

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

vs.

BOARD OF HAMILTON COUNTY
COMMISSIONERS, et al.,
Defendants.

Case No. 1:02-cv-107
Spiegel, J.
Litkovitz, M.J.

**ORDER RE: REQUEST
FOR REVIEW BY
LOUIS AND JANE KOHUS**

This matter is before the Court on the Request for Review of the denial of a Sewer Backup (“SBU”) claim by Louis and Jane Kohus. (Doc. 560). The Kohuses seek compensatory damages from the Metropolitan Sewer District of Greater Cincinnati (“MSD”) for sewer water backup into their basement.

The Kohuses’ request for review is filed under the Sewer Backup¹ program (formerly known as the Water-in-Basement [WIB] Claims Process Plan) (Doc. 131, Consent Decree, Exhibit 8). The Plan states in relevant part:

Subject to the requirements of this Plan, occupants who incur damages as a result of the backup of wastewater into buildings due to inadequate capacity in MSD’s Sewer System (both the combined and the sanitary portions) can recover those damages. This plan also provides a means for occupants to recover damages arising from backups that are the result of MSD’s negligent maintenance, destruction, operation or upkeep of the Sewer System. The Claims Process is not intended to address water in buildings caused by overland flooding not emanating from MSD’s Sewer Systems or caused by blockages in occupants’ own lateral sewer lines.

(Doc. 131, Consent Decree, Exhibit 8 at 1). In determining the cause of SBU, MSD must

¹The “Water-In-Basement” program has been renamed the “Sewer Backup” program to more accurately reflect MSD’s responsibility for sewage backups caused by inadequate capacity in MSD’s sewer system. *See* Doc. 452 at 4; Doc. 454 at 16.

exercise its good faith reasonable engineering judgment and consider the following non-exclusive factors: amount of precipitation, property SBU history, condition of the sewer system in the neighborhood, results of a visual inspection of the neighborhood to look for signs of overland flooding, neighborhood SBU history, capacity of nearby public sewer lines, and topography. (Doc. 131, Consent Decree, Exhibit 8 at 2). Damages arising from basement backups for which MSD is responsible are limited to documented real and personal property. *Id.* Claimants must cooperate with MSD's efforts to investigate and document the losses that have occurred as a result of a SBU incident and must "submit copies of any documents that they may have that substantiate the existence and/or extent of their damages." *Id.* at 3.

I. Background

The Kohuses are the owners of the property located at 6219 Woodlark Drive, Cincinnati, Ohio. In 2011, the Kohus property experienced two SBUs: one on June 21, 2011 (SBU Incident No. 4150) and one on July 23, 2011 (SBU Incident No. 4269). MSD was notified of both events, investigated, performed the clean-up, and documented the property removed from the basement on both occasions. The Kohuses made two claims to MSD for property loss under the SBU program. The first claim for damages for the July 2011 SBU (SBU Incident No. 4269) has been resolved. (Doc. 599). The second claim for damages for the June 2011 SBU (SBU Incident No. 4150) is the subject of the instant request for review.

On March 7, 2012, the Kohuses filed a SBU claim form with MSD for property loss damages sustained on June 21, 2011. At this time, the Kohuses alleged property loss of \$654,824.57. Mr. Kohus, a professional inventor, identified some of the more expensive items of personal property damaged or destroyed by the June 2011 SBU incident as:

(a) a large, vintage collection of collector trading cards, wax wrappers, and toy rings comprised of: (i) rare, unopened packs of non-sports and sports cards; (ii) rare singles of non-sports and sports cards; (iii) rare wax wrappers from opened packs of non-sports cards; and, (iv) complete sets of a variety of rare, theme-specific toy “Flicker” rings having lenticular lenses;

(b) a large, vintage collection of embroidered public safety emblems comprised of department-issued police and fire patches; and,

(c)(i) several one-of-a-kind, full-scale, 100% professionally handcrafted U.S. Patent invention prototypes; (ii) a large, irreplaceable group of high-end, commercial studio photographs professionally made over a period of years to expertly document some of my new product inventions, designs, and prototypes and also used for my various marketing, advertising, and sales purposes; (iii) a large, irreplaceable group of original master detail drawings for the design, engineering, tooling, and production of some of my new product inventions, designs, and prototypes; and (iv) several very large, irreplaceable groups of my business and personal documents, files, records, and new product invention and design samples of all types and kinds from various pre-production, printing, and/or manufacturing stages.

(Doc. 560, First Kohus Aff., ¶ 11). Mr. Kohus stated that he stored these collectibles in the basement to protect them from regular exposure to light as wrappers, cards, and patches could lose substantial value if faded. *Id.* at ¶ 12. He averred that “[u]ntil several weeks before the SBU incident, the boxes had been stored on shelves, but with my daughter’s graduation from college I was forced to make room for her belongings. The boxes containing my collections were therefore temporarily moved to the floor in the main section of the basement.” *Id.* The cover letter accompanying claim No. 4150 informed MSD that the Kohuses claimed \$654,824.57 in property loss, less \$10,000.00 in insurance proceeds, for a “remaining loss/claim balance of \$644,824.57 for SBU Incident No. 4150.” (Doc. 560, Binder 1).

Although the Kohuses claimed losses of \$654,824.57 in their June 2011 SBU claim to MSD, on appeal to this Court they now request an award for “the full amount of the property

loss— \$826,544 – plus all costs, expert witness fees, and expenses related to this claim.” (Doc. 560 at 6). The Kohuses now claim they undervalued the property lost in the June 2011 SBU and that the total property loss is actually \$826,544.00, and not \$654,824.57 as originally claimed.

Given the magnitude of the claim made in this case,² the Court permitted the parties to engage in limited discovery and to submit supplemental briefs. (Doc. 605). This matter was set for an evidentiary hearing, at which Mr. Kohus testified. (Doc. 619). The parties have proffered the deposition testimony of James F. Lakes, Amy Leugers, Robert Connelly, Anita Boulmetis, and Dorothy Carman in lieu of live testimony. (Docs. 609, 610, 611).

There is no dispute that the cause of the damage to the Kohuses’ real and personal property in June 2011 was the inadequate capacity of the MSD sewer system. The issues in the instant appeal involve: (1) the identification of the damaged property for which the Kohuses seek compensation; and (2) the amount of compensation the Kohuses may receive for personal and real property damage.

II. Items not documented

As an initial matter, MSD argues that the losses to personal and real property must be documented before the Kohuses may receive compensation. MSD contends that to the extent the Kohuses fail to meet this burden, this Court is bound by the limits of the Consent Decree and must deny them compensation.

As MSD correctly notes, compensation under the Consent Decree is limited to “documented” real and personal property losses. (Doc. 131, Consent Decree, Exhibit 8 at 2). In

²MSD asserts it has spent an average of \$668,613 annually on *all* real and personal property claims between 2004 and 2011 for SBU claims, with an average of \$3,530 spent on each individual claim during that period (Doc. 569 at 12-13), and that the Kohuses’ claim alone exceeds the amount spent annually on all SBU claims to date.

addition, claimants are obligated to cooperate with MSD's investigation and documentation of the property losses and must "submit copies of any documents that they may have that substantiate the existence and/or extent of their damages." *Id.* at 3.

The Court will address the documentation issue in connection with the four main categories of personal and real property loss claimed by the Kohuses: (1) the trading card collection; (2) the police and safety patch collection; (3) other personal property; and (4) real property.

III. The Trading Card Collection

A. The Contents of the Collection

The Kohuses seek compensation for a collection of sport and non-sport trading cards, unopened packs, wax wrappers, and toy "Flicker" rings (collectively "the trading card collection"). The Kohuses have submitted an inventory of 1,597 items in this collection, including the "grade" of the item and value assigned by Mr. Kohus. Mr. Kohus testified that he kept an inventory of the trading card collection (Doc. 617, Exh. 12), but did not individually keep photographs, receipts, or insurance on any of the items. The Kohuses did provide a limited number of receipts and correspondence relating to the purchases of cards. (Doc. 617, Exh. 8). Among the items listed in the inventory are a Pete Rose 1963 Rookie Card valued by the Kohuses at \$10,898.00; a Johnny Bench Rookie Card valued by the Kohuses at \$9,312.22; and a 1957 baseball 12 card "Series-2" cello pack valued by the Kohuses at \$7,090.63.

MSD contends the Kohuses have not provided either photographic or written documentation of the existence of the majority of the collection, nor have they provided independent written evidence of the quality of the cards. MSD asserts that the Kohuses'

reliance on a typed inventory and a few receipts, along with photographs of the boxes taken on the day of the cleanup and a single photograph of an individual card, are insufficient to substantiate their property loss claim in this case. (See Doc. 560, Kohus Request for Review, Binder 2, Tab A, Exh. 32). MSD argues that the Kohuses had an opportunity to photograph the damaged trading card collection, but failed to do so; they could have photographed the trading card collection over the many years Mr. Kohus spent developing the collection; and they could have photographed the cards between the time of the backup on June 21, 2011, and the date of the cleanup on June 25, 2011, similar to their documentation of the police and safety patches. (Kohus Depo., pp. 57-59; Doc. 560, Kohus Request for Review, Binder 2, Tab D).

It is undisputed that trading cards were among the items of personal property damaged by SBU in June 2011. MSD's offsite disposal report reflects "approximately 850" "unopened packs of non-sport [and] baseball cards from 1940 -1970." (Doc. 617, Exh. 2). In addition, MSD's contractor, ETC, photographed several boxes of trading cards as part of the inventory process. (Doc. 560, Binder 2, Tab A, Exh. 32). The question is whether the inventory of the trading card collection submitted by the Kohuses (Doc. 617, Exh. 12) accurately reflects the cards they claim were damaged.

The Court finds the inventory of the trading card collection kept and submitted by Mr. Kohus accurately reflects the trading card collection damaged by the June 2011 SBU. The circumstances surrounding the cleanup and documentation efforts by ETC described below indicate the inventory is an accurate listing of the contents of the trading card collection and that Mr. Kohus was led to believe that submitting the inventory was sufficient to document his claim.

Amy Leugers, the ETC customer service representative who handled the Kohuses'

cleanup, advised Mr. Kohus he had the option of documenting and disposing of the damaged items on his own or having ETC document and dispose of them. (Leugers Depo., pp. 33-34). Ms. Leugers told Mr. Kohus that if he wished to do so, he could begin removing items from his basement, but that he should be careful to document items himself if he wished to submit those items for compensation along with his claim. (Kohus Depo., pp. 57-59). Ms. Leugers testified that Mr. Kohus “was very adamant on wanting the cards documented. He referred to the fact that he wanted to make sure that we had taken pictures of them.” (Leugers Depo., pp. 30-31). Ms. Leugers also testified the Mr. Kohus “did refer to having and showed me an inventory list of the cards” and she told him “to make a copy of and to submit [the inventory] with his claim to the City.” (*Id.* at 31; Doc. 620 at 4, errata sheet, p. 31 lines 9-10). Ms. Leugers testified she did not go through the cards individually because “by the time we moved them, they were pretty mushy and soupy” and “they were stuck together and disintegrating.” (*Id.*, pp. 30, 32). Mr. Kohus likewise testified that he did not individually photograph the cards following the SBU because they were wet and fell apart when he tried to pick them up. Ms. Leugers testified that Mr. Kohus was concerned about documenting the card collection. She testified that he “was very pesty” on wanting to help with the documentation of the trading card collection and “it was pretty much, you know, let us do it . . . just so things didn’t get moved around or missed.” (*Id.*, pp. 46-47). Mr. Kohus testified he relied on MSD to document the card collection correctly.

Both Ms. Leugers and Mr. Kohus consistently testified that the cards were mushy and disintegrating at the time they were photographed by both. The evidence indicates that it may have been extremely difficult, if not impossible, for either Ms. Leugers or Mr. Kohus to individually photograph the cards and card packs in the collection. It was reasonable for Mr.

Kohus to rely on Ms. Leugers' request to "let us do it" and to believe that the detailed inventory he showed her (Doc. 617, Exh. 12) would be sufficient documentation of the individual items in the collection. Therefore, the Kohuses are entitled to compensation for the items in the trading card collection as reflected on the Kohuses' inventory. (Doc. 617, Exh. 12).

B. The Value of the Collection

Although the Court accepts the inventory as establishing the contents of the items in the trading card collection, the fair market value of those items is an entirely separate question. The Kohuses initially sought an award of \$457,255.00 for the trading card collection when they submitted their July 2011 claim to MSD. After the claim was denied by MSD, however, the Kohuses retained the services of a licensed insurance adjuster who opined that the card collection was undervalued by the Kohuses and that the actual fair market value of the card collection was approximately \$592,000.00. MSD then retained its own expert who appraised the trading card collection at \$57,000.00.

The Court has therefore been presented with the opinions of two experts who used different methodologies for the valuation of the trading card collection:

1. The Lakes Appraisal

James Lakes of Cincinnati Public Adjusters, a professional, licensed insurance adjuster and appraiser, was hired by the Kohuses to appraise the personal and real property damaged in the SBU. Given the number of individual items in the trading card collection and the limited time available, Mr. Lakes stated it was impractical to research the value of each and every collectible. He therefore developed a methodology that would have been used had the claim been submitted to an insurance carrier to arrive at a fair market value for the trading card

collection. This included selecting a majority of the items listed at higher values by the owner and a random sample of lower-valued items, which essentially would provide a check on the accuracy of the owner's valuations. Mr. Lakes stated that if the owner's valuations appeared to be materially overstated or understated, the adjuster would modify the claim amount accordingly or conduct a further review.

Based on Mr. Lakes' review, he estimated the value of the trading card collection to be \$592,000.00 and determined that Mr. Kohus materially understated the value of his card collection by approximately \$77,500.00. Mr. Lakes stated that the \$77,500.00 understatement represents the valuation for 47 of the 83 individual cards and card sets which were valued at over \$1,000.00 each. For example, Mr. Lakes valued the 1963 Pete Rose Rookie card at \$10,898.00 based on the sale price at auction, whereas Mr. Kohus valued the card at \$8,500.00, resulting in an understated value of \$2,398.00.

In his appraisal, Mr. Lakes assumed the sample of cards and card sets he reviewed was representative. He accepted Mr. Kohus's representation that he in fact had a trading card collection as reflected on the inventory provided by Mr. Kohus. Mr. Lakes also accepted and relied on the card grades reflected on the inventory. Mr. Lakes did not know if the Kohus trading card collection was ever graded by an independent, third-party company to authenticate the collection.

In support of his appraisal, Mr. Lakes submitted documentation purportedly supporting the actual sale price of particular cards sold at auction. Mr. Lakes relied considerably on the internet in valuating the cards. He could not recall if he contacted any professional, third-party authenticators like Professional Sports Authenticator. Instead, he contacted "major" collectors he

found on the internet³ and questioned them about the Kohus trading card collection. Mr. Lakes reported that “[a]lmost every collector we contacted stated that the prices that he [Mr. Kohus] had listed on his inventory were well in line and many of the listed prices were low to very low. Some of them stated that on some of the items that we identified he was very low and very few were high.” (Doc. 560, Kohus Request for Review, Binder 2, Tab A). However, Mr. Lakes admitted that these collectors did not know the actual grades of the Kohus card collection. Mr. Lakes stated that in doing his internet research, he did rely on cards graded by third-party authenticating companies as comparisons.

Mr. Lakes testified that as a card’s grade declines, so does the value of that card. Mr. Lakes testified that the value of a trading card can drop by 40% from one grade to the next lower grade for cards graded in the 7 to 10 range. In setting a value for the trading card collection, Mr. Lakes used “replacement cost value,” which he defined as what it would cost to replace that item today. (Lakes Depo., p. 63; Doc. 560, Kohus Request for Review, Binder 2, Tab A). Therefore, in setting the values for the Kohus trading card collection, Mr. Lakes added tax and shipping costs to the sale price of the item. (Doc. 560, Kohus Request for Review, Binder 2, Tab A, Documentation).

2. The Connelly Appraisal

Bob Connelly performed an appraisal of the trading card collection at the request of MSD. Mr. Connelly stated that his analysis and conclusions were made in conformity with the

³One such individual was a Mr. Todd Riley from Columbus, Ohio. While Mr. Lakes denied Mr. Kohus directed him to Mr. Riley and stated he found out about Mr. Riley through his internet search, Mr. Kohus testified at the hearing that in response to Mr. Lakes’ question about who he could contact to verify the Kohus estimates, Mr. Kohus referred Mr. Lakes to Mr. Riley.

Uniform Standards of Professional Appraisal Practice and that he valued the trading card collection at \$57,000.00 as of July 18, 2012.

Mr. Connelly is certified by the Appraisers Association of America and is a Senior Member of the American Society of Appraisers. He is certified as an appraisal practitioner in the fields of antiques, decorative arts, and personal property. Mr. Connelly testified that he has appraised over 25,000 baseball cards and sold over 1 million baseball cards. Mr. Connelly testified that he does not personally grade the cards, and the value of a trading card depends, in part, on the grade of the card. He stated that Professional Sports Authenticator (PSA) is the most respected authentication and grading company, and that PSA has set the industry standard in the grading of sports cards. Mr. Connelly noted that the grades assigned to the Kohus trading card collection were not set by an independent, third-party grader, but by Mr. Kohus himself in conjunction with the sellers of the trading cards. In his appraisal, Mr. Connelly did not accept Mr. Kohus's "grade" listed on the trading card collection inventory because Mr. Kohus had no experience in grading or appraising cards. Given the large quantity of cards in the collection, Mr. Connelly based his appraisal on a random sampling of the cards listed on Mr. Kohus's inventory, as well as an evaluation of the higher priced items like the Pete Rose Rookie card. In appraising the Kohus collection, Mr. Connelly reviewed the "population reports from PSA to determine the most likely grade of the card." He testified that this is the method he uses when he auctions sport cards.

Mr. Connelly testified that he believed the grades given to Mr. Kohus's trading card collection were overstated for several reasons: the storage of the cards in a basement (where the Kohuses had three dehumidifiers running) as moisture in a basement deteriorates the card stock

by causing fading and blurring of the image; the fact that the cards were not placed in sealed holders; the fact that the collection included unopened “wax packs” of cards, which are not water or humidity proof and exposure to humidity on the printer’s ink causes cards to stick together and influences the grading; the relative rarity of a grade 9 card; and the fact that no independent expert graded the cards.

Mr. Connelly also testified that the grading of cards is very important to an accurate valuation and that the value of a trading card may drop appreciably from one grade to another grade. For example, the very same auction that the Kohuses submitted as a comparable sale in support of their valuation of the Pete Rose Rookie card shows a difference of over \$18,000 between a rare mint card and a near mint card. *See* Doc. 613, Exh. B at 18.⁴ For these reasons, Mr. Connelly opined that the appraisal of the trading card collection by Mr. Lakes was overstated by approximately 90%. *Id.* at 22.

3. Analysis

The Court does not credit the appraisal submitted by Mr. Lakes for several reasons. First, Mr. Lakes relied on the grade of the card as represented by Mr. Kohus in his trading card collection inventory. This grade was not assigned by an independent, third-party grader like PSA, but rather was based on the grade assigned by the sellers of the cards or card packs at the time Mr. Kohus purchased them. These sellers, by Mr. Kohus’s own admission, had an incentive to assign a grade that would maximize their return. As Mr. Lakes acknowledged, a card could drop 40% in value from one grade to the next lower grade. Therefore, accurate grading of the

⁴Mr. Connelly’s appraisal states that “Mr. Lakes obviously is not used to reading auction results. There was a buyer’s premium [for the Pete Rose Rookie card]. The card actually sold for \$19,975 (\$17,000 plus 17.5% buyer’s premium of \$2,975=\$19,975 selling price).” (Doc. 613, Exh. B at 18).

cards is crucial to their value and the absence of substantiation by a professional, independent grader weighs against Mr. Lakes' appraisal.

Additionally, this Court has consistently held that the proper standard for evaluating personal property damaged or lost as a result of SBU is fair market value as of the date of loss, not the original cost or cost of replacement. (*See, e.g.*, Doc. 271 at 2; Doc. 400 at 2; Doc. 422 at 2, Doc. 494 at 2). Yet, Mr. Lakes' appraisal of the trading card collection is based on replacement cost and not fair market value. Therefore, the estimates presented by Mr. Lakes in his appraisal of the trading card collection are overstated.

In addition, Mr. Lakes' estimates are suspect as he used cards that were not objectively comparable to estimate the value of some of the more highly valued cards in the trading card collection. Three examples will suffice. In assessing the value of the 1968 Johnny Bench (RC) #247 (1968 Topps Inc.) card (Doc. 617, Exh. 12, Line 16 of the Kohus inventory), Mr. Lakes relied on the sale of a comparison card that was rated "Gem Mint PSA 10" and which sold for \$8,711.00. After adding sales tax and shipping, Mr. Lakes valued the card at \$9,312.22. (Doc. 560, Kohus Request for Review, Binder 2, Tab A, Documentation). However, this card was advertised as "one of only ten GEM MINT 10 examples graded by PSA to date." *Id.* In contrast, the 1968 Johnny Bench card listed on the Kohus inventory was rated only a "9" and valued by Mr. Kohus at \$1,000.00. By Mr. Lakes' own admission, the value of a card may be reduced by 40% from a grade 10 to a grade 9, yet Mr. Lakes appraised the card in the Kohus collection as if it were comparable to a grade 10 card, and not a grade 9 card. It is undisputed that the value of a trading card depends on the condition of the card, *i.e.*, the grade of the card, and the rarity of the card, *i.e.*, the supply and demand for the card. Because Mr. Lakes did not have this requisite

information when assessing the value of the 1968 Johnny Bench card, there is no objective basis for the \$9,312.22 appraisal given by Mr. Lakes.

Mr. Lakes also assessed the value of the American Beauties-12-card 5 cent paper-banded pack (1941 Gum Inc.). (Doc. 617, Exh. 12, Line 70 of the Kohus inventory). As a comparison, Mr. Lakes relied on a collection of 4 cards from 1944 that were rated “PSA Mint 9” and which sold for \$1,554.00. After adding sales tax and shipping, Mr. Lakes valued these cards in the Kohus collection at \$1,690.01. (Doc. 560, Kohus Request for Review, Binder 2, Tab A, Documentation). In contrast, the “American Beauties” card pack listed on the Kohus inventory was valued by Mr. Kohus at \$750.00 and consisted of a 12 card collection from 1941, not 1944, and was rated 8.5, and not 9. Again, there is no objective basis for accepting the \$1,690.01 appraisal by Mr. Lakes.

Finally, Mr. Lakes appraised a Bewitched “Test Issue” card #14 “PRETTY WITCH” (1965 Topps Inc.) that Mr. Kohus valued at \$1,150.00. (Doc. 617, Exh. 12, Line 211 of the Kohus inventory). Mr. Lakes represented that this card sold in 2007 by Worthpoint Auction for \$10,189.00, and therefore he assigned a value of \$10,189.00 to Mr. Kohus’s “PRETTY WITCH” card. However, the evidence submitted by Mr. Lakes in support of his appraisal fails to confirm his valuation. The internet screen shot submitted in support of Mr. Lakes’ estimate does not show a sales price for the card. Instead, it shows the actual “Sold For” price as being hidden from view.⁵ Under the description of the card, the reader is invited to view the links to previous auction sales “as a point of reference” and directs the reader to “a 1965 Topps ‘Bewitched’ *never*

⁵Viewers must sign up for a “free trial” before the sale price will be revealed. There is no evidence Mr. Lakes did this to obtain the actual sale price of the card.

released test issue near *set* sold for \$10,189.00.” (Doc. 560, Kohus Request for Review, Binder 2, Tab A, Documentation). Thus, Mr. Lakes did not base his estimate on the actual sale price of the single “PRETTY WITCH” card; instead, he based his estimate on a representation from the seller of the card that a previous “test issue near *set*” sold for \$10,189.00. There is simply no reliable basis for crediting Mr. Lakes’ appraisal.

In addition, the high value assigned to the trading card collection by Mr. Lakes is suspect given how Mr. Kohus treated the card collection. Mr. Kohus testified that he did not take pictures of the cards or obtain a third-party grader because he was not in the “business” of selling trading cards; rather, he purchased them for his own enjoyment. By Mr. Kohus’s own estimate, the trading card collection was worth over \$450,000.00. However, Mr. Kohus made no attempt to insure the trading card collection because he stated he “didn’t want people to know what he had in his house.” This is simply not credible. Procuring insurance for personal valuables does not equate to informing the public of the existence of the insured items. The fact that Mr. Kohus chose not to insure a trading card collection allegedly worth one-half million dollars casts significant doubt on the high value he assigned to the collection.

Additionally, when Mr. Kohus’s daughter returned home from college with her things, the decision was made that her college items deserved to be on shelves and not on the basement floor. These items included memorabilia from Africa, artwork, cookware, and quilting items. Mr. Kohus testified that his wife and daughter insisted that the college items be placed on shelves and that it was easier to move his things than to argue with them. Yet, when the Kohuses needed to make room on the shelves, they chose to remove and place on the floor a “one-half million dollar trading card collection,” as opposed to any of the other items on the shelves lining the

walls. These actions are not in keeping with how reasonable people handle and protect items of extremely high value, casting further doubt on the Kohuses' value of the trading card collection. The Kohuses' failure to take reasonable measures to insure the trading card collection and the treatment of the card collection vis-a-vis their daughter's college memorabilia and items significantly detracts from the stated value attributed to the cards by the Kohuses.

The Court adopts the appraisal given by Mr. Connelly as a more realistic valuation of the trading card collection under the circumstances presented by this case. The grades assigned to the Kohus trading card collection were not assigned by a professional, independent, third-party grader, but by Mr. Kohus himself at the point of sale based on representations by the seller and the advice of other collectors and traders. Yet, the difference in value from one grade level to the next can be substantial. As noted by Mr. Connelly in his report, the value of the Pete Rose Rookie Card dropped over \$18,000.00 from "Gem" mint to "Near" mint. The Court acknowledges that Mr. Connelly appraised the cards effective July 17, 2012, based on the mistaken assumption that the loss occurred on July 18, 2012. However, the Court also notes that many of Mr. Lakes' estimates were based on comparisons to cards sold in 2012, and not 2011 when the SBU occurred. (*See, e.g.*, Doc. 560, Kohus Request for Review, Binder 2, Tab A, Card Collection Valuation lines 4, 16, 70, 386, 504, 592). In any event, because both Mr. Lakes and Mr. Connelly testified that the cards generally appreciated in value, reliance on Mr. Connelly's 2012 estimate does not prejudice the Kohuses.

Finally, Mr. Kohus testified that the grading of trading cards is subjective as "beauty is in the eye of the beholder." He acknowledged that different people will place different grades on the same card, similar to a school teacher's grading of a student's essay. However, the one-half

million dollar award sought by Mr. Kohus in this case depends on the accurate grading of the cards and other conditions such as supply and demand. These variables are uncertain given the circumstances of this case. There is no doubt that the trading card collection was valuable and important to Mr. Kohus. But where the value is uncertain given the failure to have the cards graded by an independent, third-party grader and the destruction of the cards in the SBU, Mr. Kohus must bear the burden of that uncertainty and not the rate payers of Hamilton County. Taking an average based on PSA population reports as Mr. Connelly did in his appraisal appears to be the fairest way to estimate the fair market value of the trading card collection. Mr. Connelly's estimate is adopted, and the Kohuses are awarded \$57,000.00 for the trading card collection.

IV. The Police and Safety Patch Collection

The Kohuses seek damages of \$44,920.00 for the Police and Safety Patch Collection ("Patch Collection") consisting of approximately 2,000 patches. Mr. Kohus testified that he acquired most of his collection at no cost either by writing to police departments or by trading with other collectors, although he did buy some patches. (Kohus Depo., pp. 148-149). He estimated that 50% of his collection was given to him free of charge and that 50% was acquired through sales from individuals or manufacturers. (*Id.*, p. 151). Mr. Kohus represented that all of the patches in his collection were "Grade 10 MINT (Perfect) CONDITION," meaning they were new, never used, and rarely handled. None of the patches in the collection were valued at less than \$10.00.

James Lakes, the Kohuses' appraiser, stated there is no readily accessible online or published list of prices or values for collectible patches and that the market for such patches

consists of an active community of collectors. He opined that the “only commercially reasonable means of evaluating whether the fair market values assigned by Mr. Kohus were accurate was to conduct an investigation and solicit information from other prominent collectors in the market place.” (Lakes Aff., ¶ 11). Mr. Lakes therefore based his appraisal of the patches on the value assigned by Mr. Kohus and by talking to other people who trade in patches to confirm the value assigned by Mr. Kohus. (Lakes Depo., p. 115).

Bob Connelly, MSD’s appraiser, appraised the patches at a fair market value of \$6,000.00. Mr. Connelly reported that there are approximately 53,000 patches for sale on eBay. He reviewed comparable sales of police patches and opined that most patches sell for \$2.00 to \$4.00 each.⁶ (Doc. 613, Ex. B at 22). Using this average, he valued the Patch Collection at \$6,000.00.

The Court finds that Mr. Lakes has overestimated the value of the Patch Collection. No patch in the collection is appraised under \$10.00, despite that fact that Mr. Kohus obtained one-half of his collection at no cost and despite the fact that Mr. Kohus could obtain new, replacement patches for less than \$10.00 each. For example, while Mr. Lakes appraised the Salem Police “Flying Witches” emblems at \$20.00 each for a total of \$200.00, the Salem, Massachusetts Police Department sells identical new patches for \$5.00 each⁷, and other identical “new” Salem “Flying Witches” emblems are offered for sale on eBay for \$4.00 to \$4.50. Given that Mr. Kohus acquired one-half of his collection at no cost, there is evidence that he can replace

⁶While Mr. Connelly reported that he found a contemporary collection of similar Ohio patches on eBay offered at a minimum of 86 cents per patch, the patches actually sold for more than this amount. (Doc. 613, Ex. B at 22).

⁷See <http://www.salempd.org/The%20Cop%20Shop%20Patches.htm> (last visited on Oct. 18, 2013),

many of the patches for free, and one-half of his collection was acquired at varying costs, the Court finds an award of \$4.00 per patch, or a total of \$8,000.00, fairly compensates for the loss of the Patch Collection.

V. Personal Property: Items Documented by ETC

After careful review, the Court awards compensation for the loss of personal property documented by ETC as follows:

Apollo inspection bill \$79

Rota-rooter bill \$0⁸

2 power backup supplies \$110

2 power backup supplies \$160

DVD player \$25

Little Tikes shopping cart \$0

iPod video \$150

Kolcraft Corner Suite playard \$148

Graco open top child swings (2) \$168

dry erase board \$65

tennis racquet \$50

cookie maker \$0

Easy-bake oven \$0

2 leather jackets \$550

⁸The maintenance and cleaning of the building sewer from the building to the point of connection with the public local sewer is the responsibility of the owner. *See* Rules and Regulations, The Metropolitan Sewer District of Greater Cincinnati, Section 2008.

Craft supplies \$10

2 picture frames \$275

100 CDs \$200

Portfolio case \$55

Sleeping bag \$25

Satellite radio tuner and accessories for home and car \$120

Dog bed \$25

Yoga mat \$10

500 catalog envelopes \$60

Electronic organizer \$15

3 Apple hard drives \$123

Que! Drive \$22

Apple computer memory module 2GB \$20.49

23 fluorescent bulbs \$50

5 books \$23

5 pairs boots \$250

100 Memorex CD-Rs \$27.05

Baseball hat \$20

3 pieces of luggage \$0

Doll high chair \$0

Doll cradle \$0

Step stool \$0

Snowman decoration \$15

Christmas ornaments \$20

Easter basket with decorations \$15

Watch band \$23

3 packages computer printer labels \$74.17

HP notebook \$0

Chipset for external hard drive \$32.50

VI. Personal Property: Items Not Documented by ETC

The Kohuses have submitted claims for the items listed on Lines 1x through 15 on the spreadsheet contained in Doc. 560, Binder 2, Exhibit B. MSD asserts that the Kohuses are not entitled to compensation for several items of personal property that were not accounted for, photographed, or documented on disposal sheets by ETC during the cleanup. The Court disagrees.

As discussed above, Amy Leugers of ETC gave Mr. Kohus the option of disposing of and documenting items himself and if he wished to do so, to begin removing items from his basement, as long as he was careful to document the items he wished to include in his claim. (Kohus Depo., pp. 57-59). Ms. Leugers testified that Mr. Kohus advised her that he did not want ETC to dispose of blueprints, paperwork affiliated with his patents and prototypes, and items he considered confidential and personal. (Leugers Depo., p. 15). Ms. Leugers also stated that while she attempted to document all of the items at the Kohus residence, she made several trips back and forth to the Kohus residence while attempting to deal with numerous other residences affected by SBU on the Kohuses' street. She admitted it was possible that items were moved

elsewhere and not documented. In addition, the Kohuses have submitted photographs of the items in question (Exhibits 1 through 34) and it is apparent from the photographs that the items catalogued were involved in the SBU incident. Under the circumstances of this case, the Court will not deny compensation for these items solely because they were not documented by ETC.

After careful review, the Court awards compensation for the loss of personal property as follows:

14 patent plaques \$1,575

Leather sofa \$1,500

Teak veneer sideboard \$1,500

Notebook adaptor \$5.00

Iced tea pot \$15

Dorm refrigerator \$272

Christmas garland \$50

Floor mat \$50

Floor mat \$50

Scanner \$90

EnviroShade \$190.64

Nixvue Vista 40gb storage device \$300

Notebook card adaptor \$20

Bulletin board \$20

2 sports photos of daughter \$20

Printer and toner \$430

Laptop computer \$680

VII. Bird Cage Prototype, Commercial Photographs, and Technical Drawings

The Kohuses seek compensation of \$65,785.87 for a design model prototype of a bird cage; \$17,250.98 for a lot of 960 professional, commercial photographs; and \$40,557.69 for a lot of 143 technical drawings. The bird cage prototype was developed in 1993-1994 and is described as “a one-of-a-kind, full-scale, handcrafted model of a bird cage constructed as a visualization aid to study, analyze, and refine the new design,” which was eventually patented and licensed. Mr. Kohus sold the rights to this bird cage to another company sometime in 2005 to 2007, which was the last time he used it. When asked whether there was any useful purpose for keeping the bird cage prototype, Mr. Kohus testified that he kept it for sales and marketing purposes to show his ability and quality of work. He stated that if he was still aggressively pursuing new product designs today, it would have a place in his “Dog and Pony Show.” (Kohus Depo., p. 79). The Kohuses estimate that it would cost about \$90,000 or more to remake the model. In setting a value for the prototype, the Kohuses used the U.S. Consumer Price Index and adjusted their cost of making the prototype (\$43,359.00) for inflation to arrive at the \$65,785.87 amount.

The 960 commercial photographs were taken in 1993-1994 and were made to document Mr. Kohus’s new product designs and inventions (Bird Cages, Bird Perches, and Cat Litter Boxes) and for purposes of advertising, selling, and marketing his products. Mr. Kohus testified that he saved these photographs for archival purposes, not for investment purposes. He admitted that it is not known whether anyone would want to purchase his photographs in the future. The Kohuses estimate the replacement cost to be over \$25,000. Adjusting the June 1994 cost of the

photographs (\$11,370.00) for inflation, the Kohuses arrived at a value of \$17,250.98.

The 143 technical drawings are described as “Master Detail Drawings for the design, engineering, tooling, and production” of various fishing product designs and inventions. The group of technical drawings were developed from 1989 to 1993. Mr. Kohus testified that there is no market for the drawings and that he has never attempted to sell or market the drawings. He also testified that if he decided to “resurrect” an item and attempt to sell or make the item, there may be a market for the technical drawings. The Kohuses estimate the cost of the drawings to be \$26,055.00, and that adjusted for inflation, the value of the technical drawings would be \$40,557.69.

The Kohuses have failed to meet their burden of showing there is any useful life for the bird cage prototype, the commercial photographs, and the technical drawings. These items were all used in Mr. Kohus’s previous business ventures and have no current market value. There is no evidence that Mr. Kohus was currently using the prototype, photographs, or drawings, or had any concrete plans to use them in any of his businesses in the future. Although Mr. Kohus testified that he could have some use for these items in the future, his claim for compensation is too speculative in the absence of any documentation of commercial or other business purposes for which he could utilize the prototype, photographs or drawings. In SBU cases, compensation for personal property is based on fair market value as of the date of loss, not original cost or cost of replacement. While these items may have sentimental value to Mr. Kohus, they have no fair market value. The Court declines to award compensation for these three items.

VIII. Real Property

The Kohuses initially sought an award of \$10,000 for damage to their real property when

they submitted their July 2011 claim to MSD. (Doc. 560, Binder 1 and Binder 2, Tab C, Line 71). They submitted an estimate from their insurance company, made two weeks after the SBU, showing total estimated repairs of \$9,043.03, with a depreciated value of \$8,299.23. (Doc. 560, Binder 2, Tab F). Their insurance company initially paid them \$7,931.07 (\$8,299.23 less the Kohuses' \$500.00 deductible) on the claim, then subsequently paid an additional \$2,068.93, for the total policy limit of \$10,000.00. *Id.* The only documented claim estimate from the insurance company is for the \$8,299.23 amount. There is no evidence as to what the \$2,068.93 covers.

After the claim was denied by MSD and 10 months after the July 2011 SBU, Mr. Lakes inspected and appraised the real property loss at \$52,430.24. (Doc. 613, Exh. G). Mr. Lakes reported that like the Kohuses' insurance company, he used the Exactimate system for his estimate. Mr. Lakes opined that it is "normal and customary for an insurance carrier to write the damages slightly above the policy limit and stop." (Doc. 560, Binder 2, Tab E, Lakes' Property Evaluation of Dwelling Repairs). He further stated that "[o]nce the policy limit has been reached, there is no need to write any other damages since that is all the carrier will pay." *Id.* Mr. Lakes opined that he believes the Kohuses' insurance adjuster "stopped writing the complete damage" once he was over the policy limit. *Id.*

There is simply no credible evidence that the Kohuses' insurance company's adjuster purposely limited the estimated amount of damages to the \$10,000 policy limit as opined by Mr. Lakes. Under Mr. Lakes' theory, the adjuster would have stopped writing the estimate at \$10,000. Yet, the written estimate of the damages given by the insurance adjuster was \$8,299.23, which was less than the \$10,000 limit. There is no further documentation from the insurance company showing any additional estimates or damages. Nor is there any evidence that

the Kohuses perceived the insurance company's estimate to be inaccurate when they submitted their claim to MSD.

In addition, there is a \$40,000 discrepancy between the insurance adjuster's estimate and Mr. Lakes' estimate. A careful review of both estimates indicates that Mr. Lakes' appraisal inflates the cost of replacement in numerous respects when compared to the Kohuses' insurance company's estimate. For example, Mr. Lakes' appraisal included removal and replacement of ceiling tiles throughout the basement when there is no evidence the ceiling tiles were damaged by the SBU. He likewise included an estimate for work on the first floor of the residence, when there is no evidence that the first floor was impacted by the SBU. Mr. Lakes' appraisal also utilizes more expensive, upgraded materials than the insurance company's estimate reflects existed in the Kohus basement. For instance, Mr. Lakes' appraisal for the basement bathroom includes cost estimates for installing *both* drywall at \$268.83 *and* "high grade" paneling at \$768.04 for a total of \$1,036.87 (Doc. 613, Exh. G at 4), while the insurance estimate lists replacement of "hardboard, good" paneling in the bathroom with "hardboard, good" paneling at a total cost of \$255.23. (Doc. 613, Exh. F at 1). Likewise, Mr. Lakes' appraisal replaces "sheet, good" linoleum in the bathroom with "premium grade" vinyl tile and "high grade" carpet at a total cost of \$521.40, as compared to the insurance company's estimate of \$288.55 for replacing the linoleum only. Mr. Lakes also included \$6,561.96 for "overhead" and "profit" in his appraisal without any explanation or justification. Mr. Lakes' estimate is simply not credible evidence of the damage to the Kohuses' real property.

The Court also denies compensation for the Dry Patrol estimate for remediation of the "main floor" of the residence as there is no evidence that SBU entered the main floor of the

residence, but only the basement. To the extent the Kohuses present evidence that there is mold behind the wallpaper in the office/exercise room (Doc. 618, Exh. 16), they have already received compensation from their insurance company for the removal, repair, and replacement of the drywall and wallpaper. (*See* Doc. 613, Exh. F at 2-3). Therefore, the Court adopts the insurance company's estimate of the damage to the Kohuses' real property.

IX. Contributory Negligence and Mitigation

MSD contends that the Kohuses failed to exercise a minimum of due care in the storage of their trading card collection. MSD argues that a portion of the fault for the damage to the trading card collection⁹ should be attributed to the Kohuses and compensation for the collection should be limited due to their contributory fault. MSD points to a notation on a WIB Incident Report form completed by Ms. Leugers that the Kohuses stated they had experienced a prior flood of some sort in their basement 10 years prior to the June 2011 incident. (Leugers Depo., Exh. A). Yet, Ms. Leugers testified that she recalled Mr. Kohus reporting that the basement had not flooded previously, contrary to the notation on the report. (Leugers Depo., p. 18). Ms. Leugers testified that MSD's records showed there had never been a previous SUB event at that location, but she acknowledged that the notation may have related to a non-SBU event, such as a washing machine overflow. (*Id.* at 19). Mr. Kohus testified that he recalled a previous incident with a broken washing machine hose that caused his basement to flood. (Kohus Depo., p. 35). Assuming the previous basement flood was from a faulty washing machine hose and not SBU, the Kohuses were nevertheless on notice that the basement was prone to flooding.

⁹MSD limits the contributory negligence argument to the trading card collection.

This Court has previously determined that under appropriate circumstances, homeowners and MSD must share the responsibility of SBU damages where there is evidence that both parties were at fault. (*See, e.g.*, Doc. 323 at 3; Doc. 439 at 2; Doc. 586 at 10). Otherwise, the citizens of Hamilton County become the “insurer” of valuable items recklessly stored on the basement floor by homeowners who deliberately choose to not take reasonable measures to insure their most valuable possessions. Where a homeowner stores a collection of trading cards arguably worth between \$57,000 and \$592,000.00 on the basement floor and chooses to not take reasonable measures to protect those items, the homeowner must bear some of the responsibility for the loss. Here, the Court attributes one-third of the loss of the trading card collection to the Kohuses and thereby reduces the total value of that loss to \$38,000.

MSD also argues that the Kohuses failed to mitigate their damages by retrieving and photographing the trading cards they claim were the most valuable in the collection after the SBU and by failing to inquire about cleaning the police patches. The Court has already fully addressed the issue of the content of the trading card collection above. The Court declines to reduce compensation for any alleged failure to inquire about cleaning the patches. The Consent Decree’s provision regarding Future Claims Mitigation applies only to claimants who have been previously compensated under the Claims Processing portion of the Consent Decree and who MSD has notified in writing of their obligation to undertake reasonable mitigation measures. (Doc. 131, Exh. 8 at 3).

X. Conclusion

In sum, the Court awards the Kohuses real and personal property damages in the amount

of \$64,082.08 less \$10,000.00 in insurance proceeds received¹⁰ plus \$500.00 for their insurance deductible, for a total award of \$54,582.08.¹¹

IT IS SO ORDERED.

Date: 10/21/13


Karen L. Litkovitz, Magistrate Judge
United States District Court

¹⁰All claims brought under the SBU program are subject to the limitations of Ohio Rev. Code § 2744.05, which requires that insurance policy payments for alleged injuries must be disclosed to the Court and subtracted from any award against a political subdivision. (Consent Decree, Ex. 8 at 3).

¹¹There is no provision for an award of expert witness fees, attorney fees, or costs under the Consent Decree. Therefore, the Court denies the Kohuses' request for reimbursement of these fees and costs.