UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PATRICK JOSEPH TURNER, ET AL.	*	**CIVIL ACTION**
VERSUS	*	**NO. 05-4206 CONSOLIDATED CASE**
MURPHY OIL USA, INC.	*	**SECTION "L" (2)**

* *

THIS DOCUMENT RELATES TO ALL CASES

ORDER & REASONS

The Plaintiffs' Steering Committee ("PSC") and Murphy Oil USA, Inc. ("Murphy") have settled this class action litigation involving an oil spill in the days following Hurricane Katrina. Before the Court is Defendant Murphy Oil USA Inc.'s Motion to Revert/Reallocate Surplus Compensation Funds or, Alternatively, Reform the Settlement Agreement (Rec. Doc. No. 2453). The Court has carefully considered the written memoranda and supporting documentation submitted by all parties. The Court has also examined the procedural record and applied its own knowledge of the case accumulated through its active involvement in this litigation since inception.

Accordingly, the Court is fully advised of the matter and is now ready to rule. For the following reasons, the Defendant's Motion to Revert/Reallocate Surplus Compensation Funds or, Alternatively, Reform the Settlement Agreement is DENIED.

I. BACKGROUND

On August 29, 2005, Hurricane Katrina made landfall on the Louisiana/Mississippi border, resulting in one of the most devastating natural disasters ever to occur in the United States. As the storm passed over southeastern Louisiana, twenty-foot storm surges rolled into the

Mississippi River-Gulf Outlet ("MR-GO") and swept over and breached some fourteen miles of a levee system intended to protect St. Bernard Parish, inundating nearly all of the homes and businesses with massive flood waters and devastating the community.

Among those properties impacted by the flood waters was the Murphy Oil refinery in Meraux, Louisiana. The refinery, owned and operated by Murphy, produced approximately 125,000 barrels of refined petroleum per day. Located on Murphy's property are multiple above-ground tanks used to hold crude oil. These tanks are surrounded by earthen berms, or dikes, built to contain any oil that might escape from the tanks in the event of a leak or spill.

Murphy's Tank 250-2, designed to hold 250,000 barrels of oil, was surrounded by an eight-foot-high earthen dike. Sometime shortly following the overtopping and breaches along the MR-GO levee system, flood waters reportedly up to twelve feet in height swept over, eroded, or traveled through openings in the earthen dike, entering the containment area where Tank 250-2 was located. Though the parties debate the specific facts, time frame, and causes of this incident, there is no dispute that the flood waters quickly surrounded Tank 250-2. The Tank dislodged from its moorings, causing it to float and subsequently rupture. Water entered the Tank due to hydrostatic pressure, and it ultimately began to sink. As flood waters receded and hydrostatic pressure dropped, the crude oil mixture leaked from the Tank and escaped beyond the dike. A significant amount of crude oil escaped from the Tank, spilled into the refinery property, and traveled to the surrounding neighborhood in the days following the hurricane's arrival, contaminating homes and businesses already saturated with flood waters.

On September 3, 2005, Murphy notified the federal government that the oil spill had been detected. Federal and state environmental regulators quickly traveled to the scene to assess the scope of damage and begin recovery of spilled oil. Murphy undertook a voluntary settlement

program with residents of the area neighboring its refinery. It also began cleanup and remediation efforts in public spaces and for homeowners who gave Murphy permission to test and clean their property.

After some initial discovery, motions were filed seeking class certification. Following an evidentiary hearing and extensive briefing the Court certified this matter as a class action. *See, Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597 (E.D.La.2006) (certifying class action). On March 3, 2006, the Court adopted a trial plan for this litigation, which bifurcated the trial into two different phases.[1] Phase One would address common issues of liability and general causation; Phase Two would consist of successive trials on specific causation and compensatory damages. However, Phase Two would only take place if a jury found Murphy liable in whole or in part in Phase One.

Phase One of the trial was scheduled to commence on October 2, 2006. However, on September 25, 2006, the trial was cancelled because the parties reported to the Court that they had come to an amicable resolution of the case and had signed a Memorandum of Understanding to this effect.[2] On October 9, 2006, the parties presented a Final Settlement Agreement and Notice Program to the Court,[3] which was preliminarily approved on October 10, 2006,[4] pending a fairness hearing noticed to all class members. The total amount of the settlement was $330,126,000. In addition, Murphy also agreed to pay all reasonable common benefit fees and costs to be determined by the Court. *See Turner v. Murphy Oil USA Inc.*, 472 F.Supp.2d 830, 845

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[1]*See* Rec. Doc. No. 257.

[2]*See* Rec. Doc. No. 588.

[3]*See* Rec. Doc. No. 742.

[4]*See* Rec. Doc. No. 731.

(E.D.La.2007).

A fairness hearing was held on January 4, 2007, and the matter was taken under submission by the Court at that time.[5] On January 30, 2007, the Court approved the Class Action Settlement of $330,126,000 and awarded an additional sum for common benefit fees and expenses. *Turner v. Murphy Oil, USA, Inc.*, 472 F.Supp.2d 830 (E.D.La.2007).[6]

According to the Settlement Agreement, under the Compensation Program, all residents and residential and commercial property owners in the class area who had not previously settled with Murphy, as well as all residents and property members in the specified Buyout Zone,[7] were to receive $120,000,000 pursuant to a fair and equitable allocation subject to fair approval. Murphy has certified that it will take less than $115,000,000 to compensate the class under this program, leaving a surplus of undistributed funds. The Plaintiffs have now received their funds and class counsel has reached an agreement regarding the distribution of the Common Benefit Fund among the Plaintiffs' attorneys.[8] The issue before the Court is the disposition of remaining surplus funds.

II. THE MOTION

Murphy seeks an order from this Court reverting or reallocating the remaining funds to the Defendant. Murphy details the swift actions that it took to redress the devastation caused by Hurricane Katrina. Murphy also states that its costs have far outweighed the amounts set forth in the Settlement Agreement. Accordingly, Murphy asserts that it has acted with "clean hands"

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[5]*See* Rec. Doc. No. 1042.

[6]*See* Rec. Doc. No. 1072.

[7]*See* Rec. Doc. No. 742.

[8]*See* Rec. Doc. No. 2700.

and it is entitled to equitable reformation reverting the funds to the Defendant. In the alternative, Murphy urges the Court to reform the Settlement Agreement, as the excess funds represent a bilateral mistake in which both parties overestimated the funds needed to support the Compensation Program.

The Plaintiffs' Steering Committee ("PSC") argues that Murphy has no legal right to the remaining funds, and instead requests the establishment of a cy pres distribution plan for the surplus funds. The Plaintiff class maintains a legal claim based on the terms of the Settlement Agreement. Furthermore, reformation of the contract is not warranted. The PSC argues that the contract should instead be enforced to carry out the intent of the parties to benefit the class.

III. LAW AND ANALYSIS

A. Reformation of the Contract

Murphy argues that the excess funds result from a bilateral mistake that warrants reformation of the Settlement Agreement so that the funds are returned to the Defendant. Murphy states that the Compensation Program was based on data that 2.9 persons resided in each home and that the average house size in the class area is 2000 square feet. In fact, the average home size was less than 2.9 per home, and the average house size is 1900 square feet. Murphy asserts that this overestimate was a bilateral error in contract subject to equitable reformation by the Court.

Reformation is an equitable remedy that may be used when a contract between the parties fails to express their true intent, either because of mutual mistake or fraud. *Edwards v. Your Credit Inc.*, 148 F.3d 427, 436 (5th Cir. 1998). "[T]he intent of the Settlement Agreement was to compensate the Class for their alleged losses..."[9] The Settlement Agreement included a

[9]Def.'s Mem. Supp. Revert Funds Rec Doc. No. 2453-2.

"non-reversion" clause, reflecting the intent of the parties that all payments be spent for the benefit of the class.[10] Thus, the agreement accurately reflects the intent of the parties that all funds benefit the class and, notwithstanding the existence of remaining funds under the Compensation Program, reformation of the contract is not warranted. *See also Diamond Chem. Co., Inc. v. Akzo Nobel Chemicals B.V.*, 517 F.Supp.2d 212, 218 (D.D.C. 2007) ("[A]lthough defendants now appear to suggest that they mistakenly agreed to overpay[ment] in the settlement agreements, they entered those agreements willingly and obtained a benefit from the agreements above and beyond the compensation of claiming class members, namely a release from further litigation"); *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) ("The fact that this settlement, freely entered into by experienced counsel on both sides, has in light of subsequent events proven to be more beneficial to the plaintiff classes than to the defendant does not now provide a basis for the agreement to be set aside").

B. Allocation of the Surplus Funds

In class action suits filed in federal court, the district court's power to set aside funds derives from the court's inherent power to manage its own docket and its power under Rule 23(d) of the Federal Rules of Civil Procedure to make such orders as necessary to manage the class action. When a class action settlement agreement is silent as to the distribution of excess funds, or when there is an adjudicated aggregate class recovery that results in unclaimed funds, the district judge must make the determination about the distribution of the surplus. *See* 3 Newberg and Conte, Newberg on Class Actions § 10.15 (4th ed. 2002); *see also In re Lease Oil Antitrust Litigation (No. II)*, 2007 WL 4377835, *16 (S.D. Tex. Dec. 12, 2007), *see also Wilson v.*

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[10]*See id.* at 16. This is consistent with the Buyout Program, in which the parties agreed that if Murphy did not exhaust the funds in the Buyout Zone by June 30,2007, Murphy would acquire other properties in the class area until the funds were exhausted. *See* Rec. Doc. No. 742.

Southwest Airlines, Inc., 880 F.2d 807, 811 (5th Cir. 1989).

Federal courts have held that a district court's alternatives for distributing unclaimed class action funds include: (1) pro rata distribution of the funds to located or claiming class members; (2) reversion to defendants; (3) distribution as additional attorneys' fees to class counsel; (4) escheat to a governmental body; and (5) cy pres distribution. *In re Lease Oil Antitrust Litigation (No. II)*, 2007 WL 4377835 at *18 (S.D. Tex. Dec. 12, 2007); *see also Diamond Chem. Co., Inc. v. Akzo Nobel Chemicals B.V.*, 517 F.Supp.2d 212, 217 (D.D.C. 2007); *see also Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); *see generally* 3 Newberg and Conte, Newberg on Class Actions § 10.17 (4th ed. 2002).

Neither the PSC nor Murphy seek escheat to a governmental body. Class counsel has been fully compensated. Neither of the parties to this case has a legal claim to the remaining balance of the fund. All class members who presented their claims received the full payment due them. The Defendant has willingly entered the Settlement Agreement to provide funds for the benefit of the class and to relieve itself of the burden and expense of further litigation. Thus, the class and the Defendant have no legal rights to the balance of the fund. *See Diamond Chem. Co.*, 517 F.Supp.2d at 217. However, the Defendant asserts an equitable right to the remaining funds.

1. Reversion to the Defendant

Murphy argues that it is entitled to the surplus funds to compensate for excess spending required for other components of the settlement program.. Murphy reports that it spent a total of $347 million on the class settlement, $17 million more than the $330 million projected costs outlined in the Settlement Agreement.[11] In response, the PSC claims the Defendant has no

[11]*See* Def.'s Mem. Supp. Revert Funds Rec Doc. No. 2453-2.

standing to make the request and urges the Court to use its equitable authority to invoke a cy pres distribution.

An important threshold question in determining the propriety of any form of distribution of an unclaimed portion of a class monetary award is whether the defendant has standing to contest any such distribution or to assert entitlement to a return of the money. 3 Newberg and Conte, Newberg on Class Actions § 10.24 (4th ed. 2002). Several cases have specifically ruled that the defendants have no standing for that purpose because the defendant, who paid its judgment, was not the rightful owner of the unclaimed portion of the judgment deposited in the escrow account. *Id.* In the cases where the defendant could rightfully assert a claim regarding the disposition of unclaimed funds after settlement, courts have found that the defendant had a legal or equitable entitlement to the funds. *See, e.g., Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 811 (5th Cir. 1989). Since the Court has found that Murphy has no legal right to the remaining funds, it now turns to the issue of whether Murphy has an equitable claim to the funds.

The Defendant cites *Wilson* to support its claim that it is entitled to unclaimed excess funds in a class action. In *Wilson*, the Fifth Circuit held that a cy pres distribution of a class action residual fund was an abuse of discretion.880 F.2d 807. None of the parties had a legal right to the balance of the fund. However, the court noted that the defendant sought the funds "with clean hands sufficient to claim equitable rights," as it had in effect a hiring process that it "believed in good faith to be legal, but found out to the contrary." *Id.* at 815. Furthermore, since the defendant and class counsel had reached an agreement regarding the distribution of the funds after class members had been fully compensated, the remedial purpose of Title VII to make the class whole had already been achieved, the class size was relatively small and the defendant

provided the funds with the expectation that excess funds would be returned, the defendant and class counsel had an equitable claim to the funds and applying cy pres was not an appropriate disposition of the funds.

Murphy asserts that, consistent with *Wilson,* a non-refundability clause in the Settlement Agreement should not serve as a bar to the reversion of the excess funds to the Defendant. The non-reversion clause in the Settlement Agreement at bar is distinct from that used in *Wilson*. In *Wilson*, the Court read a non-refundability clause that stated that any excess was to be disposed of at the court's discretion, in conjunction with the Judge's statements construing the provision as having the limited purpose of keeping the parties from taking advantage of each other during the settlement process. 880 F.2d at 814. The parties agreed that the clause was solely meant to protect the integrity of the claims process, and the court viewed the clause as provisional. The Court of Appeals in *Wilson* concluded that the defendant had the expectation of receiving remaining funds. Because of this expectation, the Court found that the non-refundability clause did not preclude the parties from agreeing to return some of the excess funds to the defendants.

In this case, the non-reversion clause states, "Non-reversion - All future payments under the Buyout and Compensation Programs will be spent for the benefit of Class Members." There is no indication that the parties expected the funds to be returned to the Defendant. In fact, the language in the Settlement Agreement indicates the intent of the parties that the entire negotiated settlement fund would benefit the class as a whole. The Court will not construe the Settlement Agreement contrary to the parties' express intent that the funds would not be subject to reversion.

The Defendant further argues that this is a private action in which it should not be

obliged to pay more than the amount claimed by the class. However, the Defendant's assertion that it paid the settlement funds "for the specific and limited purpose of compensating Class members for oil spill damages," Def.'s Mem. at 9, obscures the reality that the settlement not only compensated those Plaintiffs who made claims to the fund, but also relieved the Defendant of liability from the Plaintiffs' individual claims. *See Diamond Chem. Co.*, 517 F. Supp.2d at 218. The Settlement Agreement states, "Murphy has agreed to enter into this Settlement Agreement in order to put to rest all controversy in this matter and to avoid further expense and burdensome, protracted and costly litigation that would be required in defending this litigation." Thus, although Defendant now suggests that it mistakenly agreed to an overpayment in the Settlement Agreement, it entered the agreement willingly and obtained a benefit from the agreement above and beyond the compensation of claiming class members, namely a release from further litigation. *See Diamond Chem. Co.*, 517 F. Supp.2d at 218.

2. Purpose of the Litigation and Settlement Agreement

To determine the appropriate distribution of the excess funds, it is important to examine the purpose of the fund and whom it was to benefit, as well as the purpose of the litigation. *See Wilson*, 880 F.2d at 812. In *Wilson*, the litigation resulted from a violation of Title VII, a compensatory program. The fund was "established to grant relief only to males who could show that they were victims of sex discrimination in a distinct period of time and for a specific job classification." 880 F.2d at 813. The court found that the objective had been met when the claimants were compensated.

In this case, the estimates in the Settlement Agreement were based primarily on property damage. However, large sections of St. Bernard Parish were affected. The Settlement Agreement states, "It is the intent of the Recovery Program to compensate Class Members for

crude oil related damage only." Many homes were contaminated and the quality of life dissipated as a result of this damage. Although the thrust of the settlement was for property damage, the objectives of the underlying litigation included the redress of the destruction and damage caused by the oil spill. It was difficult to establish the amount of pain and suffering or physical injuries endured by members of the community, but the quality of life of the residents of St. Bernard Parish was nevertheless drastically affected.

The substantive law applicable to this case involves negligence concepts under Louisiana law, strict liability, nuisance and trespass. The legislative policy underlying these causes of action operates to deter injury and unlawful activity, disgorge unjust enrichment, and compensate victims. *See Billieson v. City of New Orleans*, 1998-1232 (La. App. 4 Cir. 3/3/99). Reversion to the Defendant would be inappropriate in light of the deterrent as well as compensatory goals of the litigation. *See Diamond Chem. Co.*, 517 F.Supp. 2d at 218. The Supreme Court has recognized, "[t]he members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481-82 (1980). The equitable claims of the class make reversion to the Defendant even less appropriate.

It would be inappropriate to give the money exclusively to claimants who have already been compensated because that would give them a windfall. *See In re Lease Oil Antitrust Litigation (No. II)*, 2007 WL 4377835 at *18 (S.D. Tex. Dec. 12, 2007). Class counsel has been fully compensated and has reached an agreement regarding the disposition of the remaining funds in the Common Benefit Fund. *See* Rec. Doc. No. 2700. It would also be inappropriate to give the funds to the Defendant because it was charged with environmental wrongdoing, deterrence is one component of the legislative policy underlying the claimants' suit, the Settlement Agreement

reflects the intent of the parties that all funds would be used for the benefit of the class, and the purpose of redressing the destruction of the community for the benefit of the class has not been fully consummated. Accordingly, the Court turns to the cy pres doctrine as a potential answer for the distribution of unclaimed funds for the indirect benefit of the class.

3. Cy Pres Distribution

The cy pres doctrine takes its name from the Norman French expression, *cy pres comme possible*, which means "as near as possible." *In re Airline Ticket Com'n Antitrust Litigation*, 307 F.3d 679, 682 (8th Cir. 2002) (citations omitted). In the class action context, it may be appropriate for a court to use cy pres principles to distribute unclaimed funds. *Id.*

The cy pres, or next best use, doctrine was first used in the charitable trust field when courts took steps to prevent the failure of trusts. *In re Lease Oil Antitrust Litigation (No. II)*, 2007 WL 4377835 at *20 (S.D. Tex. Dec. 12, 2007); *see also* Note, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 452 (1972). The cy pres doctrine has been described in the following terms: This disposition of funds that have not been individually distributed, by distributing them for the next best use which is for indirect class benefit, has been approved under the equitable power of courts in various cases under the analogous cy pres doctrine. *Id.* Under the cy pres doctrine, the courts, guided by the parties' original purpose, direct that the unclaimed funds be distributed for the indirect prospective benefit of the class. *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703 (8th Cir. 1997) (citations omitted); *see also In re Lease Oil Antitrust Litigation (No. II),* 2007 WL 4377835 at *20. The cy pres distribution serves the objectives of compensation for the class (albeit in an indirect manner), access to judicial relief for small claims, and deterrence of illegal behavior. *See* 3 Newberg and Conte, Newberg on Class Actions § 10.15 (4th ed. 2002). In such a case, the

unclaimed funds are distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated. *In re Airline Ticket Com'n Antitrust Litigation*, 307 F.3d at 682.

In applying cy pres principles in the present case the Court concludes it is appropriate for a court to consider (1) the objectives of the underlying substantive law, (2) the nature of the underlying suit, (3) the interests of the class members, and (4) the geographic scope of the case. *Diamond Chem. Co., Inc. v. Akzo Nobel Chemicals B.V., et al.*, 517 F.Supp.2d 212 (D.D.C. 2007). After full consideration of these factors, the Court concludes that it is appropriate to distribute the excess funds in a manner which will benefit the community devastated by the incident giving rise to this lawsuit. Accordingly, at the appropriate time the Court will appoint a committee to recommend a cy pres distribution consistent with the principles discussed in this Order and Reasons.

IV. CONCLUSION

For the foregoing reasons, the Defendant's Motion to Revert/Reallocate Surplus Compensation Funds or, Alternatively, Reform the Settlement Agreement (Rec. Doc. No. 2453) is DENIED.

New Orleans, Louisiana, this 13 day of February, 2009.

UNITED STATES DISTRICT JUDGE