERCLA”), 42 U.S.C. § 9601, *et seq.*

26 **I. Background**

27 As the Parties in this case know well, this civil action arises out of the alleged
28 contamination of the surface water and groundwater in and around Lake San Marcos

1 (“the Lake”) and San Marcos Creek (“Creek”) located in San Marcos, California. *See*
2 ECF No. 286, Second Amended Complaint (“SAC”) ¶¶ 1, 3. On approximately
3 September 20, 2011, the California Regional Water Quality Control Board, San Diego
4 Region (“the RWQCB”) issued an Investigative Order (“the IO”) alleging that Plaintiff
5 CDC had released pollutants into the Lake. *See id.* ¶ 4. In response, Plaintiff filed this
6 action against Defendants County, San Marcos, Escondido, Vallecitos, and Hollandia
7 Dairy (“Hollandia”), alleging that each of them was responsible for the discharges that
8 contaminated the Lake and its surrounding waters. ECF No. 86, SAC ¶ 9; *see generally*
9 ECF No. 1, Complaint.

10 **A. CDC’s Allegations**

11 CDC alleges that a variety of sources discharged contaminants into the Lake,
12 including urban and suburban runoff, private golf courses, agricultural land uses,
13 improper waste disposal, poor and/or unmanaged landscaping practices from commercial,
14 recreational and residential sites, sanitary sewer overflows, septic system failures,
15 groundwater infiltration, the presence and operation of the dam, and other non-point
16 source discharges during storm events and dry weather conditions. ECF No. 86, SAC ¶¶
17 5-7. These discharges, CDC alleges, were generated by the real property that is located
18 upgradient of the Lake within the San Marcos Creek Watershed (“the Watershed”),
19 which includes property owned or operated by Defendants. *Id.* ¶¶ 8, 22-26.

20 Based on these and other allegations, the SAC asserts seven causes of action
21 against Defendants, including: (1) private recovery under the Comprehensive
22 Environmental Response, Compensation, and Liability Act (“CERCLA”); (2) declaratory
23 relief under federal law; (3) continuing nuisance; (4) continuing trespass; (5) equitable
24 indemnity; (6) declaratory relief under California state law; and (7) injunctive relief under
25 the Resource Conservation and Recovery Act (“RCRA”). *See id.* The SAC’s CERCLA
26 theory of liability is predicated on the assertion that Defendants contaminated the Lake
27 by releasing known “hazardous substances” into its watershed. *Id.* ¶ 50. CDC identifies
28 those “hazardous substances,” as “nitrogen, phosphorus, and nutrients found in fertilizers,

1 pesticides and sewage.” *Id.* ¶ 43.

2 **B. Counterclaims by City of San Marcos**

3 San Marcos filed counterclaims against CDC for its contamination of the Lake,
4 asserting claims for: (1) response costs under CERCLA; (2) declaratory relief under
5 CERCLA; (3) state-law unjust enrichment; (4) state-law negligence; (5) negligence per
6 se; (6) state-law declaratory relief; and (7) equitable indemnity. ECF No. 297.

7 **C. Counterclaims by Escondido**

8 Escondido filed counterclaims against CDC for its contamination of the Lake,
9 asserting claims for: (1) response costs under CERCLA; (2) declaratory relief under
10 CERCLA; (3) response costs under California Superfund Act; (4) declaratory relief under
11 California Superfund Act; (5) contribution under state law; (6) negligence; (7) negligence
12 per se; (8) equitable indemnity; and (9) unjust enrichment. ECF No. 298.

13 **D. Counterclaims by the County**

14 The County filed counterclaims against CDC for its contamination of the Lake,
15 asserting claims for (1) response costs under CERCLA; (2) declaratory relief under
16 federal law; (3) continuing nuisance; (4) continuing trespass; (5) equitable indemnity; (6)
17 declaratory relief under state law; and (7) injunctive relief pursuant to RCRA. ECF No.
18 292.

19 **E. Procedural History**

20 This action was initially filed on February 8, 2012. ECF No. 1. On January 8,
21 2014, the Court ordered a stay in the lawsuit to permit the parties to pursue mediation of
22 their claims. ECF No. 94. By 2017, the mediation had not resulted in settlement, and the
23 parties continued with discovery through September 2019, at which point Magistrate
24 Judge Crawford stayed discovery pending settlement discussions. *See* ECF No. 348. By
25 February 24, 2020, the parties had reached a settlement regarding claims by and against
26 Hollandia, and Judge Crawford lifted the stay of discovery with respect to the remaining
27 claims between CDC and the remaining Defendants. ECF No. 362.

28 On May 5, 2020, the Court granted the Joint Motion for Good Faith Settlement

1 Determination and Establishment of Hollandia LSM Settlement Trust, which all Parties
2 joined. ECF No. 384. As a result, Hollandia was to pay \$1.5 million to the designated
3 trust for the implementation of investigative and remedial actions, and all claims filed by
4 and against Hollandia in this matter were dismissed with prejudice. *Id.*; ECF No. 363-4
5 at 266–87.¹ Claims against Hollandia for contribution or indemnity were also barred,
6 except for claims expressly excluded in the settlement agreement. ECF No. 384.

7 On February 11, 2021, the Court granted the Motion for Good Faith Settlement
8 Determination and Establishment of Vallecitos LSM Settlement Trust. ECF No. 402.
9 Vallecitos was to pay \$1 million to the designated trust for remedial costs as well as
10 \$83,035.88 towards additional investigative and regulatory oversight costs. All claims
11 filed by and against Vallecitos in this matter were dismissed with prejudice and claims
12 against Vallecitos for contribution or indemnity were also barred. ECF No. 402 at 13.

13 On December 10, 2021, CDC and San Marcos filed a Joint Motion for Good Faith
14 Settlement Determination. ECF No. 471. Escondido filed a conditional opposition (ECF
15 No. 484), in which County joined stating it would oppose the Motion if the Court does
16 not apply the “proportionate share” approach to account for the Settlement reached by
17 CDC and San Marcos in determining the scope of Escondido and County’s potential
18 liability. ECF No. 485. Escondido filed a statement of conditional withdrawal of this
19 Opposition on September 8, 2022. ECF No. 527. San Diego has not filed a statement of
20 conditional withdrawal, but the issue of accounting method is moot, for the reasons
21 discussed below.

22 On August 11, 2022, CDC and Escondido filed a Joint Motion for Good Faith
23 Settlement Determination. ECF No. 523. The County filed a conditional opposition
24 stating it would oppose the Motion if the Court does not apply the “proportionate share”
25 approach discussed above. ECF No. 525. However, the County stated that “if the
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27 ¹ All citations to particular pages of electronically filed documents, including exhibits,
28 refer to the page numbers provided by the CM/ECF system.

1 County's Good Faith Settlement Motion is granted before the Court rules on
2 [Escondido's] Motion [], the method of allocation should have no impact to the County
3 and, therefore, the County would not be opposed to this Motion." *Id.* at 2. Thus, ruling on
4 all three Motions for Good Faith Settlement at once disposes of the conditional
5 opposition as well.

6 On September 9, 2022, the County filed its Motion for Good Faith Settlement
7 Determination. ECF No. 528. The Court provided a briefing schedule, and no
8 Oppositions were filed.

9 **II. Legal Standard**

10 To approve of a consent decree under CERCLA, "a district court must conclude
11 that the agreement is procedurally and substantively 'fair, reasonable, and consistent with
12 CERCLA's objectives.'" *United States v. Coeur d'Alenes Co.*, 767 F.3d 873, 876 (9th
13 Cir. 2014) (quoting *United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741, 748 (9th
14 Cir. 1995)). Courts have applied the same standard to the review of settlement
15 agreements. *See San Diego Unified Port Dist. v. Gen. Dynamics Corp.*, No. 07-CV-
16 01955-BAS-WVG, 2017 WL 2655285, at *6 (S.D. Cal. June 20, 2017).

17 Under California law, in a case with multiple tortfeasors a court must make a
18 determination that any settlement was entered into in "good faith" before the other
19 alleged joint tortfeasors will be barred from seeking contribution or indemnity from the
20 settling party. Cal. Code Civ. P. §§ 877, 877.6; *see also Mason & Dixon Intermodal, Inc.*
21 *v. Lapmaster Int'l LLC*, 632 F.3d 1056, 1061 (9th Cir. 2011) (courts sitting in diversity
22 apply Sections 877 and 877.6, as substantive California law, to good faith settlement
23 determinations).

24 In determining whether a settlement was reached in good faith under Section 877
25 and 877.6, a court must consider the factors laid out in *Tech-Bilt, Inc. v. Woodward-*
26 *Clyde & Assocs.*, 38 Cal. 3d 488 (1985), including: (1) "a rough approximation of the
27 plaintiffs' total recovery and a settlor's proportionate liability"; (2) "the amount paid in
28 settlement"; (3) "a recognition that a settlor should pay less in settlement than if found

1 liable after a trial”; (4) “the allocation of settlement proceeds among plaintiffs”; (5) “the
2 financial conditions and insurance policy limits of settling defendants”; and (6) whether
3 there is evidence of “collusion, fraud, or tortious conduct aimed to injure the interests of
4 nonsettling defendants.” *Tech-Bilt*, 38 Cal. 3d at 499. An opposing party must
5 “demonstrate . . . that the settlement is so far ‘out of the ballpark’ in relation to these
6 factors as to be inconsistent with the equitable objectives of the [joint tortfeasor] statute.”
7 *Id.* at 499–500. An evaluation of the factors is to be made based on the information
8 available at the time of settlement. *Id.* at 499.

9 Although courts have taken different approaches to determine whether the
10 settlement of CERCLA claims is fair and reasonable, a number of courts in the Ninth
11 Circuit have “borrowed” from California law the legal framework for determining
12 whether a settlement has been entered into in good faith within the meaning of California
13 Code of Civil Procedure Sections 877 and 877.6 and as explained in *Tech-Bilt*. See
14 *Heim*, 2014 WL 1340063, at *3; *Santa Clarita Valley Water Agency v. Whittaker Corp.*,
15 No. 2:18-CV-06825-SB (RAOx), 2020 WL 8125638, at *2 (C.D. Cal. Nov. 16, 2020);
16 see also *Lewis v. Russell*, No. 2:03-CV-02646 WBS AC, 2019 WL 5260731, at *3 (E.D.
17 Cal. Oct. 17, 2019) (“The factors used to evaluate whether a CERCLA settlement is fair,
18 reasonable, and adequate parallel those used to determine whether a settlement is in good
19 faith under California law.”). Other courts have applied the *Tech-Bilt* factors in
20 combination with settlement factors drawn from federal common law in cases involving
21 both CERCLA and California state law claims. E.g., *San Diego Unified Port Dist.*, 2017
22 WL 2655285, at *6–10; *Cooper Drum Cooperating Parties Grp. v. Am. Polymers Corp.*,
23 No. CV 19-03007-AB (FFMx), 2020 WL 2504331, at *5–8 (C.D. Cal. May 13, 2020).

24 **III. Discussion**

25 Because of the similarity between CDC’s and San Marcos’s, Escondido’s, and the
26 County’s Settlement Agreements, the Court analyzes them simultaneously.

27 **A. Good Faith Settlement Determination Under *Tech-Bilt***

28 *i. Settlement Terms*

1 Under the terms of San Marcos’s settlement, San Marcos has agreed to pay \$3.4
2 million towards remediation costs. ECF No. 471-3 at 5. Additionally, San Marcos has
3 agreed to pay over \$40,000 towards additional investigative and regulatory oversight
4 costs. *Id.* at 4. The settlement funds are to be paid into a remediation trust. *Id.* In
5 exchange, the Settlement Agreement provides for dismissal with prejudice of claims by
6 and against San Marcos in this action and is conditioned on the Court entering an order
7 barring claims for contribution and indemnity relating to the Site.² *Id.* at 6–8.

8 Under the terms of Escondido’s settlement, Escondido has agreed to pay \$1.3
9 million towards remediation costs. ECF No. 523-3 at 4. Escondido also has agreed to pay
10 approximately \$20,000 towards additional investigative and regulatory oversight costs.
11 *Id.* at 3. The settlement funds are to be paid into the remediation trust. *Id.* at 4. Further,
12 the Escondido Settlement Agreement states that Plaintiff CDC will make a one-time
13 payment of \$2.8 million into the trust. *Id.* In exchange, the Settlement Agreement
14 provides for dismissal with prejudice of claims by and against Escondido as well as other
15 terms similar to those in the San Marcos Agreement. *Id.* at 6.

16 Under the terms of the County’s settlement, the County has agreed to pay \$2.6
17 million towards remediation costs. ECF No. 528-3 at 4. Additionally, the County has
18 agreed to pay \$12,445.65 toward additional investigative and regulatory oversight costs.
19 *Id.* The funds are to be paid into the remediation trust. *Id.* In exchange, the County’s
20 agreement looks similar to the other two agreements addressed in this Order and provides
21 for dismissal with prejudice of all claims by and against the County. *Id.* at 5-6.

22 *ii. Approximation of potential recovery and proportionate liability and*
23 *recognition that settling defendant should pay less than should it proceed to trial*

24 To meet the standard of “good faith,” the amount of a settlement must be “within
25 the reasonable range of the settling tortfeasor’s proportional share of comparative liability

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27 ² In this order, the term “Site” has the same meaning as used in the Settlement
28 Agreements.

1 for the plaintiff's injuries." *Tech-Bilt*, 38 Cal. 3d at 499; *see also Torres v. Union Pac. R.*
2 *Co.*, 157 Cal. App. 3d 499, 509 (1984) (holding that "a co-defendant's settlement price
3 cannot be grossly disproportionate to his fair share of the damages"). The Court must
4 therefore determine the approximate potential total recovery, and San Marcos's,
5 Escondido's, and the County's share of the potential liability.

6 1. Approximation of potential total recovery

7 In determining the total potential recovery for the purposes of evaluating a
8 settlement under *Tech-Bilt*, the court makes a "rough approximation of what plaintiff
9 would actually recover." *West v. Superior Court*, 27 Cal. App. 4th 1625, 1636 (1994).
10 Plaintiff's claim for damages is not determinative. *Id.*

11 Under CERCLA, "a private party may 'recover expenses associated with cleaning
12 up contaminated sites.'" *City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d
13 998, 1002 (9th Cir. 2010) (quoting *United States v. Atl. Research Corp.*, 551 U.S. 128,
14 131 (2007)). The estimated remediation costs under the RI/FS totaled roughly \$11.3
15 million in 2015 dollars, which according to CDC is equivalent to \$13.2 million in 2021
16 dollars, taking inflation into account. ECF No. 471-1 at 20. Opposing Parties to San
17 Marcos's Motion state that CDC has claimed \$19,909,044 in the underlying litigation as
18 the present value of past and future remedial costs, plus interest. ECF No. 484 at 4.
19 Opposing Parties do not indicate that they actually expect CDC to recover the entire
20 amount of claimed damages, and have not otherwise identified what they regard as
21 CDC's approximate potential recovery. For the purposes of this Motion, the Court
22 accepts the remediation costs figure provided by Movants based on the RI/FS as a "rough
23 approximation of what plaintiff would actually recover" for response costs. *West*, 27 Cal.
24 App. 4th at 1636.

25 2. San Marcos' estimated proportionate liability

26 The Court turns to the Parties' contentions regarding San Marcos's approximate
27 proportionate liability. Movants argue that the apportionment of liability between all
28 parties would likely be determined based upon the "Gore Factors," and that consideration

1 of those factors would militate in favor of approving the Settlement Agreement because
2 “San Marcos’ settlement payment representing between 23% and 55% of estimated
3 remedial costs is reasonably within the range offered by the parties’ various experts.”
4 ECF No. 471-1 at 21. Pursuant to the RI/FS, CDC and the Defendants jointly retained
5 environmental expert LimnoTech to perform Lake modeling. Escondido (and San Diego
6 by their Joinder) argues in the Opposition that “San Marcos’s proposed settlement of \$3.4
7 million represents from approximately 17.08 percent to 25.76 percent of the monetary
8 claim in this matter, far less than its proportional share of the USMC Watershed or its
9 proportional share of loading.” ECF No. 484 at 4-5.³ To support this contention, the
10 Opposition points to the RI/FS model which estimates that 58.3 percent of the USCM
11 Watershed is within San Marcos’s boundaries, and 51.55 percent of nutrient loading
12 originates from the San Marcos portion of the USMC Watershed, while the Opposing
13 Parties’ share of the Watershed and nutrient loading is much smaller (9.3 percent and 8.4
14 percent for Escondido). *Id.* at 3.

15 Under CERCLA, “the court may allocate response costs among liable parties using
16 such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f)(1).
17 Some courts consider the Gore Factors, named after a proposed amendment to CERCLA
18 that was rejected by Congress. *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1187 (9th
19 Cir. 2000). “The Gore Factors are: ‘(1) the ability of the parties to demonstrate that their
20 contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
21 (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the
22 hazardous waste involved; (4) the degree of involvement by the parties in the generation,

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25 ³ Escondido has filed a statement of conditional withdrawal of their Opposition to
26 San Marcos’s Motion to be effective once the Court grants their Motion for Good Faith
27 Settlement. ECF No. 527. Because the Court is granting Escondido’s Motion in this
28 Order, the Court assumes that Escondido no longer opposes San Marcos’s Motion.
However, the County has not yet filed a statement of withdrawal of the Opposition to San
Marcos’s Motion, so the Court will discuss the Opposition as if it is still in effect.

1 transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of
2 care exercised by the parties with respect to the hazardous waste concerned, taking into
3 account the characteristics of such hazardous waste; and (6) the degree of cooperation by
4 the parties with Federal, State, or local officials to prevent any harm to the public health
5 or the environment.” *TDY Holdings, LLC v. United States*, 885 F.3d 1142, 1146 n.1 (9th
6 Cir. 2018) (quoting *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321,
7 326 n.4 (7th Cir. 1994)). However, district courts are not limited to consideration of these
8 factors and can allocate response costs using other equitable factors as they deem
9 appropriate. *Boeing*, 207 F.3d at 1187.

10 CDC contends that San Marcos bears significant liability based on its historic and
11 ongoing discharges of nutrients, nutrient-laden sediment, and sewer waste mixed with
12 groundwater and storm water to the Creek and Lake. ECF No. 471-1 at 20. San Marcos
13 disputes liability and contends that other parties (including CDC) bear responsibility for
14 the alleged harm. *Id.* However, according to CDC’s experts, updated future remediation
15 costs in the RI/FS total approximately \$17.3 million. According to San Marcos’s expert,
16 out of the \$11.3 million estimated in the RI/FS, approximately \$8.7 million will be
17 required to remediate the Site. Because the Hollandia Dairy and Vallecitos settlements
18 already paid \$2.5 million, the remaining cost to be distributed among the remaining
19 Defendants, would be between \$6.2 million and \$14.8 million. *Id.* “Thus, the San Marcos
20 settlement payment of \$3.4 million represents between 23% and 55% of the total
21 estimated remedial costs.” *Id.* at 20-21. Somewhat unhelpfully, San Marcos’s expert and
22 Escondido’s expert offered widely disparate opinions on the allocation of liability.⁴ San
23 Marcos’s expert allocated 4.5% liability to San Marcos based on his analysis, while
24 Escondido’s expert opined that San Marcos contributed more than 50% of the phosphorus
25 and nitrogen to the Lake. ECF No. 471-1 at 21. Based on those estimates, the Settlement

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28 ⁴ County of San Diego offered no expert opinions in which nutrient contributions were
calculated on as percentages among the Defendants.

1 payment of \$3.4 million would cover between 23% and 55% of remedial costs. San
2 Marcos argues this is “reasonably within the range offered by the parties’ various
3 experts.” *Id.* Opposing Parties take a different view. Using the \$19.9 million figure
4 (based on CDC’s claims from underlying litigation) as the denominator, the Opposition
5 states that San Marcos’s proposed settlement of \$3.4 million represents between 17.08
6 percent and 25.76 percent of the monetary claim in the case, which is less than San
7 Marcos’ share of the USMC Watershed (58.3%) and of the nutrient loading (which is up
8 to 51.6%). ECF No. 484 at 4-5.

9 The Court notes that the parties’ differing views on the proportional share of San
10 Marcos’s liability, as well as the differing views on what proportion of the remedial costs
11 the San Marcos settlement will actual cover are indeed widely divergent. The estimates
12 and figures that the Movants and the Opposition use to describe proportional liability are
13 based on extremely different baselines—on the one hand, the Movants use the RI/FS
14 estimate, which is much lower, to support their contention that the proposed settlement
15 covers a larger percent of the potential liability, while the Opposition, on the other hand,
16 uses CDC’s \$19 million damages claim to suggest that the proposed settlement does not
17 cover enough.

18 As *Tech-Bilt* suggested, the Court will not adopt an interpretation of “good faith”
19 that “would tend to convert the pretrial settlement approval procedure into a full-scale
20 mini-trial.” *Tech-Bilt*, 38 Cal. 3d at 499. The Court therefore need not definitively
21 determine which side’s expert determination of the remedial costs would carry the day at
22 trial, so long as evidence supports Movants’ assertion that the settlement amount is within
23 the range of San Marcos’s potential liability. Of course, the widely divergent estimates of
24 San Marcos’s liability (because of the widely divergent estimates of the total liability)
25 make it difficult to determine whether the Movants’ proposed settlement does indeed
26 require San Marcos to pay a proportional share.

27 Based on the information available at the time of the Settlement Agreement, the
28 proposed \$3.4 million settlement payment, which represents between 23% and 55% of

1 the RI/FS remedial costs, plus investigatory costs, is “within the reasonable range of [San
2 Marcos’s] proportional share of comparative liability for” remediation costs. *Tech-Bilt*,
3 38 Cal. 3d at 499. That the 23%-55% range of remedial costs is on the lower range of San
4 Marcos’s proportional share of the San Marcos Watershed, and possible share of the
5 nutrient load, this is not inconsistent with the *Tech-Bilt* factors. *Tech-Bilt*, 38 Cal. 3d at
6 499 (courts determining good faith should recognize “that a settlor should pay less in
7 settlement than he would if he were found liable after a trial”). As the Movants state,
8 “San Marcos is settling before trial and before the parties are required to engage in
9 further costly and lengthy trial preparations, including preparation of expert testimony
10 and rebuttal testimony.” ECF No. 471-1 at 24. *Abbott Ford, Inc. v. Superior Court*, 43
11 Cal. 3d 858, 874 (1987) (“[A] ‘good faith’ settlement does not call for perfect or even
12 nearly perfect apportionment of liability.”).

13 The Court therefore finds that the Opposition has not met its burden of showing
14 that the approximately \$3.4 million provided for in the Settlement Agreement would be
15 “so far ‘out of the ballpark’” of San Marcos’s potential share of liability that the
16 settlement would be inequitable. *Tech-Bilt*, 38 Cal. 3d at 499–500. The Opposition
17 seems less concerned about the actual amount of San Marcos’s \$3.4 million payment, and
18 more concerned about what it might mean for their own possible liability at trial.

19 Further, because this Order approves the Motions for Good Faith Settlement
20 Determination for all remaining Defendants in this action, any opposition by any of the
21 parties to the terms of the other Defendants’ Settlement Agreements should be moot. All
22 of the parties have settled.

23 3. Escondido’s estimated proportionate liability

24 The Court does not recount the law and considerations already laid out above.
25 Instead, the Court simply turns to the Parties’ contentions regarding Escondido’s
26 approximate proportionate liability to determine if the amount of the settlement is “within
27 the reasonable range of [Escondido’s] proportional share of comparative liability for the
28 plaintiff’s injuries.” *Tech-Bilt*, 38 Cal. 3d at 499. It is.

1 Escondido retained an expert to provide a report estimating Escondido's liability.
2 Specifically, the expert noted that although Escondido's current contribution is 8.4%, the
3 historical contribution of Escondido must be less because it has "historically had less
4 watershed acreage than what is reflected in the model, and other jurisdictions had intense
5 agricultural operations (such as poultry farms), while Escondido did not." ECF No. 523-1
6 at 12. The expert concluded Escondido's contribution into the San Marcos Lake was "at
7 most, approximately 4 percent." *Id.* In contrast, CDC's expert, in response to Escondido's
8 expert, felt Escondido was responsible for 10.2% of the loading. *Id.* at 13. Thus,
9 Escondido's proportionate liability ranges anywhere from 4% to 10.2%. Escondido also
10 argues that its ultimate share of liability should be further reduced by CDC's share of
11 liability for its role in operating the Lake. *Id.* at 14.

12 Assuming that the future remediation costs will range between \$5 million and
13 \$17.3 million, as stated in Escondido's Motion, Escondido's range of potential liability is
14 from \$200,000 to \$1,760,000. *Id.* at 19. Escondido has agreed to pay \$1.3 million. This is
15 clearly on the higher end of the potential liability range, and as such, this settlement is not
16 "so far 'out of the ballpark'" of Escondido's potential share of liability that the settlement
17 is inequitable. *Tech-Bilt*, 38 Cal. 3d at 499–500. No Parties, including the County, argue
18 that this is an unfair or unreasonable settlement amount.

19 4. The County's estimated proportionate liability

20 The Court now turns to the Parties' contentions regarding the County's
21 approximate proportionate liability to determine if the amount of the settlement is "within
22 the reasonable range of [the County's] proportional share of comparative liability for the
23 plaintiff's injuries." *Tech-Bilt*, 38 Cal. 3d at 499. It also is.

24 The County has agreed to pay \$2.6 million. The County states that CDC's expert
25 allocated 40.1% of liability to the County. ECF No. 528-1 at 10. CDC's rebuttal expert
26 assigned 27.6% of liability to the County. *Id.* at 11. Assuming that the future remediation
27 costs will range between \$5 million and \$17.3 million, as stated above, the County's
28 range of potential liability is from \$1.38 million to \$6.94 million. Although the County's

1 agreement to pay \$2.6 million is on the lower end of this range, there is no opposition
2 arguing this amount is unreasonable, so the Court similarly finds that the settlement
3 amount is not so far out of the ballpark as to render this settlement disproportionate.

4 *iii. Other Tech-Bilt factors*

5 No Opposition argues that the other *Tech-Bilt* factors, such as the allocation of the
6 settlement proceeds, the financial condition and insurance policy limits of the three
7 remaining Defendants, or the possibility of collusion, fraud, or tortious conduct weigh
8 against good faith settlement determinations. Additionally, upon independent review, the
9 Court finds that Movants have demonstrated that these factors support a finding that the
10 settlements were entered into in good faith. There is no issue regarding allocation
11 because the settlements are mainly to be allocated to remedial actions at the Site, while
12 the remaining will be put towards investigative and regulatory oversight costs. Lastly, the
13 Court is satisfied that the Settlement Agreements are the result of arm's-length
14 negotiations over the course of one decade of litigation, and that there is no evidence that
15 Movants engaged in any collusion, fraud, or other tortious conduct in coming to this
16 agreement.

17 Accordingly, the Court finds that upon review of the *Tech-Bilt* factors, the
18 settlement agreements were arrived at in good faith.

19 **B. Determination of Whether Settlement is Fair, Reasonable, and Consistent**
20 **with Purposes of CERCLA**

21 Courts have often approved of settlements and bar orders upon determination that
22 “the proposed settlement is fair, reasonable, and consistent with the purposes that
23 CERCLA is intended to serve,” drawing from the standard courts apply in evaluating
24 proposed consent decrees under CERCLA. *Cooper Drum*, 2020 WL 2504331, at *4
25 (quoting *Rev 973, LLC v. Mouren-Laurens*, No. CV 98–10690 DSF (Ex), 2016 WL
26 9185139, at *1 (C.D. Cal. July 1, 2016)); *see also United States v. Montrose Chem. Corp.*
27 *of Cal.*, 50 F.3d 741, 746 (9th Cir. 1995); *Coppola*, 2017 WL 4574091, at *2. Here, for
28 the reasons set forth more fully above, the settlements are substantively and procedurally

1 fair. *See San Diego Unified Port Dist.*, 2017 WL 2655285, at *6–7 (citing *Arizona v.*
2 *City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014)). The settlements were arrived at
3 after years of litigation and mediation, and sufficient formal discovery and independent
4 investigation had occurred at the time of settlements to provide Movants with a basis
5 from which they could approximate the Defendants’ proportionate share of liability. *Cf.*
6 *id.* (“[B]ecause all of the parties had ample opportunity to investigate the contamination
7 and because they negotiated the settlement at arm’s length, the Court concludes the
8 settlement is procedurally fair.”).

9 Additionally, the settlements further the purposes of CERCLA. “[O]ne of the core
10 purposes of CERCLA is to foster settlement through its system of incentives and without
11 unnecessarily further complicating already complicated litigation.” *Chubb Custom Ins.*
12 *Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013) (quoting *California Dep’t*
13 *of Toxic Substances Control v. City of Chico, Cal.*, 297 F. Supp. 2d 1227, 1235 (E.D. Cal.
14 2004)); *see also San Diego Unified Port Dist.*, 2017 WL 2655285, at *5 (“[O]ne of
15 CERCLA’s purposes is to encourage settlement through providing contribution
16 protection—that is, preventing settling parties from being later sued for contribution by
17 other joint tortfeasors.”). After approximately ten years of litigation, mediation, and
18 settlement discussions, this purpose of CERCLA is certainly served by settlement at this
19 stage of proceedings.

20 The Court therefore finds that the settlements are fair, reasonable, and adequate,
21 and are consistent with the purposes of CERCLA.

22 **C. Method of Accounting for Settlements**

23 “[A] district court has discretion under § 9613(f)(1) to determine the most
24 equitable method of accounting for settlements between private parties in a contribution
25 action.” *AmeriPride*, 782 F.3d at 487. Courts typically choose between the pro tanto
26 approach and the proportionate share approach, “competing methods of accounting for a
27 settling party’s share when determining the amount of a nonsettling defendant’s liability.”
28 *Id.* at 484. *AmeriPride* gives district courts discretion to use either the pro tanto or

1 proportionate share approaches: “[T]he court may allocate response costs among liable
2 parties using such equitable factors as the court determines are appropriate.” *Id.* at 486.
3 While the decision is within the district court’s discretion, electing to use a method that
4 would “produce plainly inequitable results could constitute abuse of discretion.” *Id.* at
5 488.

6 San Marcos and Escondido both provide for a pro tanto method of accounting,
7 “such that the total amount of damages for which liability, if any, may be allocated at
8 trial, shall be reduced by the dollar value of the [] settlement payment.” *See e.g.*, ECF No.
9 471-1, ECF No. 471-3 (San Marcos Settlement Agreement) at 8-9. The County opposes
10 this on the ground that “if a pro-tanto settlement is applied, it would shift the risk of an
11 underfunded settlement to the final settling party in this action, potentially unfairly
12 prejudicing the County in the process.” ECF No. 525 at 2; *see also* ECF No. 484 (the
13 County’s Opposition to San Marcos’s Motion). However, the County’s opposition only
14 stands “so long as the Court does not rule on the County’s Good Faith Settlement Motion
15 first.” *See* ECF No. 525 at 10. Given that the Court is ruling on the County’s Motion
16 simultaneously with all of the remaining party Motions, the opposition no longer stands.

17 Here, the Court has found that all of the Settlement Agreements presented by the
18 remaining parties are fair and reasonable and an accounting of liability has been made.
19 There will be no trial as to a remaining nonsettling party and there will be no further
20 accounting of liability. Because San Marcos’s, Escondido’s, and the County’s Motions
21 are approved concurrently, the issue of accounting method is moot.

22 **IV. Conclusion**

23 The Court hereby **ORDERS** as follows:

- 24 1. The Motions are **GRANTED**;
- 25 2. The Settlement Agreement and Mutual Release (“Settlement Agreement”)
26 reached by the Parties with respect to The City of San Marcos, The City of
27 Escondido, and The County of San Diego, which is the subject of the
28 Motion, is in good faith, fair, reasonable, and consistent with the intent of

1 the Comprehensive Environmental Response, Compensation, and Liability
2 Act (“CERCLA”), 42 U.S.C. § 9601, *et seq.* and California Code of Civil
3 Procedure (“CCP”) §§ 877 and 877.6;

4 3. Pursuant to the Settlement Agreement, CERCLA, and CCP § 877, *et seq.*, all
5 persons and parties are barred from pursuing any claims against San Marcos,
6 Escondido, or the County for implied and/or equitable indemnity, implied
7 and/or equitable comparative contribution, indemnity or cost recovery under
8 CERCLA § 107, indemnity or contribution under CERCLA § 113, indemnity
9 or contribution under the Carpenter-Presley-Tanner Hazardous Substance
10 Account Act (“HSAA”) (Cal. Health and Safety Code § 25300, *et seq.*), or for
11 any other cause of action based upon comparative fault, indemnity or
12 otherwise arising from any alleged past negligence, act, omission, or
13 misconduct of San Marcos, Escondido, or the County in connection with the
14 Site and subject matter of this litigation. This Order shall apply whether such
15 claims are pending or could be asserted in the future pursuant to federal or
16 state law.⁵

17 4. All claims, asserted in the action by CDC against San Marcos, Escondido,
18 and the County, and all claims San Marcos, Escondido, and the County
19 asserted against CDC in this litigation, are hereby dismissed with prejudice,
20 with the Parties each bearing their own attorneys’ fees and costs.

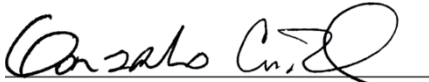
21 5. The San Marcos LSM Settlement Trust shall be established as either a
22 “Designated Settlement Fund” or a “Qualified Settlement Fund” pursuant to
23 Section 468B of the Internal Revenue Code, 26 U.S.C. § 468B, and the
24 regulations promulgated pursuant thereto and codified at 26 C.F.R. §
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27 ⁵ See ECF No. 471-3 at 5-6 (San Marcos); ECF No. 523-3 at 6-7 (Escondido); ECF No.
28 528 at 6-7 (the County) for the full terms of the express exclusions from the Parties’
Mutual Releases.

1 1.468B, and in accordance with the terms and conditions of the Settlement
2 Agreement.

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4 **IT IS SO ORDERED.**

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6 Dated: September 21, 2022

7 
8 Hon. Gonzalo P. Curiel
9 United States District Judge

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