

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:

OXFORD AUTOMOTIVE, INC., et al.¹

Case No.: 04-74377

Chapter 11

(Jointly Administered)

Hon. Steven W. Rhodes

Debtors.

**SUPPLEMENT TO THE PINE RIVER SUPERFUND CITIZEN TASK FORCE'S
RESPONSE TO THE JOINT OBJECTION OF THE DEBTORS AND THE POST-
EFFECTIVE DATE COMMITTEE TO THE CLAIM OF THE PINE RIVER
SUPERFUND CITIZEN TASK FORCE AS TO STANDING ONLY**

The Pine River Superfund Citizen Task Force (the "Task Force"), by and through its counsel, Allard & Fish, P.C., submit the following supplement to its response to the Joint Objection of the Debtors and the Post-effective Date Committee to the Claim of the Pine River Superfund Citizen Task Force as to Standing Only (the "Supplement").

Introduction

The Task Force seeks to hold the Debtors to greater responsibility in cleaning up an area of contaminated water in the Pine River (the "Contaminated Area") that the Debtors in part, on information and belief, contributed to by carelessly dumping numerous chemical substances that were the byproduct of the operation of the Lobdell Emery Corporation plant in Alma, Michigan, which later became known as Oxford Automotive, Inc. The Task Force filed a Proof of Claim in the above-captioned bankruptcy proceeding in the amount of \$100,000,000.00 for "environmental-health" (the "Claim"). On June 22, 2005, the Debtors and the Post-Effective Date Committee filed an objection to the Task Force's Claim (the "Objection"), citing, among other reasons, that the Claim should be denied because the Task Force lacked standing. The Task Force filed a Response to the Objection (the "Response"), explaining its group's formal title and status as a community advisory

¹ The Debtors are Oxford Automotive, Inc.; Oxford automotive Alabama, Inc.; Lobdell Emery Corporation; Howell Industries, Inc.; Oxford Suspension, Inc.; RPI Holdings, Inc.; Prudenville Manufacturing, Inc.; RPI, Inc.; OASP, Inc.; OASP II, Inc.; CE

group, which it noted is a formal U.S. Environmental Protection Agency ("EPA") term with accompanying guidelines. The Response also noted how a previous effort to clean the Contaminated Area failed, even though approximately \$38,000,000.00 was expended towards the cleanup effort. On August 4, 2005, the Debtors and the Post-Effective Date Committee filed a Reply in support of the Objection, alleging the Task Force failed to show that it had standing to assert a claim because it is neither a governmental entity nor a creditor with a cognizable claim under the Bankruptcy Code (the "Code").

Through its respective attorneys, the Task Force, the Debtors, and the Post Effective Date Committee have agreed that the issue of standing should be addressed prior to litigating the extent and validity of the Claim. Further, while the Task Force concedes that it is not entitled to a priority claim, it asserts that it does have standing and is otherwise entitled to an unsecured claim for damages suffered as outlined below. This Supplement provides additional facts and case law to support the Task Force's standing to bring the Claim. The amount of the Claim, should the court grant standing, can be determined via an evidentiary hearing set for a later date.

Supplemental Explanatory Facts

The Task Force's Articles of Incorporation were filed on April 21, 1998, and state that it is a domestic nonprofit corporation with a stated purpose:

to bring together those people interested in the proper and complete cleanup of the Velsicol Superfund Site and related sites in the Pine River Basin. The task force's major function will be to ensure the sites are no longer hazardous to human health and the environment. The task force will work with the Environmental Protection Agency and other agencies. It will inform and educate the community by holding meetings and by using the media to awaken public interest.

See attached Exhibit A, Articles of Incorporation. In line with its stated purpose, the Task Force is comprised of various professionals with specific knowledge and/or expertise regarding the Contaminated Area together with various citizens who allege to have knowledge of the Claim and

Technologies, Inc.; and Tool and Engineering Company, as debtors and debtors-in-possession.

allege to have been affected by the Debtors' activities.

Phillip G. Ramsey is one such member of the Task Force. He has made the following allegations in the affidavit marked as Exhibit B to the Supplement. Mr. Ramsey lives near the Contaminated Area and was also an employee of the Debtor Lobdell Emery Corporation ("Lobdell"). Id. at 2-4. Mr. Ramsey worked in Lobdell's Plating Department. Id. at 4. During this time, Mr. Ramsey observed that there were two areas in the Plating Department, one area was exclusively for copper and the other area was for zinc, nickel, and chrome. Id. at 6. He also observed that some of the chemicals that were used in these areas were nitric acid, sulfuric acid, oxalic acid, and cyanide. Id. at 7. Mr. Ramsey further observed that the chemicals came dry in paper barrels and were mixed into a solution onsite. Id. at 8. He noted that these solutions included a chromic acid, a copper solution, and a zinc solution and were stored in certain tanks. Id. at 11. He observed that these solutions were used inside the plant in a certain enclosed area that had floor drains where the solution would escape. Id. at 10. Also, the tanks that stored the solutions were drained onto the floor and allowed to flow into the above-noted floor drains, which, in turn, flowed into the Pine River by Lobdell. Id. at 12, 13.

In addition, Mr. Ramsey further alleges the following things. He worked with his father at Lobdell. Id. at 14. During this time he observed his father coming home from Lobdell and suffering nose bleeds. Id. at 14. After Mr. Ramsey's father retired from Lobdell, his father had to have corrective surgery done on his sinuses and the roof of his mouth so that he could breathe and talk comfortably. Id. at 14. Mr. Ramsey also saw his father having to use an oxygen generator because of lung damage. Id. at 15. Mr. Ramsey himself developed "chrome boils" on his knees, elbows, wrists, and the top of his feet from working at Lobdell. Id. at 16.

Jake Stockton is a resident of St. Louis, Michigan and an active member of the Task Force. He has made the following allegations in the affidavit marked as Exhibit C to the Supplement. He asserts that he is another former employee of Lobdell. Id. at 2-4. In April of 1964, just prior to

going into military service, Mr. Stockton was employed in the zinc-plating department at Lobdell, which became the Oxford Automotive plant, in Alma. Id. at 4. During his employment at the plant he followed the company's practice of emptying tanks used in the plating process, either once a week or once a month depending on the type of tank, into a common drain in the plant that went into the soil beneath the plant. Id. at 5. In addition to the zinc plating, Mr. Stockton also worked in the anodizing department and he participated in a similar company practice of dumping approximately thousands of gallons down the common drain that went into the soil beneath the plant. Id. at 6. He also participated in a company practice of dumping chromium plating down the common drain that went into the soil beneath the plant. Id. at 7. The plant was approximately 1320 feet from the Pine River. Id. at 8. He worked at the plant for approximately nine years. Id. at 9.

Another member of the Task Force is Professor Borrello. He has made the following allegations in the affidavit marked as Exhibit D to the Supplement. He has studied the effects of chemical pollution on the Pine River. Id. at 7. Professor Borrello is a resident of Alma, Michigan and an instructor of geology and the director of the Environmental Studies Program at Alma College. Id. at 4. He has consulted for the EPA, the Michigan Department of Environmental Quality, and the Michigan Department of Natural Resources. Id. at 5. He obtained a B.A. degree from Albion College, a M.S. degree from the University of Massachusetts, and he is completing his Ph.D. (ABD) from Michigan State University. Id. at 6.

Professor Borrello further alleges the following things. His research regarding the chemicals that Oxford Automotive dumped into the Pine River reveals that the nature of the chemicals, where the chemicals are located, and the chemicals' individual and collective toxicity contributed to the ecological degradation and caused measurable harm to the Pine River and surrounding areas. Id. at 8. His research also reveals that Oxford Automotive significantly contributed to the deterioration of the ecological environment of the Pine River, which collectively, along with other pollution, has caused and continues to cause a total fish consumption ban in the Pine River. Id. at 9.

Finally, Professor Borrello further alleges that he has been active in advising and observing both federal and state agencies in their respective cleanup efforts as they relate to the Pine River. Id. at 10. He believes that the cleanup costs sought by the federal and state agencies are not sufficient to adequately clean the polluted areas of the Pine River. Id. at 11.

Arnold S. Bransdorfer is another Task Force member. He has made the following allegations in the affidavit marked as Exhibit E to the Supplement. Mr. Bransdorfer is a resident of St. Louis Michigan. Id. at 2,3. The Pine River, from the city of Alma downstream to and including the city of St. Louis, provided a pleasant recreational area for Mr. Bransdorfer and his family since he moved to St. Louis Michigan in December of 1956. Id. at 4. He had taken two of his four sons fishing at the Pine River during their grade and middle school years. Id. at 5. He remembers canoe races being a feature of the Pine River for local citizens and visitors on Memorial Day weekends, and he further observed that the fishing and boating events were subsequently cancelled when the pollution in the Alma area was noted. Id. at 6, 7. Mr. Bransdorfer and his family lost interest and the ability to make use of the Pine River when they were warned of the pollution. Id. at 8.

Lester E. Eyer is a resident of Alma, Michigan. He has made the following allegations in the affidavit marked as Exhibit F to the Supplement. Mr. Eyer is another active member in the Task Force. Id. at 2, 3. Mr. Eyer was born in 1912, and he and his family moved into Alma in 1924. Id. at 4. As a child, he spent much of his time in activities on the Pine River in Alma, including swimming, fishing, canoeing, ice skating, and birding. Id. at 5. As a child, due to his family's poverty, he went door to door and sold fish taken from the Pine River. Id. at 6. His family ate the fish taken from the Pine River for lunch and dinner. Id. at 6. Mr. Eyer can no longer eat any fish caught in the Pine River from the Alma dam on downstream due to the industrial contaminants that have built up in the Pine River, which has caused a ban on the consumption of fish from the Pine River. Id. at 7. He is concerned that some poverty-stricken people still feed fish from the river to their families. Id. at 8. It upsets Mr. Eyer that the fish from the Pine River are not clean enough to

safely feed his or other families. Id. at 9.

Mr. Eyer further alleges the following things. He was informed of the Lobdell-Emery plant dumping contaminants into the Pine River. Id. at 10. This information caused him concern as a biologist and a naturalist because he knew the dumping of acids and heavy metals into the Pine River was detrimental to fish and other life in the Pine River. Id. at 11. Based on this concern, Mr. Eyer collected some minnows from upstream of the polluted part of the river and put them in a fish bowl in water collected from the polluted part of the Pine River: the minnows sickened and died in the fish bowl. Id. at 12. He has observed that upstream from Alma he could enjoy watching birds, fish, clams, turtles, and other river life; yet, he cannot enjoy these same observations on the Pine River downstream from the Lobdell-Emery plant. Id. at 13.

Norman B. Keon is resident of St. Louis Michigan. He has made the following allegations in the affidavit marked as Exhibit G to the Supplement. Mr. Keon is an active member in the Task Force. Id. at 2, 3. Mr. Keon cannot enjoy the aesthetic value of the Pine River because of the smell of the odors that he believes are given off by the chemical pollution. Id. at 4. He is in fear of swimming, or otherwise enjoying the Pine River, based on the knowledge of the chemical pollution of the Pine River. Id. at 5.

Gary J. Smith is another member of the Task Force. He has made the following allegations in the affidavit marked as Exhibit H to the Supplement. Mr. Smith is a resident of St. Louis, Michigan. Id. at 2, 3. He enjoyed fishing and swimming the Pine River as a child. Id. at 4. As a child, he went on a motorboat ride on the Pine River with his father and his brother and he enjoyed how wild and pretty the Pine River was. Id. at 5. He remembers that in 1974 the Pine River was put under a fish advisory, based on the pollution of the Pine River, that banned the eating of any fish. Id. at 6. Mr. Smith remembers that people in the area stopped eating the fish and there was a general fear of even touching the fish after the fish advisory. Id. at 7. Shortly after the fish advisory, he remembers less people were playing or relaxing along the Pine River. Id. at 8. Shortly after the fish

advisory, Mr. Smith stopped enjoying the Pine River, and since that time he has not let any of his children play near the Pine River, based on fear of the harms caused by the pollution. Id. at 9.

Legal Analysis

The Claim seeks \$100,000,000.00 in additional environmental-health cleanup fees to be put towards the cleanup of the Pine River. The documentation attached to the Claim provides a liability analysis (the "Company Memo") generated by Oxford Automotive Inc. ("Oxford"). The Company Memo makes note of, among other things, that the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") imposes joint and several liability on responsible parties based on releases of hazardous or toxic substances, materials or wastes, pollutants or contaminants, including petroleum and petroleum products. The Company Memo also notes that the Michigan Department of Environmental Quality ("MDEQ") lists Oxford's Alma plant as one of the Michigan Sites of Environmental Contamination. The Company Memo also notes that Oxford has been named as a potentially responsible party.

Pursuant to 11 U.S.C. § 501(a), any creditor of a debtor may file a proof of claim. The term "claim" is defined in 11 U.S.C. § 101(5), in relevant part, as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured...." Pursuant to 11 U.S.C. § 502(a), "[a] claim ... proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest...objects." A party in interest has objected to the Claim thereby initiating this contested matter.

This being the framework of the Supplement, it should be noted that the Bankruptcy Code of 1978 eliminated previous "concepts of provability and allowability... in favor of an all encompassing definition of 'claim,' which includes any right to payment regardless of how contingent or unmatured it might be." Matter of Baldwin-United Corp., 55 B.R. 885, 897 (Bankr.S.D. Ohio 1985). This was based on an inequity seen in allowing only debts that were provable and allowable to be discharged-

which seemed to go against affording the honest debtor his "fresh start." Specifically, in cases where liability and amount of a potential recovery on a claim were unknown, the claim could be disallowed, and, therefore, not discharged. The claim would then only appear later, thereby causing the potential of the old creditor receiving more than its pro-rata share that it would have received if the claim were allowed in the bankruptcy. To this end, the legislative history of the U.S. Bankruptcy Code reads that: "[The statute] contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 309 (1977), U.S. Code Cong. & Admin.News 1978, pp. 5787, 6266.

The Task Force is comprised of members of the community directly affected by the Contaminated Area. The Task Force alleges that state and federal agencies are not adequately resolving the continuing harm caused by the Debtors. The Task Force, based on its members' past experience, expertise, and knowledge of the Contaminated Area, alleges that it will cost approximately \$100,000,000.00 to adequately clean the contaminated area. The individual members of the Task Force live in and around the Contaminated Area and allege that they are thereby directly harmed by the Contaminated Area not being adequately cleaned.

The difficulty in assessing and valuing the damages sought by the Task Force should not impede allowing its claim. While the claim may be difficult to value, the bankruptcy code provides for the expeditious estimation of unliquidated contingent claims, and bankruptcy courts are experienced in these estimations in the similarly difficult situation of assessing and valuing class claims. See, e.g., Kane v. JohnsManville Corp., 843 F.2d 636 (2d Cir. 1988); In re Charter Co., 876 F.2d 866 (11th Cir. 1989).

An analysis of the Task Force's standing to bring a claim against the Debtors, in whole or in part, must be made with this overview of the purpose of a bankruptcy claim in mind. The bankruptcy court can allow an evidentiary hearing on the extent of the Task Force's damages if it

finds that the Task Force has standing to bring the Claim.

To have standing a plaintiff must show "injury in fact," causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). For an association like the Task Force to have constitutional standing to assert a claim on behalf of its members it needs to show that (1) the individual members would have standing, (2) the interests that it is asserting are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the action. See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 182; 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). In Friends of the Earth, Inc., certain environmental groups ("Friends of the Earth") were seeking to bring a citizen suit under the Clean Water Act against a holder of a certain federal permit (the "Defendant") for violating discharge limits, and also seeking declaratory and injunctive relief, civil penalties, costs, and attorney fees. One of the main issues that made the case reach the Supreme Court was the Defendant's challenge as to Friends of the Earth's standing to bring the claim. The Court noted that Friends of the Earth were able to show an injury in fact by the affidavits and testimony of its members that asserted reasonable concerns about the effects of the Defendant's pollutant discharges, which directly affected these members' recreational, aesthetic, and economic interests.

The Court noted that the relevant constitutional standing issue was not injury to the environment, but injury to the plaintiff. The Court relied on affidavits stating how a member "lived a half mile from [the Defendant's] facility; that he occasionally drove over the [complained of contaminated river], and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by [the Defendant's] discharges." Id. at 182-83. Additional members of the group listed how they lived near the complained of facility and used the area to picnic, walk, and bird watch by

the river where the pollutants were discharged because of the areas natural beauty; however, the member stopped these activities because of concern of the harmful effects of the discharged pollutants. Id. at 182.

The Court noted its previous holding where "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." Id. at 184, citing, Sierra Club v. Morton, 405 U.S. at 735. The Court also noted that its holding in Lujan was not contradictory to these findings. In that case, the Court held that the plaintiff could not simply rely on "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." Id. at 184, quoting, Lujan 497 U.S. at 889

In the case at had, like the Friends of the Earth, the Task Force members have been directly affected by the Contaminated Area. As noted in the Supplemental Explanatory Fact section, members of the Task Force alleged that they enjoyed the Pine River prior to pollutants being discharged into the river by, among others, the Debtors. Individual members further alleged that they enjoyed activities that took place on the Pine River that no longer take place because of the Contaminated Area. Individual members have alleged that they lost interest in fishing, or otherwise enjoying the river because of the pollution and reasonable fear of the affect of the pollution. The individual members have also alleged that the aesthetic value of the Pine River is lost to individual members because of the rivers' odors believed to be given off by the chemical pollution. Finally, individual members allege that they have a fear of swimming in, eating fish from, or otherwise enjoying the Pine River based on knowledge of the chemical pollution.

Additionally, members of the group allege that they have direct knowledge of Lobdell's practice of dumping pollutants, and members of the group allege that they have researched the affects these pollutants have on the Pine River. The Task Force alleges that federal and state

agencies are failing to seek a sufficient claim against the Defendants to adequately clean the contaminated area. The Task Force's major function is to ensure that certain sites in and around the Pine River are no longer hazardous to human health and the environment.²

Conclusion

For the reasons stated in the Response, and for the additional facts and circumstances made evident by the Supplement, the Task Force has standing to assert a claim against the Debtors. The Debtors may be liable to the Task Force under both state and federal law. The allegations made by members of the Task Force allege that the Contaminated Area harmed individual members of the Task Force, and that there are facts and circumstances that indicate that Debtors contributed to the harm suffered by the individual members. The Task Force believes that allowance of the Claim would increase the likelihood that the Contaminated Area would be adequately cleaned. Furthermore, taking steps to increase the likelihood that the Contaminated Area will be adequately cleaned is germane to the Task Force's purpose. Allowance of the Claim does not require the participation of the individual members. Allowing an evidentiary hearing to determine the extent and validity of the Claim would be in accord with the U.S. Bankruptcy Code's purpose as set forth above.

Wherefore, the Task Force respectfully requests this Court grant standing for the Task Force and to enter an Order scheduling an evidentiary hearing to be held allowing the Task Force to fully and accurately prove its claims against the Debtors.

ALLARD & FISH, P.C.

Timothy R. Graves (P64622)

² It should also be noted, as mentioned in Friends of the Earth, Congress authorized the federal district courts to entertain Clean Water Act (the "Act") suits initiated by "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), (g). Friends of the Earth, 528 U.S. at 173. The Act bars a citizen suit where the EPA or State has commenced and is "diligently prosecuting," an enforcement action. 33 U.S.C. § 1365(b)(1)(B). Furthermore, the Supreme Court has stated that the Act's allowance of citizen suits has a "central purpose of permitting citizens to abate pollution when the government cannot *or will not* command compliance." Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 62, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (emphasis added).

Colin T. Darke (P68294)
Attorneys for The Pine River Superfund
Citizen Task Force
2600 Buhl Building
535 Griswold
Detroit, MI 48226
(313) 961-6141
email: tgraves@allardfishpc.com
email: cdarke@allardfishpc.com

Dated: September 6, 2005