

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LOVELLA GATEWOOD, BERTHA)
ARMSTRONG, CHRISTIAN CHAPEL BAPTIST)
CHURCH, HARRISON JOYCE, MILDRED)
ISABEL, and ELIZABETH GATE, on behalf of)
themselves and all similarly situated persons,)

Plaintiffs,)

No. 04-2297-DV

v.)

VELSICOL CHEMICAL COMPANY, an Illinois)
corporation,)

Defendant.)

**ORDER CERTIFYING CLASS AND APPROVING PROPOSED CLASS ACTION
SETTLEMENT**

Pursuant to the Court’s prior order of January 31, 2008 (Doc. 106), the Court held a hearing on Friday, May 30, 2008, to consider final certification of a settlement class and approval of the proposed class settlement in this case. For the reasons stated on the record at the hearing and those set out below, the Court certifies the class under Rule 23 of the Federal Rules of Civil Procedure and approves the proposed settlement as fair, adequate, and reasonable.

This action was originally filed in state court on April 1, 2004. It was removed by the Defendant Velsicol Chemical Corporation (Velsicol)¹ to the United States District Court on April

¹ The Defendant was originally identified as Velsicol Chemical Company. Its correct name is Velsicol Chemical Corporation and all pleadings are hereby amended to reflect this correction.

26, 2004 (Doc. 1). Jurisdiction is based on diversity under 28 U.S.C. § 1332 and is not contested. A motion to dismiss was granted in part (as to attorney fees) and denied in part (Doc. 15). Following initial disclosures and discovery, Plaintiffs moved for class certification. After a hearing, the Magistrate Judge recommended denial of the motion based on deficiencies under Rule 23(a) and (b) on April 24, 2006 (Doc. 66). Plaintiffs filed objections and the District Court affirmed in part and reversed in part, denying certification due to concerns over the then-named Plaintiffs' adequacy and the typicality of their claims (Doc. 70). Shortly thereafter, Defendant Velsicol filed a motion for partial summary judgment, which was denied (Doc. 80).

During 2007, the parties engaged in settlement negotiations for a period of several months. In addition to counsel of record for the parties, executives of Velsicol and its coverage counsel in related insurance litigation participated in these protracted discussions. The result was a settlement agreement which proposed a \$2.1 million settlement covering claims of those with an interest in some 195 properties potentially affected by alleged releases of dieldrin from Velsicol's Memphis plant. Based on the filings by the parties (Doc. 101-02) and their presentations at a hearing on January 29, 2008, the Court preliminarily certified the settlement class, approved the proposed settlement notice, preliminarily approved the class settlement, and set a final fairness hearing under Rule 23(e) (Doc. 106). Thereafter, the parties mailed actual notice to the record owners of the 195 properties in the Cypress Creek neighborhood covered by the proposed settlement, published notice in the Memphis Commercial Appeal (downtown-midtown edition), the Tri-State Defender, the Silver Star News, and at Velsicol's web site dedicated to the Cypress Creek cleanup (www.cypresscreekmemphis.com). In addition, copies of the notice were posted at the Hollywood Branch Public Library and the Vollintine-Evergreen Community Association offices (Doc. 112). Counsel for the Plaintiffs has also distributed copies

of the settlement notice at churches in the Cypress Creek neighborhood. In response, the owners of two non-residential properties gave written notice of their decision to opt-out of the class. According to counsel for the class, all other comments received by them in response to the notice were in favor of the settlement.

Based on the record currently before the Court, the elements of Rule 23(a) have been satisfied. The class consists of the owners of any interest in the 193 properties² from April 1, 2001, through the date of preliminary approval and includes at least 193 persons, which satisfies the numerosity requirement. There are common issues of both fact and law presented by the Second Amended Complaint (Doc. 96), including the presence of dieldrin and related compounds on the properties owned by class members, the source of those chemicals, and the damages resulting from any such presence. The Court's prior concerns regarding typicality and adequacy of class representatives have been addressed in two ways. First, new representative plaintiffs have been added, including additional individual plaintiffs, a local church, and the owner of rental property. Second, bodily injury claims have been carved out of the settlement and are reserved for assertion by any individual members of the class (as are defenses to those claims by Velsicol). With these changes, the adequacy and typicality prongs of Rule 23(a) are satisfied.

In addition, the proposed class meets the standards of Rule 23(b)(3) in that the common issues predominate over individual ones and the class action device is superior to other means of addressing these claims. In addition, the rulings of the Sixth Circuit in *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004) and *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir.

² The properties are those shown in Exhibits A and B to the Settlement Agreement, minus the two opt-out owners.

1988), demonstrate that such classes may be appropriate in environmental contamination cases. Thus, the Court certifies the proposed class.

With respect to the proposed settlement, the Court's task is to determine if the settlement is fair, adequate, and reasonable. Fed. R. Civ. P. 23(e); *Internat'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. General Motors Corp.*, 497 F.3d 615 (6th Cir. 2007). In doing so, the Court must look to a number of factors, including

- (1) the plaintiff's likelihood of ultimate success on the merits balanced against the amount and form of relief offered in settlement;
- (2) the complexity, expense, and likely duration of the litigation;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the judgment of experienced trial counsel;
- (5) the nature of the negotiations;
- (6) the objections raised by the class members; and
- (7) the public interest.

Brotherton v. Cleveland, 141 F. Supp. 2d 894, 904-05 (S.D. Ohio 2001). All of these factors weigh in favor of approval in this case.

The risks to Plaintiffs from continued litigation include the potential that an opposed class might not meet certification standards, as the prior proposed class did not. In addition, the statute of limitations is a potential defense to both personal injury and property damage claims. Indeed, the statute of limitations proved decisive in a related case. In addition, Plaintiffs would be required to prove contamination, causation, and damages. According to the cleanup standards set by the Tennessee Department of Environment and Conservation (TDEC), only 18 of the 195 properties required soil cleanup—all of which have now been remediated. There are also questions regarding Velsicol's insurance coverage for these claims. In the absence of such coverage, Velsicol's ability to satisfy a judgment in the amount sought in the complaint and, at the same time, to meet its cleanup obligations, must be considered.

Weighed against these risks are the substantial benefits of the settlement. Chief among these are the \$2.1 million to be distributed (after fees and expenses) to the class, which represents a substantial portion of the assessed values of the settlement properties. In addition, the carve-out for bodily injury claims leaves class members free to pursue additional compensation for those claims should they choose to do so.³ The settlement also allows the economies of class treatment and avoids potential defenses.

The significant complexity, expense, and duration of additional litigation are also clear. This case has been pending for over four years and a litigated judgment would require many more months or years and untold additional expense. The results would be uncertain for both sides. The class settlement avoids these delays and uncertainties.

The stage of the litigation also weighs in favor of the settlement. The parties have conducted discovery, have voluntarily exchanged voluminous information, have litigated motions to dismiss, for class certification, and for partial summary judgment. Plaintiffs have substantial information on the extent of dieldrin in the Cypress Creek neighborhood, on the value of the class members' properties, and on Velsicol's insurance coverage and finances. This information is sufficient for counsel and the class to make an informed decision on the merits of the settlement.

Another important factor is the opinion of experienced counsel. Here, the parties' counsels are experienced in this type of litigation, have explored the potential strengths and weaknesses of their positions, and unanimously urge the Court to approve settlement.

The nature of the negotiations leading to the settlement is also significant. Here, the negotiations occurred over a period of several months and involved numerous representatives of

³ The Court, of course, expresses no opinion on the merits of such claims.

Velsicol. Plaintiffs were advised by experts on both real estate valuation and environmental issues. The negotiations were protracted and, at times, difficult. They were plainly conducted at arm's length and there is no evidence of collusion or other improper influences.

The lack of significant opt-outs is also important. Despite extensive notice efforts designed to insure widespread public awareness in the community, there were only two opt-outs, both of commercial properties. This minimal opt-out rate of less than two percent is strong evidence that the settlement is fair to the class. Likewise, the absence of objections weighs heavily in favor of the settlement.

Finally, the public interest supports the settlement. Resolution of these claims in a fair and prompt manner will serve the parties and the public by assuring fair compensation and avoiding unnecessary transaction costs and delays from further litigation.

For all of these reasons, the Court finds that the proposed class settlement is fair, adequate, and reasonable and is approved.

IT IS SO ORDERED this 9th day of June, 2008.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT
JUDGE