UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CITY OF MOUNTAIN PARK, GEORGIA, Plaintiff, v. LAKESIDE AT ANSLEY, LLC., et al., Defendants.	CIVIL ACTION NO. 1:05-CV-2775-CAP

O R D E R

This case was tried before a jury in October 2010 and is before the court for final judgment. The plaintiff has filed a request for injunctive relief, civil penalties, and attorney fees under the Clean Water Act ("CWA") against Defendants Lakeside at Ansley, LLC, ("Lakeside") and Chatham Holdings Corporation ("Chatham") [Doc. No. 1030]. Also pending before the court are motions related to the settlement reached between the plaintiff and Defendants Peachtree Residential Properties, Inc. ("Peachtree") and Day Investments II, Inc.'s ("Day") [Doc. Nos. 1027, 1049, and 1051]. Finally, the plaintiff has moved for default judgment as to Defendant Crabapple Development & Investment Corporation ("Crabapple") [Doc. No. 1031].

I. Defendants Chatham and Lakeside

A. Injunctive Relief

The plaintiff brought this action against several defendants alleging, *inter alia*, violations of the CWA. After a 10-day trial,

the jury found that Lakeside and Chatham each had committed 17 days of violations of § 402 of the CWA. Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES") and authorizes the Administrator of the Environmental Protection Agency to issue permits under this system that allow the permit holder to discharge limited quantities of pollutants under prescribed conditions. 33 U.S.C. § 1342(a)(1). The jury found that Lakeside and Chatham, during development operations had violated their permits, which resulted in pollutants being discharged into the plaintiff's lakes and streambeds. 33 U.S.C. § 1365(a) provides, "[A] successful suit may result in the award of injunctive relief and the imposition of civil penalties payable to the United States Treasury." Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000).

The United States Supreme Court has held that the CWA "permits the district court to order that relief it considers necessary to secure prompt compliance with the Act." Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); see also Crutchfield v. U.S. Army Corps of Engineers, 192 F.Supp.2d 444, 452 (E.D. Va. 2001) ("It is . . . well-settled that, upon a proper showing, an injunction is appropriate to remedy violations of the CWA. . . ."). The Supreme Court has further stated, "We read the [CWA] as

permitting the exercise of a court's equitable discretion . . . ." Romero-Barcelo, 456 U.S. at 318.

In this case, the plaintiff seeks a remedial injunction that would require Lakeside and Chatham to restore the aquatic ecosystems within Mountain Park. The plaintiff proposes three options for the physical removal of the sediment from Lakes Cherful and Garrett and the creek channels entering Lake Garrett. Alternatively, the plaintiff requests that the court order Lakeside and Chatham to allocate an amount of money consistent with one of the proposed options for removal of the sediment in the lakes and to restore the creek channels.

The proposals by the plaintiff are unreasonable. Given the evidence at trial regarding the historic amounts of sediment in the plaintiff's lakes, placing the responsibility on the defendants of this lawsuit for removing all the sediment is inequitable. Furthermore, in light of the jury's findings regarding negligence and causation by defendants other than Lakeside and Chatham, responsibility for at least some portion of the sediment in the plaintiff's lakes is attributable to other defendants (who did not violate the CWA). Finally, the finding by the jury of a mere 17 days of violations by Lakeside and Chatham when the plaintiff sought a finding of 3,514 days indicates the jury believed that Lakeside and Chatham's contribution to be a mere fraction of what

was alleged by the plaintiff. The 17-day finding is even more compelling for the conclusion that the jury believed the violations of the CWA had ended at some point prior to the trial rather than continuing until the sediment was removed as the plaintiff contended.

In light of the factors identified above, the injunctive relief proposed by the plaintiff––requiring Lakeside and Chatham to clean up the entirety of the sediment in the lakes and stream beds or pay to have this done--does not serve the purpose identified by the Supreme Court, which is to secure prompt compliance with the CWA. Moreover, fashioning an appropriate remedial injunction against Lakeside and Chatham, such as requiring removal of an amount of sediment that is proportionate to 17 days of CWA violations, is impractical. Accordingly, the court DENIES the plaintiff's request for injunctive relief.

B. Civil Penalties

33 U.S.C. § 1319(d) provides in relevant part:

> Any person who violates . . . section 1342 of this title . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Therefore, this court must determine the amount of daily penalty to be imposed against Lakeside and Chatham for the 17 days of violation of the CWA. The Eleventh Circuit has instructed:

> [T]he district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions.

Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990). The parties agree that the maximum penalty per violation per day for violations committed between January 20, 1997, and March 15, 2004, was $27,500; for violations committed between March 16, 2004, and February 11, 2009, the maximum penalty was $32,500. See 40 C.F.R. § 19.4 (2009). While the jury in this case did not specify when the 17 days of violations occurred, the jury did find that the CWA violation was ongoing as of October 26, 2005. Therefore, the court will utilize the daily maximum of $32,500 for the civil penalties at issue here. As such the maximum civil penalty that could be imposed against Lakeside and against Chatham is $552,500 each.

1. Seriousness

In evaluating the seriousness of the CWA violations by Lakeside and Chatham, the court finds persuasive the reasoning of the Hawaii District Court in employing the following factors: "(1)

the number of violations; (2) the duration of noncompliance; (3) the significance of the violation (degree of exceedance and relative importance of the provision violated); and (4) the actual or potential harm to human health and the environment." Hawaii's Thousand Friends v. City and County of Honolulu, 821 F.Supp. 1368, 1383 (D. Haw. 1993).

The jury found that Lakeside and Chatham had violated § 402 of the CWA in three ways: (1) by discharging pollutants in violation of their permits, (2) by failing to properly design, implement, and/or maintain the appropriate Best Management Practices to prevent and minimize erosion and sedimentation, and (3) by discharging storm water in violation of Georgia's water quality standards in violation of their permits. The jury specifically found that Lakeside and Chatham **had not**: (1) violated their permits by discharging storm water with a turbidity of greater than 25 NTUs when Best Management Practices were not in place, (2) failed to adhere to specific engineering principles including the protection of adjoining properties and the preservation of stream buffer in violation of their permits, (3) discharged dredged and/or fill materials into the waters or wetlands without a permit, or (4) designed, built, and maintained a structure or infrastructure, or impoundment requiring rock, sand, dirt, or other material for its

construction in the waters without a permit. Thus, the number of violations by Lakeside and Chatham is relatively small.

As to the duration of the violations, the jury found 17 days of violations when the plaintiff had sought a finding of more than 3,000 days. Therefore, the duration was exceedingly short.

In determining the significance of the violation, the court will incorporate the final consideration suggested by the Hawaii District Court: the actual or potential harm to human health and the environment. There was no potential or actual harm to human health in this case. Additionally, the harm to the lakes and streambeds at issue here is almost completely aesthetic in nature. Importantly, the harm is not permanent. Therefore, the court finds the significance of the violations by Lakeside and Chatham to be very small.

The court believes that the seriousness of violations of the CWA should be afforded great weight in determining the amount of civil penalties to impose. In summing up the findings under the prongs of the Hawaii District Court's test for seriousness, the court finds the limited violations by Lakeside and Chatham to be very low on the seriousness scale.

2. Economic Benefit

"Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance

if the penalties are to successfully to deter violations." Atlantic States, 897 F.2d at 1141. In other words, courts consider the economic benefit a violator receives as a factor in assessing civil penalties in order to prevent the violator from profiting from its wrongdoing. See United States v. Municipal Authority of Union Township, 150 F.3d 259, 265 (3rd Cir. 1998).

There is no evidence to allow the court to make a precise measurement of the economic benefit that was derived by Lakeside and Chatham through the three violations of the CWA that lasted for 17 days. The court can assume that there would have been increased costs for the developers to fully comply with their permits. However, given the short duration of the violations, the economic benefit would have been very small.

Because the court cannot precisely determine economic benefit received by Lakeside and Chatham, this factor weighs only slightly in the analysis to calculate the appropriate civil penalty.

3. History

"In determining the 'history of such violations,' courts consider the duration of defendants' current violations, whether defendants have committed similar violations in the past, and the duration and nature of all of the violations, including whether the violations are perpetual or sporadic." United States v. Smithfield Foods, Inc., 972 F.Supp. 338, 349 (E.D. Va. 1997). As set forth

above, the duration of the violations by Lakeside and Chatham was a fractional amount of what the plaintiff alleged; despite years of ongoing construction at the development, the jury found Lakeside and Chatham had violated the CWA for only 17 days. Furthermore, there is no evidence that these defendants had committed similar violations in the past.

The duration and past violations by Lakeside and Chatham are almost nil. Thus, the history factor in setting an amount for civil penalties suggests a very low penalty. However, in light of the fact that developers often create new corporate entities for each development undertaken, the court does not give the history prong heavy weight in this analysis.

4. Good-Faith Effort

"Whether defendants took any actions to decrease the number of violations or made efforts to mitigate the impact of their violations on the environment must be also considered when the court is determining the appropriate penalty for permit violations." Smithfield, 972 F.Supp. at 349-50. In this case, there is a great deal of evidence to demonstrate the good faith of Lakeside and Chatham. For example, representatives from Lakeside and Chatham met with residents of the City of Mountain Park prior to the start of development to address sedimentation concerns; Lakeside and Chatham hired an independent company to perform NPDES monitoring and to inspect the Best Management Practices in the

subdivision; and Lakeside and Chatham accepted responsibility for the Lake Cherful cove incident of January 17, 2004, and were committed to cleaning up the cove until the plaintiff filed suit.

Given the plethora of evidence of Lakeside and Chatham's good faith efforts to comply with the CWA and clean up the incident for which it accepted responsibility, this factor weighs heavily in favor of reduced penalties.

5. Economic Impact

Where a violator cannot show that a penalty will have a ruinous effect, the economic impact factor under Section 309(d) will not reduce the penalty. United States v. Gulf Park Water Co., 14 F.Supp.2d 854, 868 (S.D. Miss. 1998). On the other hand, where a defendant does demonstrate that an economic penalty will jeopardize its continued operation, the factor will weigh in favor of a reduction of the penalty. Here, there is evidence to establish that neither Lakeside nor Chatham has any assets. Lakeside was created solely to develop and sell lots at the Lakeside at Ansley subdivision and has had no income since 2005. Chatham served as the operating entity for the Chatham family businesses. However, because of the current economic downturn, the Chatham companies are not actively developing property at this time. Furthermore, a federal tax lien was filed against Chatham on September 3, 2010, in the amount of $122,749.77. The company does not have the assets available to satisfy the lien.

Because Lakeside and Chatham have no assets, any penalty would have a severe economic impact on the business entities. Accordingly, this factor weighs heavily in favor of a reduction in the civil penalty.

6. Other Factors

The court finds no other factors relevant in determining the amount of civil penalties against Lakeside and Chatham.

7. Conclusion

In balancing the factors discussed above, the court finds the daily civil penalty should be reduced from $32,500 to $1,500 for both Lakeside and Chatham. Accordingly, each of these defendants shall pay to the United States Treasury $25,500.

C. Attorney Fees under the CWA

The CWA provides, "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). The Eleventh Circuit has held, "The award of fees is within the discretion of the district court; however, the sound exercise of that discretion will not allow the court to deny fees and costs absent good cause." Tyson Foods, 897 F.2d 1128, 1143 (11th Cir. 1990).

The plaintiff argues, and the court agrees, that the "overriding purpose of allowing the recovery of attorney's fees under the CWA is to encourage private enforcement of federal environmental statutes." [Doc. No. 1030 at 51 (citing Tyson Foods, 897, F.2d at 1143 and Loggerhead Turtle v. The County Council of Valusia County, Florida, 307 F.3d 1318, 1325 (11th Cir. 2002))]. In other words, the fee-shifting provision is a method by which Congress encourages private citizens to share the burden of attaining the underlying goals of environmental laws. The CWA was enacted "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a).

In this case, the jury found that Lakeside and Chatham had violated their permits, resulting in the discharge of pollutants into the plaintiff's lakes and streambeds for a total of 17 days. There was evidence at trial that Lakeside and Chatham became aware of an incident that resulted in sediment being deposited in the plaintiff's lakes and streambeds and immediately sought access to the waters in order to clean up the discharged sediment. Rather than cooperate with these clean-up efforts, the plaintiff filed this lawsuit and foreclosed the ability of Lakeside and Chatham to take remedial action. Thus, the plaintiff's actions in this case, with respect to Lakeside and Chatham, actually thwarted the underlying goals of the CWA. Furthermore, Lakeside and Chatham each made an Offer of Judgment to the plaintiff in the amount of

$50,000 on February 27, 2008, well before the 5-day Daubert hearing and the 10-day trial.[1] The plaintiff refused the offers and continued to litigate. These factors lead the court to find that the plaintiff's goal in this lawsuit was in great part for monetary profit rather than the advancement of the goals of the CWA. Thus, there is good cause to deny fees and costs to the plaintiff. Accordingly, the request for costs and fees is DENIED.

D. Apportionment of Damages

The jury awarded nominal damages against Lakeside and Chatham in the amount of $17,500 each. These damages were for "the invasion of Plaintiff's property rights." Verdict Form at 23 [Doc. No. 1022]. With regard to Lakeside and Chatham, the jury found that these entities had invaded the plaintiff's property rights through nuisance, continuing trespass, negligence per se, and violation of riparian rights. Verdict Form at 14-19 [Doc. No. 1022]. As to the assessment of fault, the jury found that the plaintiff was 80.5% at fault and that Lakeside and Chatham were each 6% at fault. Verdict Form at 21 [Doc. No. 1022]. Under Georgia's apportionment of damages statute, the plaintiff shall not

[1] In the reply brief, the plaintiff contends that Rule 68 regarding Offer of Judgment is not applicable to citizen suits under the CWA. The plaintiff cites cases from other jurisdictions in support of this argument. Because the consideration of the Offers of Judgment by this court are not in the context of applying Rule 68, the court finds that cases from other circuits are not applicable.

be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages. O.C.G.A. § 51-12-33(g). Because the jury determined that the plaintiff was more than 50 percent responsible for the damages in this case, the plaintiff is not entitled to receive the nominal damages assessed by the jury.

E. Sanctions

In March 2008, the court granted a motion for sanctions against the plaintiff for discovery abuses. At the court's instruction, defense counsel filed affidavits documenting the attorney fees incurred as a result of the plaintiff's conduct [Doc. No. 518]. The plaintiff filed an objection to fee request submitted by defense counsel [Doc. No. 538]. The court chose to await conclusion of the case-in-chief before determining the amount of fees that will be awarded to the defendants. Given that the case is now at the final judgment stage, the court will include its ruling on the fee request herein.

In the order granting sanctions, the court ordered the plaintiff to reimburse the defendants for the following expenses:

> (1) any costs associated with cancelling the depositions scheduled to begin on August 27, 2007, including but not limited to court reporter fees, airline ticket cancellation fees, or hotel reservation cancellation penalties;
> (2) the attorney's fees and costs incurred arranging and participating in the August 27, 2007, telephone conference with the court; and

> (3) the attorney's fees and costs incurred in bringing the instant motion for sanctions.

[Doc. No. 506]. The court further ordered that the

> sanctions shall not include attorney's fees incurred in connection with reviewing the documents produced on April 24, 2007, as that review would have occurred regardless of the timing of the production and was beneficial to the defendants in preparing for the eventual depositions of the plaintiff's experts.

[Doc. No. 506].

In order to determine the proper amount of attorney's fees to be awarded as Rule 37 sanctions, the court will apply the lodestar method. See Smith v. Atlanta Postal Credit Union, 350 Fed.Appx. 347 (11th Cir. 2009). The lodestar method requires the court to multiply "the number of hours reasonably expended on the litigation . . . by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The lodestar method requires "[t]he fees applicant [to] produce satisfactory evidence that the requested rate is in line with prevailing market rates." Loranger v. Stierheim, 10 F.3d 776, 781 (11th Cir. 1994).

In this case, the defendants have submitted affidavits from three attorneys setting forth billing rates as follows:

Elizabeth B. Davis ($395/$405)

Bradley C. Skidmore ($350/$360)

Andrea M. Booher ($255/$260)

[Doc. No. 518]. While the plaintiff objects to the billing rates on the grounds that the rates are higher than other defense counsel

charged in the same case and because there is an arbitrary change in the rate. In reply, the defendants explain that Lakeside and Chatham were uninsured entities and that defense counsel representing other parties in the litigation were employed by insurance companies at discounted rates. Also, the defendants justify the increase in the fee award ($10 for Davis and Skidmore, $5 for Booher) as the annual firm-wide fee increase that occurs on October 1.

The Eleventh Circuit has held that a district court may use its own discretion and expertise to determine the appropriate hourly rate to apply for an attorney's fee award. See Loranger, 10 F.3d at 781; Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1303 (1988). In considering prevailing billing rates in Atlanta for the time period at issue, the court concludes that the rates charged were somewhat excessive. Accordingly, the court will base the fee award on the following rates:

Elizabeth B. Davis ($325/$335)

Bradley C. Skidmore ($280/$290)

Andrea M. Booher ($195/$205)

Next the court will analyze the number of hours expended by each attorney and determine (1) whether the tasks fall into the categories designated for reimbursement by the court in the March 19, 2008 order [Doc. No. 506], and (2) whether the time expended on the reimbursable tasks was reasonable.

On August 24, 2007, Davis billed 2.5 hours for reviewing correspondence from plaintiff's counsel regarding the delivery of the last minute document production and discussing this with other counsel. On the same date, Skidmore billed 2.5 hours for receipt and review of the last minute document production and discussions with other counsel on how to address the issue with the court. Because the court has specifically excluded review of the documents from the category of reimbursable expenses, the claimed activities for August 24 are overly inclusive. The court finds that discussions among counsel regarding strategy for addressing the issues with the court are reimbursable and the reasonable amount of time for these discussions is 1 hour each for Davis and Skidmore.

On August 26, 2007, Skidmore billed 1.3 hours for review of authorities and discussions with other counsel. On the same date, Davis billed 0.4 hours for discussions with other counsel regarding strategy for addressing the discovery issues with the court. The court finds tasks to be reimbursable, but the time spent was excessive. Accordingly, Skidmore will be afforded 0.5 hours and Davis will be afforded 0.2 hours.

On August 27, 2007, Davis billed 1.8 hours for discussions with other counsel and research related to sanctions. On the same date, Booher billed 4.5 hours for the telephone conference with the court, telephone conference with other defense counsel, and research related to the motion for sanctions and relief available. Also on

August 27, 2007, Skidmore billed 3.2 hours for conferring with other defense counsel, participating in the telephone call with the court, discussing strategy for filing the motion for sanctions, and beginning work on the motion. These tasks are reimbursable, but the time spent is excessive. Accordingly, the court reduces the amount for each attorney to the following: Davis 0.5 hours, Skidmore 1.2 hours, and Booher 2 hours.

On August 28, 2007, Booher billed 7.5 hours for continued research, drafting, and analysis for motion for sanctions and continued review of the expert documents. On the same date, Skidmore billed 3.9 hours for continued work on the motion for sanctions and reviewed and responded to correspondence from defense counsel. Also on August 28, 2007, Davis billed 5.5 hours for review of the document production, discussion with other counsel and review and revision of the motion for sanctions. Because the court has specifically excluded review of the documents from the category of reimbursable expenses, the claimed activities for August 28 are overly inclusive. The court finds that research, drafting, analyzing, and revising the motion for sanctions are reimbursable tasks. Also reimbursable is the time spent on correspondence to and from other defense counsel on the issue of the sanctions motion. The reasonable amounts of time for these tasks for each attorney is as follows: Davis 1.5 hours, Skidmore 2 hours, Booher 2.2 hours,

On August 29, 2007, Davis billed 4.4 hours for reviewing correspondence from and having discussions with plaintiff's counsel regarding issues associated with the motion for sanctions and revising the motion for sanction and supporting brief. On the same day, Skidmore billed 4.5 hours for working on the motion for sanctions and reviewing and drafting a response to correspondence with the plaintiff's counsel. And also on August 29, 2007, Booher billed 9 hours for continued research and analysis related to the motion for sanctions, continued review of the documents produced, review of correspondence from the plaintiff's counsel and revision of the responsive letter. Because the court has specifically excluded review of the documents from the category of reimbursable expenses, Booher's claimed activities for August 29 are overly inclusive. Review and draft of correspondence related to the motion for sanctions and work on the motion itself is reimbursable, but the court finds the time allotted to be excessive. Accordingly, the time will be reduced to the following: Davis 1.2 hours, Skidmore 1.7 hours, and Booher 1 hour.

On August 30, 2007, Davis billed 2.3 hours for review and response to correspondence from the plaintiff's counsel and other defense counsel related to the motion for sanctions, discussions with other counsel, and continued drafting and revising of the motion for sanctions and brief. On the same date, Skidmore billed 4.8 hours for review and analysis of comments by other defense

counsel regarding the motion for sanctions and review of the documents produced by the plaintiff. Booher billed 6.5 hours for continued research on the motion for sanctions and for two telephone calls with other defense counsel. Because the court has specifically excluded review of the documents from the category of reimbursable expenses, Skidmore's claimed activities for August 30 are overly inclusive. Discussions, telephone calls, and review and drafting of the motion for sanctions are reimbursable, but the court finds the time allotted to be excessive. Accordingly, the time will be reduced to the following: Davis 1 hour, Skidmore 1.5 hours, and Booher 3 hours.

On August 31, 2007, Skidmore billed 1.5 hours for revision of the motion for sanctions. The court finds this task reimbursable and the time spent reasonable.

On September 4, 2007, Davis billed 1.1 for discussions with Skidmore and Booher regarding the motion for sanctions and review and response to correspondence from other defense counsel. On the same date, Skidmore billed 2.0 hours for work on issues for the motion for sanctions. The court finds these tasks are reimbursable, but the time spent is excessive. Accordingly, the time is reduced to 0.5 hours for Davis and 0.7 hours for Skidmore.

On September 6, 2007, Davis billed 0.7 hours for discussions with Booher regarding the motion for sanctions. On the same date, Skidmore billed 1.9 hours for a telephone call from another defense

counsel and conferring with Davis regarding the motion for sanctions. The court finds these tasks are reimbursable, but the time spent is excessive. Accordingly the times are reduced to the following: 0.3 for Davis and 0.5 for Skidmore.

On September 7, 2007, Davis billed 1.4 hours for review and analyzation of the motion for sanctions and supporting brief. On the same date, Skidmore billed 1.5 hours for work on the sanctions motion and review of case law. Also on September 7, Booher billed 6.7 hours for continued revisions to the motion for sanctions. The court finds these tasks are reimbursable, but the time spent is excessive. Accordingly, the time is reduced to the following: Davis 0.5, Skidmore 0.7, and Booher 1.2 hours.

On September 10, 2007, Skidmore billed 3.9 hours for review of correspondence and comments from other defense counsel for the sanctions motion, revisions to the motion, and other expert witness issues. Booher billed 4.0 hours for continued revisions to the motion for sanctions and the proposed scheduling order. Because "other expert witness issues" are not reimbursable tasks, Skidmore's claimed tasks for September 10 are overly excessive. Work on the sanctions motion and the proposed scheduling order are reimbursable, but the time spent is excessive. Accordingly the time is reduced to the following: Skidmore 1 hour and Booher 1 hour.

On September 11, 2007, Davis billed 1.2 hours, Skidmore billed 2.2 hours and Booher billed 3.5 hours. All three attorneys worked

at finalizing the motion for sanctions. Given the vast amount of time spent on this motion in prior days, the court finds these additional expenditures of time unnecessary and therefore not reimbursable.

On October 1, 2007, Davis billed 1.8 hours for consideration of issues raised in the plaintiff's response to the motion for sanctions as well as discussions with other defense counsel regarding the response. On the same date, Skidmore billed 0.7 hours for review of the plaintiff's response and research related thereto, and Booher billed 1 hour for the same tasks. The court finds these tasks to be reimbursable and the time spent reasonable.

On October 2, 2007, Davis billed 0.8 hours for work on the response to the plaintiff's response and Skidmore billed 0.6 hours to address issues for sanctions motion. Because the sanctions motion was completed at the time, Skidmore's time will not be allowed. Davis's work on replying to the plaintiff's response is a reimbursable task, and the time spent is reasonable.

On October 12, 2007, Booher billed 3.3 hours for research and review in preparation for drafting the reply brief regarding the sanctions motion. The court finds this task reimbursable, but the time spent was excessive. Accordingly, these hours are reduced to 1.5 hours.

On October 16, 2007, Booher billed 8.5 hours for continued work on drafting the reply brief and preparing the revised scheduling

order. The court finds these tasks reimbursable, but the time spent was excessive. Accordingly, these hours are reduced to 2.5 hours.

On October 17, 2007, Davis billed 0.9 hours for review and revision of the reply brief. The court finds this task to be reimbursable, and the time spent was reasonable.

On October 18, 2007, Davis billed 1.7 hours for review and response to correspondence from other defense counsel regarding the reply brief, revision of the brief to incorporate comments, and discussions with other defense counsel. On the same date, Booher billed 1.3 hours for drafting the affidavit regarding the document production at Grossman's deposition. The court finds these tasks to be reimbursable and the time spent reasonable.

On October 19, 2007, Skidmore billed 1.3 hours for revision and editing the reply brief. While this is a reimbursable task, the court finds that the time allowed for the brief in prior days was sufficient to complete the task. Accordingly, Skidmore's 1.3 hours on October 19 will not be reimbursed.

On October 22, 2007, Booher spent 0.3 hours reviewing the plaintiff's motion for leave to file a surreply. The court finds this task reimbursable and the time spent reasonable.

Based on the reasonable billable rate and the reasonable time spent for the reimbursable tasks, the court finds the fee award

total to be $11,570.50.[2] Accordingly, the plaintiff shall pay to counsel for defendants Lakeside and Chatham $10,947.50 as sanctions for discovery abuses pursuant to Rule 37.[3]

II. Defendants Day and Peachtree

The remaining issues as to Defendants Peachtree and Day are addressed in those defendants' motion for judgment [Doc. No. 1027], motion to withdraw the motion for judgment and a new motion for judgment [Doc. No. 1049], and motion to supplement the motion to withdraw [Doc. No. 1051].

On November 9, 2010, Peachtree and Day filed a motion for judgment on the jury's verdict pursuant to Federal Rule of Civil Procedure 54(b) [Doc. No. 1027]. The plaintiff filed a brief in opposition [Doc. No. 1032]. However, in a letter dated December 28, 2010, counsel for Peachtree notified the court that Peachtree, Day, and the plaintiff had reached an agreement to resolve all outstanding matters among these three parties. As a result, on

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[2] This total results from the following calculations: Davis 6.7 hours X $325 (pre-October 1 rate)+ 5.2 hours X $335 (October 1 and beyond rate); Skidmore 12.3 hours X $280 + 0.7 hours X $290; Booher 10.4 hours X $195 + 6.6 hours X $205.

[3] The court notes that the plaintiff has retained new counsel since the time the motion for sanctions was granted. The plaintiff takes the position that the fee award should be against its former counsel. The plaintiff cites no authority for this assertion. Accordingly, the judgment regarding sanctions shall be against the plaintiff. To the extent the plaintiff seeks reimbursement from its former counsel, that issue is beyond the scope of this litigation.

April 6, 2011, Peachtree filed a motion to withdraw its original motion for judgment and sought entry of a judgment to which there has been no objection or opposition by the plaintiff. Additionally, Day and Peachtree filed a motion to supplement the prior motion to include a fully executed agreement among the three parties.

The motion to withdraw [Doc. No. 1049] and the motion to supplement [Doc. No. 1051] are GRANTED. The original motion for judgment [Doc. No. 1027] is HEREBY WITHDRAWN, and the clerk is DIRECTED to terminate the pending status of that motion.

The court has read and considered the second request for entry of judgment as well as the fully executed agreement between Peachtree, Day, and the plaintiff [Doc. Nos. 1049 and 1051]. Because the same issues of apportionment of damages addressed above is applicable to Day and Peachtree, infra, Part I.D., the court finds that the plaintiff is not entitled to receive the nominal damages awarded by the jury as to Day and Peachtree. The court will direct entry of final judgment as to these two defendants along with the other remaining defendants at the conclusion of this order.

III. Defendant Crabapple

On September 27, 2010, a few days before the start of trial, the court granted Defendant Crabapple's motion to withdraw its answer and defenses on the ground that Crabapple no longer has assets upon which to rely in order to defend against this action [Doc. No. 967]. On October 5, 2010, the clerk entered default

against Crabapple. The plaintiff now seeks a default judgment against Crabapple.

Because Crabapple has admitted all allegations of liability as to the claims asserted against it in the complaint, the issue before the court is what relief will be afforded the plaintiff as to Crabapple. The plaintiff seeks injunctive relief, civil penalties, and attorneys fees for Crabapple's violations of the CWA. Additionally, the plaintiff seeks judgment for nominal damages, attorneys fees, and punitive damages against Crabapple for the claims of nuisance, trespass, negligence, negligence per se, riparian rights, and attorney fees pursuant to O.C.G.A. § 13-6-11.

A. Clean Water Act Claims

Pursuant to the Clean Water Act, the plaintiff seeks a remedial injunction that would require Crabapple to restore the aquatic ecosystems within Mountain Park. The plaintiff proposes three options for the physical removal of the sediment from Lakes Cherful and Garrett and the creek channels entering Lake Garrett. Alternatively, the plaintiff requests that the court order Crabapple to allocate an amount of money consistent with one of the proposed options for removal of the sediment in the lakes and to restore the creek channels.

Given the evidence at trial regarding the historic amounts of sediment in the plaintiff's lakes, placing the responsibility on Crabapple for removing all the sediment is inequitable.

Furthermore, in light of the jury's findings regarding negligence and causation by defendants other than Crabapple, responsibility for at least some portion of the sediment in the plaintiff's lakes is attributable to other defendants. Therefore, the court will not impose injunctive relief in the form of remediation for the whole of the situation in the plaintiff's lakes.

Of the alternatives proposed by the plaintiff's expert Mark LaRue, which would result in the complete removal of the sediment in the lakes, both alternatives two and three would cost approximately $800,000. The court will use this figure as the basis for reaching an amount of money that it will order Crabapple to allocate for remediation of the plaintiff's lakes streams and wetlands.

In light of the evidence of historic amounts of sediment in the plaintiff's lakes dating back to the 1950s, the court finds that the defendants collectively can be held accountable for no more than 20% of the sediment removal. As to the portion that should be attributed to Crabapple, the relatively small scope of the development leads the court to conclude that Crabapple's contribution to the sediment amount is less than 2% of the total. Accordingly, the court will order Crabapple to allocate funds in the amount of $15,920.

As to civil penalties to be assessed against Crabapple, the court finds that the economic circumstances of Crabapple mean that

any order for civil penalties would be meaningless. Accordingly, the court reduces the daily amount of civil penalties assessed against Crabapple to $0.

As set forth above, the CWA provides, "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). Here, Crabapple has admitted liability for violations of the CWA. Therefore, the plaintiff is the prevailing party with respect to those claims against Crabapple. The plaintiff has submitted a fee declaration to support an award of attorney fees and litigation against Crabapple in the amount of $188,495.78. Because there has been no challenge to the reasonableness of these fees, the court will award the entire amount to the plaintiff.

B. State Law Claims

Because default against Crabapple has been entered, liability for all the state law claims has been admitted. This case, however, is somewhat unusual in that a jury rendered a verdict which assessed the level of fault as to the plaintiff, the litigating defendants, the settling defendants, and Crabapple. The jury assigned 2.5% of the fault to Crabapple and 80.5% of the fault to the plaintiff. The court finds that this jury verdict overrides the admission of complete liability that resulted from the default. Accordingly,

pursuant to O.C.G.A. § 51-12-33(g), the plaintiff is entitled to receive no damages on the state law claims for injury to the plaintiff's property. Likewise, the plaintiff is not entitled to receive punitive damages based on the state law claims. Furthermore, the court finds that the high level (more than 50%) of fault assigned to the plaintiff by the jury, overrides the admission of liability as to the plaintiff's claim for attorney fees pursuant to O.C.G.A. § 13-6-11. Therefore, the court will not award damages to the plaintiff under this statute. Moreover, because the plaintiff is receiving the full of amount of attorney fees sought against Crabapple pursuant to the fee-shifting provision of the CWA, any award of attorney fees under O.C.G.A. § 13-6-11 would be duplicative.

V. Rulings on Motions

Based on the foregoing,

(1) the plaintiff's motion for permanent injunction, civil penalties and attorney fees [Doc. No. 1030] is GRANTED in part and DENIED in part;

(2) Day and Peachtree's motion to withdraw their prior motion for judgment [Doc. No. 1049-1] is GRANTED, and the clerk is DIRECTED to terminate the pending status of the initial motion for judgment [Doc. No. 1027];

(3) Day and Peachtree's subsequent motion for judgment [Doc. No. 1049-2] is GRANTED;

(4) Day and Peachtree's motion to supplement the motion to withdraw [Doc. No. 1051] is GRANTED; and

(5) the plaintiff's motion for default judgment against Crabapple [Doc. No. 1031] is GRANTED.

IV. Final Judgment

This clerk is DIRECTED to enter final judgment as follows:

> Lakeside at Ansley, LLC is not liable to the plaintiff on its claims for violations of § 404 of the Clean Water Act and the state law claims for negligence, expenses of litigation, or punitive damages. Lakeside at Ansley, LLC is liable to the plaintiff on its claims for violation of § 402 of the Clean Water Act, nuisance, continuing trespass, negligence per se, and violation of riparian rights. The plaintiff is not entitled to injunctive relief or attorney fees based on the Clean Water Act claims against Lakeside at Anlsey, LLC. Lakeside at Ansley, LLC is liable for civil penalties for the violations of the Clean Water Act in the amount of $25,500, payable to the United States Treasury. Because of the jury's assessment of fault and Georgia law on the apportionment of damages, the plaintiff is not entitled to any damages on its claims for nuisance, continuing

trespass, negligence per se, or violation of riparian rights.

Chatham Holdings Corporation is not liable to the plaintiff on its claims for violations of § 404 of the Clean Water Act and the state law claims for negligence, punitive damages, or expenses of litigation. Chatham Holdings Corporation is liable to the plaintiff on its claims for violation of § 402 of the Clean Water Act, nuisance, continuing trespass, negligence per se, and violation of riparian rights. The plaintiff is not entitled to injunctive relief or attorney fees based on the Clean Water Act claims against Chatham Holdings Corporation. Chatham Holding Corporation is liable for civil penalties for the violations of the Clean Water Act in the amount of $25,500, payable to the United States Treasury. Because of the jury's assessment of fault and Georgia law on the apportionment of damages, the plaintiff is not entitled to any damages on the claims for nuisance, continuing trespass, negligence per se, or violation of riparian rights.

Peachtree Residential Properties, Inc., is not liable to the plaintiff on its claims for violation of the Clean

Water Act, nuisance, continuing trespass, negligence, negligence per se, attorney fees, expenses of litigation, and punitive damages. Peachtree Residential Properties, Inc., is liable to the plaintiff for violation of the plaintiff's riparian rights. However, because of the jury's assessment of fault and Georgia law on the apportionment of damages, the plaintiff is not entitled to any damages on this claim.

Day Investments II, Inc., is not liable to the plaintiff on its claims for violation of the Clean Water Act, nuisance, continuing trespass, negligence, negligence per se, attorney fees, expenses of litigation, and punitive damages. Day Investment II, Inc., is liable to the plaintiff for violation of the plaintiff's riparian rights. However, because of the jury's assessment of fault and Georgia law on the apportionment of damages, the plaintiff is not entitled to any damages on this claim.

Crabapple Development and Investment Corporation is liable to the plaintiff on all claims based on the entry of default. With regard to injunctive relief, Crabapple Development and Investment Corporation is ORDERED to

allocate $15,920 for use by the plaintiff for cleanup of the portion of sediment in the plaintiff's lakes and streambeds that is attributable to Crabapple. Crabapple Development and Investment Corporation, while liable for violations of the Clean Water Act, is assessed civil penalties in the amount of $0. The plaintiff is awarded attorney fees and costs of litigation based on the Clean Water Act in the amount of $188,495.78. Because of the jury's assessment of fault and Georgia law on the apportionment of damages, the plaintiff is not entitled to any damages on the claims for nuisance, continuing trespass, negligence, negligence per se, or violation of riparian rights. The plaintiff is not entitled to expenses of litigation or punitive damages.

The plaintiff, City of Mountain Park, Georgia, is liable to defendants Lakeside at Ansley, LLC and Chatham Holdings Corporation in the amount of $10,947.50 as sanctions for discovery abuse.

SO ORDERED, this 21st day of July, 2011.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge