No. 19A_____

In the
SUPREME COURT OF THE UNITED STATES
October Term 2019

JOSLYN MANUFACTURING COMPANY, LLC,
Applicant,

v.

VALBRUNA SLATER STEEL CORPORATION, ET AL.,
Respondents.

Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

APPLICATION TO THE HONORABLE JUSTICE BRETT M. KAVANAUGH AS CIRCUIT JUSTICE

CARTER G. PHILLIPS*
TIMOTHY K. WEBSTER
JENNIFER J. CLARK
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com
Counsel for Applicant Joslyn Manufacturing Company, LLC
* Counsel of Record

November 25, 2019

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellant, cross-appellee below) is Joslyn Manufacturing Company, LLC. Respondents (plaintiffs-appellees, cross-appellants below) are Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Applicant Joslyn Manufacturing Company, LLC states as follows: Joslyn Company, a Delaware Limited Liability Company, owns 100% of Joslyn Manufacturing Company, LLC. Danaher Corporation, a publicly held company, is the ultimate parent company.

APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court's Rules 13.5, 22, and 30.3, Applicant Joslyn Manufacturing Company, LLC ("Joslyn") hereby requests a 45-day extension of time, to and including January 20, 2020, within which to petition for a writ of certiorari in this case. Absent an extension, the petition would be due on December 5, 2019. This application is made at least 10 days before that date.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment sought to be reviewed is the decision of the United States Court of Appeals for the Seventh Circuit in *Valbruna Slater Steel Corp.* v. *Joslyn Manufacturing Co.*, 934 F.3d 553, (7th Cir. 2019) (attached hereto as Exhibit A).

JURISDICTION

The Seventh Circuit issued its decision on August 8, 2019. On September 6, 2019, the court denied Joslyn's petition for panel rehearing and rehearing *en banc* (unreported order attached as Exhibit B). This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

REASONS JUSTIFYING AN EXTENSION OF TIME

1. This case concerns the proper interpretation of the term "remediation" for purposes of the statute of limitations under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). For CERCLA cost-recovery claims, "[t]he applicable limitations period … depends on whether, and when, 'removal' or 'remediation' occurred. *See* 42 U.S.C § 9613(g)(2)(A)–(B)." *Valbruna Slater Steel Corp.* v. *Joslyn Mfg. Co.*, 934 F.3d 553, 563–64 (7th Cir. 2019). "For removal actions, the time to file suit expires three years after the removal is

complete," whereas "[f]or remedial action … the time expires six years after the remedial action's initiation." *Id.* at 563. CERCLA, in turn, defines a removal as "the cleanup or removal of released hazardous substances from the environment," and remedial actions as "those actions consistent with permanent remedy taken instead of or in addition to removal actions," including, but not limited to, "such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, [and] clay cover," among other actions. 42 U.S.C. § 9601(23)–(24). "[R]emoval generally 'refers to a short-term action taken to halt risks posed by hazardous wastes immediately,'" whereas "[r]emedial actions 'are longer term, more permanent responses.'" *Valbruna Slater Steel Corp.*, 934 F.3d at 564.

2. Joslyn Manufacturing and Supply Company, a steel manufacturer, operated the site at issue from 1928 to 1981, resulting in pollution of soil, sludge and groundwater. Slater Steels Corporation ("Slater") purchased the site in 1981 and undertook lengthy cleanup efforts. From 1981 to 1987, Slater excavated sludge and contaminated soil from an impoundment area and a waste pile on the site. Then, in 1991, Slater installed a permanent concrete cap on the excavated impoundment area and implemented a ground-water detection program. In 2000, Slater sued Joslyn to recover cleanup costs in state court under Indiana's Environmental Legal Actions statute (ELA). Slater went bankrupt while the suit was pending, and Valbruna Slater Steel ("Valbruna") acquired the site. Valbruna continued with cleanup efforts as required under its purchase agreement and in 2010 sued Joslyn in federal court for cost recovery under CERLCA and ELA. Joslyn

argued that Valbruna's claims were precluded by the prior state-court action and that the current action was time-barred because it was commenced more than six years after Slater initiated the remedial actions to excavate sludge and contaminated soil and to permanently cap the impoundment area.

3. The district court determined that Valbruna's ELA claim was barred on claim-preclusion grounds based on the prior state-court action, but that the CERCLA claim was not precluded. With regard to the statute of limitations, the district court ruled that Slater's cleanup was a "removal," not "remediation" and therefore the statute of limitations did not begin to run until Valbruna initiated its remedial cleanup in 2005. The court reduced Valbruna's costs by $500,000, finding that amount was already incorporated into Valbruna's purchase price and thus would constitute a double recovery. Moreover, the district court apportioned 25% of the ongoing costs to Valbruna.

4. Joslyn appealed the rulings on the statute of limitations and on res judicata as to the CERLCA claim, and Valbruna cross-appealed the ruling that its ELA claim was precluded, the reduction in costs, and the apportionment of liability. The Seventh Circuit affirmed across the board. As relevant here, the Seventh Circuit agreed with the district court that the claims were timely because Slater's cleanup efforts were removals, not remedial actions. It held that the nearly-eight-year-long excavation effort was a removal because it "was a temporary solution, covering only a part of the plant's pollution causes" and was performed "in response to the threat the waste posed to nearby water sources." 934 F.3d at 564. As to the cement cap, the Seventh Circuit held that even though "the fix may have been

permanent," it did not qualify as remediation because it "covered just one area" and was not meant to "substantially resolve the bulk of the site's ongoing pollution problems." *Id.* at 565. The Seventh Circuit noted that it had no need to address the district court's alternative ruling that "even if the earlier cleanups were remedial, they were separate 'operable units' from Valbruna's current cleanup," and therefore subject to separate statutes of limitations. *Id.* at 565 n.4. The court acknowledged, however, that "other circuit courts have rejected the idea that there can be multiple removal or remediation actions at a given site." *Id.*

5. The Seventh Circuit's decision warrants this Court's review, because it conflicts with multiple other circuits' interpretation of what constitutes a "remedial" action under CERCLA. The Seventh Circuit held that even though the concrete cap was permanent, it did not count as a remedial action because it "covered just one area," rather than the entire site. *Id.* at 565. Merely because the cap provided a permanent fix for only part of the affected area, however, does not deprive it of its remedial nature. Other courts have recognized that multi-phase cleanup actions qualify as a single remedial action. "[C]ourts have generally held that there can be only one removal and one remedial action per facility, *regardless of the number of phases in which the clean-up occurs*." *Yankee Gas Servs. Co.* v. *UGI Utils., Inc.*, 616 F. Supp. 2d 228, 270 (D. Conn. 2009) (emphasis added). As the Second Circuit has explained, "[v]irtually every court that has considered this issue has agreed" that "there can only be one remedial action at any given site." *N.Y. State Elec. & Gas Corp.* v. *FirstEnergy Corp.*, 766 F.3d 212, 235–36 (2d Cir. 2014) (citing, inter alia, *Colorado* v. *Sunoco, Inc.*, 337 F.3d 1233, 1241 (10th Cir. 2003) and *Kelley* v. *E.I.*

DuPont de Nemours & Co., 17 F.3d 836, 843 (6th Cir. 1994) (holding that all removal activity should be considered part of one removal action because "[i]t is simply inconsistent with the[ ] 'essential purposes' [of CERCLA] to require suit on each arguably independent removal activity" (citation omitted))). The Seventh Circuit recognized that "other circuit courts have rejected the idea that there can be multiple removal or remediation actions at a given site," 934 F.3d at 565 n.4, but in refusing to find the cement cap remedial because it offered a permanent fix for only part of the site, the Seventh Circuit would require separate treatment of each phase of a multi-phase cleanup, presumably with only the final phase qualifying as a remedial action. This approach conflicts with that of other circuits and would expand the applicable limitations period significantly beyond what Congress intended. Joslyn therefore intends to ask this Court to grant a petition for a writ of certiorari to correct the decision below and resolve the conflict among the circuits.

6. There is good cause for a 45-day extension of time to file a petition for writ of certiorari in this case. An extension is warranted to allow sufficient time in light of the upcoming holidays for undersigned counsel, who was very recently retained, to review the record and address the legal issues presented by this case.

7. The extension of time is also necessary because of the press of other client business. For example, undersigned counsel of record is responsible for presenting oral argument before the Federal Circuit in *Netlist, Inc.* v. *ITC*, No. 18-1676, on December 5, 2019. Undersigned counsel of record is also responsible for preparing the Brief for Intervenor Supporting Respondent in *NASDAQ Stock Market, LLC* v. *SEC*, No. 18-1324, in the D.C. Circuit due on December 2, 2019; a

Brief in Opposition to Plaintiff's Motion for Entry of Judgment in *Drummond Coal Sales, Inc.* v. *Norfolk Southern Railway*, No. 7:16-cv-489 in the Western District of Virginia due on December 6, 2019; a Petition for a Writ of Certiorari in *Connecticut Fine Wine & Spirits, LLC* v. *Seagull* due in this Court on December 6, 2019; a Supplemental Response Brief in *Carlton & Harris Chiropractic, Inc.* v. *PDR Network, LLC*, No. 16-2185, due in the Fourth Circuit on January 13, 2020; and Appellant's Reply Brief in *U.S. House of Representatives* v. *Mnuchin*, No. 19-5176 due in the D.C. Circuit on January 13, 2020.

CONCLUSION

For the foregoing reasons, Joslyn respectfully requests that this Court grant a 45-day extension of time, to and including January 20, 2020, within which to file a petition for a writ of certiorari.

Dated: November 25, 2019

Respectfully submitted,

/s/ Carter G. Phillips

CARTER G. PHILLIPS*
TIMOTHY K. WEBSTER
JENNIFER J. CLARK
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Applicant Joslyn Manufacturing Company, LLC

* Counsel of Record