UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JUAN DUARTE and BETSY DUARTE, on Behalf of Themselves and all Others Similarly Situated, **Plaintiffs,** **vs.** **UNITED STATES METALS REFINING COMPANY, *et al*.,** **Defendants.** --	**Civ. No. 2:17-cv-01624-EP-MAH** **CLASS COUNSEL'S MOTION SEEKING AN AWARD OF REASONABLE COSTS, ATTORNEY FEES, AND INCENTIVE AWARDS**

Pursuant to Fed. R. Civ. P 23(h) and 54(d)(2), plaintiffs, by and through undersigned counsel, respectfully move this Court for an order approving Class Counsel's Motion Seeking an Award of Reasonable Costs, Attorneys' Fees, and Incentive Awards.

Plaintiffs respectfully seek an order, in connection with and contingent upon the final approval of the proposed Class Action Settlement Agreement, that (1) awards reasonable attorneys' fees of $19,900,000; (2) approves reimbursement of litigation costs to Class Counsel in the amount of $992,396.59; and (3) approves $60,000 in incentive awards ($15,000 each) for the two named Class Representatives, Betsy Duarte and Juan Duarte, as well as former Class Representatives Betty Nobles and Leroy Nobles. All payments will be paid from the common fund. Defendants do not oppose the award sought in this Motion.

Class Counsel should be awarded reasonable attorneys' fees of $19,900,000. For the reasons set forth in Class Counsel's Memorandum in Support, application of the lodestar method is proper in this case because the precise value of the Settlement Benefits flowing to the Class

which include $42,000,000 cash + Settling Individual Homeowner cash additions + value of enhancement of $61mm NJDEP Program evade precise dollar valuation.[1] The requested fee of $19,900,000 yields a lodestar multiplier of 3.27, which is well within the accepted range in this Circuit and is presumed to yield a reasonable fee.

Even applying the percentage-of-recovery method, the $19,900,000.00 fee award equals 31.95% of the $62,280,936.70 full benefits flowing to the Class, assuming at least $1mm in Settling Individual Homeowner cash additions to the Common Fund and that the Court credits Class Counsel with enhancing the cleanup by 1/3. This percentage is well within the range of reasonable percentages of 19% to 45% awarded in this Circuit.

Class Counsel should also be awarded reimbursement for reasonable litigation costs incurred. Class Counsel advanced $992,396.59 in reasonable and necessary litigation costs in pursuing this action and effectuating this Settlement.

Class Counsel further seeks this Court's approval of $60,000 in total incentive awards, $15,000 each for the two named Class Representatives, Betsy Duarte and Juan Duarte, as well as former Class Representatives Betty Nobles and Leroy Nobles. These awards are justified under the circumstances, and the amount of incentive awards sought is an appropriate and reasonably calculated payment for services provided in developing and prosecuting the case.

WHEREFORE, Class Counsel respectfully requests that this Court enter an Order approving the award of attorneys' fees, reimbursement of reasonable costs, and incentive awards. A proposed order is attached.

Dated: May 18, 2023, Respectfully submitted,

s/ Steven J. German

[1] Specifically, Class Counsel's contribution to the $61mm residential cleanup and restoration program evades precise dollar valuation.

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Plaintiffs,	)	
vs.	)	
UNITED STATES METALS REFINING COMPANY, *et al*.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF CLASS COUNSEL'S MOTION SEEKING AN AWARD OF REASONABLE COSTS, ATTORNEYS' FEES, AND INCENTIVE AWARDS

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I. INTRODUCTION

After five years of litigation, Class Counsel has secured a considerable settlement on behalf of owners of Class 2 residential property located proximate to the former USMR Smelter, fully resolving this hard-fought litigation.

The Settlement provides a per-property cash payment of at least $17,466 from a $42,000,000 (or greater, as explained below) common fund to the owners of 1-4 family residential property in the Class Area who allege that defendants' generation, disposal, and failure to properly remediate lead, arsenic, copper, and other contaminants ("Smelter Contaminants") interfered with their use and enjoyment of property and caused a diminution in their property value. D.E. 267-2, p. 18.

In addition to cash payments, USMR has incurred more than $61,000,0000 in a residential soil cleanup program which includes community outreach; sampling and analysis; environmental remediation and property restoration; and reporting, all of which is subject to NJDEP oversight (the "NJDEP Program"). *Id*. As detailed below, the Class Settlement Benefits include Class Counsel's contribution to the NJDEP Program including, but not limited to, technical review, comments, monitoring, independent soil testing, and the discovery and deposition of the responsible oversight authority for the program (the "LSRP"), which ultimately influenced and enhanced the NJDEP Program. *Id*.

The settlement does not resolve any personal injury or medical monitoring claims, or the claims of owners of property other than 1-4 family residential property. *Id.* pp. 5-6.

The parties have also negotiated a separate $2,000,000 settlement with certain property owners outside of the Class Area (the "Settling Individual Homeowners"). *Id.* p.18. If the total aggregate of payments to all Settling Individual Homeowners is less than $2 million, USMR will also pay the remaining amount to the class action Settlement Fund. *Id.*

Finally, administration expenses up to $250,000 will be paid directly by USMR. *Id.* p. 26.

The Claims Administrator, JND Class Action and Claims Solutions, Inc. ("JND"), expects this to cover all administration costs, with no deduction from the Settlement Fund. *See* Declaration of Steven J. German in Support of Class Counsel's Motion Seeking an Award of Reasonable Costs, Attorneys' Fees, and Incentive Awards, ¶8 ("German Decl."). Fees, costs, and incentive awards may not exceed 33% of the Class Settlement benefits or 50% of the cash Settlement Fund. D.E. 267-2, p.24.

* * *

Class Counsel respectfully move the Court for an award of reasonable attorneys' fees and costs totaling $20,952,396.60, consisting of $992,396.59 in costs, $60,000 in incentive awards ($15,000 each) for the two named Class Representatives, Betsy Duarte and Juan Duarte, as well as former Class Representatives Betty Nobles and Leroy Nobles, and $19,900,000 in attorneys' fees.

In determining the reasonableness of attorneys' fees, "[t]o fully value the entire Settlement the value of the Monetary Award Fund needs to be combined with the value created by [its] other provisions." *In re Nat'l Football League Players' Concussion Inj. Litig.*, No. 2:12-MD-02323-AB, 2018 WL 1635648, at *5 (E.D. Pa. Apr. 5, 2018), aff'd in part, remanded in part, 814 F. App'x 678 (3d Cir. 2020). As detailed below (pp. 12-13), Class Counsel enhanced the NJDEP Program, thereby conferring a direct benefit to the Class for which Class Counsel deserves credit. Because the dollar value of this benefit conferred "evades precise evaluation," application of the lodestar method is proper. *Petruzzi's Inc. v. Darling-Delaware Co.*, 983 F. Supp. 595, 599 (M.D. Pa. 1996) (quoting *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir.), cert. denied, 516 U.S. 824 (1995). Here, the requested fee award of $19,900,000 yields a lodestar multiplier of 3.27, which is well within the accepted range in this Circuit.

Finally, when analyzing the fee award using the percentage-of-recovery method, the $19,900,000.00 fee award sought equates to 48.59% of the initial $42,000,000 cash fund,[1] after the

[1] Based on the Settling Individual Homeowner retainers count, all counsel estimate an ~$1,000,000

deduction of costs ($42,000,000 (fund) - $992,396.59 (costs) - $60,000 (incentive awards) = $40,947,603.40) as required by *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 501 (3d Cir. 2017). Reasonably assuming (as demonstrated below) that Class Counsel enhanced the cleanup by 1/3, that percentage would equal 31.95% of the $62,280,936.70 benefit ($41,947,603.40+ $20,333,333.33).

To summarize, the value of the entire Settlement is $42,000,000 + Settling Individual Homeowner cash additions + value of enhancement of NJDEP Program. Defendants do not oppose the requested award. D.E. 267-2, p. 24.

II. HISTORY OF LITIGATION AND WORK PERFORMED

A. Development and Prosecution of Plaintiffs' Claims

This case arises from defendants' alleged wrongful release of toxic and hazardous waste, *i.e.*, Smelter Contaminants, which was generated as a by-product of their smelter and related industrial operations located on and around 300-400 Middlesex Avenue in the Borough of Carteret (the "Smelter") and their alleged failure to test, identify, disclose, remove and properly remediate Smelter Contaminants from Class properties. Plaintiffs allege damage to their properties, loss of use and enjoyment of their properties, and diminution in property value.

Prior to initiating this litigation, Class Counsel and their scientific consultants investigated and reviewed voluminous (i) documents discussing the historic and present conditions at and around the Smelter; (ii) documents made public in prior lawsuits concerning USMR's production operations, Smelter Contaminant releases, and the environmental fate and toxicity of Smelter Contaminants; (iii) peer-reviewed and scientific literature concerning Smelter Contaminants and their fate in the environment; (iv) studies and reports concerning appropriate medical tests and screening for the early detection of serious latent disease in populations exposed to Smelter Contaminants; and (v) case law

addition to the Class Fund, totaling ~$41,947,603.40. The $19,900,000 fee equates to 47.44% of the enlarged $41,947,603.40 cash fund. Class Counsel should be allowed a proportionate fee on the enhanced Class Fund from the Settling Individual Homeowner surplus, within the fee limits.

concerning class certification of property damage and medical monitoring claims in the Third Circuit and nationwide. German Decl. ¶34. Counsel relied on that work during the litigation. *Id.* ¶36. Class Counsel also met extensively with Carteret residents to understand their concerns and interest in pursuing a case against USMR. *Id*.

Litigation commenced on January 30, 2017, when plaintiffs filed a complaint in Middlesex County Superior Court. German Decl. ¶39. Defendants promptly removed the case to this District. D.E. No. 1. Defendants filed a Motion to Dismiss. D.E. 6. After extensive briefing, the parties worked cooperatively to resolve the Motion. D.E. 50. Plaintiffs filed an Amended Complaint on consent. D.E. 51.

In August 2017, the parties began discovery in earnest. German Decl. ¶42. Fed. Civ. P. Rule 26 disclosures were exchanged. *Id*. The parties exchanged Interrogatories and Requests for Production of Documents. *Id*. In response to Defendants' Requests, plaintiffs produced hundreds of pages of property records, financial records, medical records, and other personal information. *Id.* ¶43. They also underwent invasive and (somewhat destructive) Rule 34 property inspections and physical testing. *Id*.

In response to Plaintiffs' Requests for Production of Documents and Interrogatories, defendants produced several million pages of documents in 28 separate rolling productions between August 2017 and March 2022. *Id*. ¶44. Defendants additionally provided ongoing access to a live document database containing voluminous environmental testing and remediation files in real-time. *Id*. Many of these documents consisted of highly technical environmental reports such as soil sampling data, investigation reports, and remediation records. *Id*.

Plaintiffs also served OPRA requests and subpoenas on the New Jersey Department of Environmental Protection ("NJDEP"), the NJDEP's LSRP, and other non-party environmental consultants. They collectively produced tens of thousands of additional documents. *Id*. ¶45.

The parties appeared for 34 depositions: including class representatives, 30(b)6 deponents, non-party environmental consultants and engineers, the LSRP, and 15 experts (some multiple days). *Id*. ¶46. The Class Representatives appeared for lengthy and sometimes difficult and emotional depositions. *Id*.

Before settlement, the parties appeared for 23 court conferences, including extensive in-person full-day oral argument before Judge Salas on June 23, 2021. *Id*. ¶47. The Court issued numerous Scheduling Orders, which, due to the complexity and magnitude of the case, were periodically amended and deadlines were extended. *Id*.

Expert discovery was extensive including the exchange of seven affirmative plaintiff expert reports, nine defense expert reports, plaintiff rebuttal expert reports, and depositions of each – sometimes multi-day. These experts were in highly technical fields such as environmental science, medicine, toxicology, statistics, soil chemistry/geochemistry, smelter operations, air modeling, forensic microscopy, economics, property valuation, and appraisal. *Id*. ¶48.

There was significant motion practice, including seven *Daubert* Motions to preclude plaintiffs' experts (including renewed Motions), Plaintiffs' Motion to Certify the Class (including renewed Motion), motions to dismiss, motions for leave to amend, motions to quash subpoenas, and plaintiffs' successful appeals to the District Court of Magistrate Judge Mannion's denial of Plaintiffs' 1) Motion for Leave to Amend and 2) to exchange rebuttal expert reports. *Id*. ¶49.

As the case progressed and plaintiffs learned new information during discovery, plaintiffs amended their Complaint four times to narrow the scope of the litigation. The Complaint was also amended to conform the Class definition to the Settlement Agreement. *Id*. ¶50. These amendments were not always by consent and required plaintiffs to brief a Motion for Leave to Amend. *Id*.

As demonstrated above, the parties' pre-trial work resulted in significant substantive development of this case. Throughout this time, the parties explored settlement opportunities. *Id*. ¶51.

B. The Settlement

In April 2018, the parties engaged in initial direct settlement discussions, which proved unsuccessful. German Decl. ¶28. In April 2020, the parties began settlement discussions with the aid of Hon. Diane M. Welsh (Ret.) of JAMS.[2] *Id.* Judge Welsh held an unsuccessful formal mediation on August 20, 2020. *Id*. In December 2022 counsel engaged in two days of direct settlement negotiations, at which time a settlement was reached directly between counsel for the parties. *Id.*

On February 7, 2023, the settling parties advised the Court of their agreement in principle to settle. *Id.* ¶29. On March 28, 2023, the parties filed their Joint Motion for Preliminary Approval of Class Action Settlement. D.E. 267. On April 19, 2023, the Court issued an Order Certifying Settlement Class, Preliminarily Approving Class Action Settlement and Approving Form and Manner of Notice. D.E. 276.

Pursuant to the Settlement Agreement, USMR agrees to provide cash payments to the Settlement Class Members. D.E. 267-2, p.18. The Parties have computed that the Settlement Class consists of 1,205 Eligible Properties. German Decl. ¶5. Thus, if the Settlement Fund is $21,047,603.40 after deduction of fees, costs, expenses, and incentive awards, each Eligible Property will receive an initial allocation of $17,466.89. *Id*. ¶6. In addition, if the total aggregate of payments to all Settling Individual Homeowners is less than $2 million, USMR will pay the remaining amount to the class action Settlement Fund and will increase the per property payment to a higher amount, to be determined. *Id*. ¶7.

After the Settlement Administrator determines that all valid Claim Forms have been adjusted and paid the Eligible Property Payment Amount, any remaining monies in the Class Settlement Fund,

[2] The parties began working with Prof. Francis McGovern as mediator in 2019 until his untimely death in early 2020.

if any, shall revert to USMR. *Id*. ¶9. However, this reversion shall not exceed 30% of the amount in the Settlement Fund after deduction of Class Counsel's attorneys' fees, costs, expenses, and payment of incentive awards. *Id*. If there are remaining monies after payment of this reversion to USMR, there will be a second distribution to Class Members filing valid claims, pro rata. *Id*.

The Class Settlement Benefits also include Class Counsel's contribution to the NJDEP Program as detailed below, pp. 12-13. D.E. 267-2, p.18.

The Settlement caps Class Counsel's attorneys' fees, costs, expenses, and payment of incentive awards at one-half the cash value of the common fund, initially $21,000.000. *Id*. p. 24.

Notice to the Class Members was mailed, published in a local newspaper of general circulation (print and on-line editions) in Middlesex County, New Jersey, and posted on the settlement website on May 10, 2023. German Decl. ¶33; *see also* D.E. 276, ¶16.

The time for objecting, opting out and/or filing a claim will expire 45 days thereafter. D.E. 276 ¶19.

A Fairness Hearing is scheduled for July 26, 2023, at 2:00 p.m. *Id*., ¶23.

III. THE ATTORNEY FEES SOUGHT ARE REASONABLE AND SHOULD BE AWARDED

Applications for the award of Class Counsel's attorney's fees and expenses are submitted pursuant to Fed. R. Civ. P. 23(h), which provides: "In a certified class action the Court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." *In re Diet Drugs (Phen Fen) Prod. Liab. Litig*., 582 F.3d 524 (3rd Cir. 2009); *In re Rite Aid Corp. Sec. Litig*., 396 F.3d 294, 300 n.7 (3d Cir. 2005). A court must, in "its discretion," determine the reasonableness of the fees recovered. *In re Diet Drugs*, 582 F.3d at 550. "The standard for evaluating fee awards is reasonableness." *Hall v. AT & T Mobility LLC*, No. CIV.A. 07-5325 JLL, 2010 WL 4053547, at *15 (D.N.J. Oct. 13, 2010) citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

This Circuit authorizes the use of the percentage of recovery method to determine the reasonableness of attorney fees in common fund cases, such as this one. *See Sullivan v. DB Investments, Inc*., 667 F.3d 273, 330 (3d Cir. 2011) (citations and internal quotations omitted); *In re AT&T Corp*., 455 F.3d 160, 164 (3d Cir. 2006*); In re Cendant Corp. PRIDES Litig*., 243 F.3d 722, 734 (3d Cir. 2001); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) ("The percentage-of-recovery method is generally favored * * * and is designed to allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'") (citation omitted); *In re Ins. Brokerage Antitrust Litig*., 297 F.R.D. 136, 153 (D.N.J. 2013) ("The percentage-of-recovery method is used in common fund cases, as courts have determined that 'class members would be unjustly enriched if they did not adequately compensate counsel responsible for generating the fund.'"); *Dewey v. Volkswagen of Am*., 728 F. Supp. 2d 546, 592 (D.N.J. 2010) rev'd and remanded sub nom. *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012); *Varacallo v. Massachusetts Mut. Life Ins. Co*., 226 F.R.D. 207, 248-49 (D.N.J. 2005); *In re AremisSoft Corp. Sec. Litig*., 210 F.R.D. 109, 128-29 (D.N.J. 2002).

To "fully value the entire Settlement," however, "the value of the Monetary Award Fund needs to be combined with the value created by [its] other provisions." *In re NFL*, 2018 WL 1635648, at *5. Where, as here, "the nature of the settlement evades the precise evaluation needed for the percentage of recovery method," a district court may employ the lodestar method. *Petruzzi's*, 983 F. Supp. at 599. "The lodestar is strongly presumed to yield a reasonable fee." *Id., citing Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir.1996). "The ultimate choice of methodology will rest within the district court's sound discretion." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig*., 55 F.3d 768, 821 (3d Cir. 1995).

The Third Circuit has articulated seven factors for evaluating the reasonableness of a fee request: "(1) the size of the fund created and the number of persons benefitted; (2) the presence or

absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." *Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 195 n.1 (3d Cir. 2000); *Kirsch v. Delta Dental of New Jersey*, 534 F. App'x 113, 116-17 (3d Cir. 2013); *Sullivan*, 667 F.3d at 330; *In re AT&T Corp*., 455 F.3d at 165; *In re Rite Aid Corp. Sec. Litig*., 396 F.3d at 301. These factors need not be applied in a formulaic way, and their weight may vary on a case-by-case basis. *Yong Soon Oh v. AT & T Corp*., 225 F.R.D. 142, 146 (D.N.J. 2004). "There is no set standard for determining a reasonable percentage and awards utilizing this calculation method can range from nineteen percent to forty-five percent of a common fund." *Id.* (citing *In re AremisSoft*, 210 F.R.D. at 129; *In re Computron Software, Inc., Sec. Litig*., 6 F.Supp.2d 313, 322 (D.N.J.1998)).

Additional factors that may be considered include the "*Prudential* factors": (1) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations, (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained, and (3) any "innovative" terms of settlement. *In re AT&T Corp*., 455 F.3d at 165; citing *In re Prudential Ins. Co*., 148 F.3d 338-40. Here, each of the "*Gunter* factors," as well as the discretionary "*Prudential* factors," supports granting Class Counsel's request for fees and costs.

A. The *Gunter* Factors

The Size of the Fund Created is Significant and Benefits Many Property Owners

As demonstrated above, here, the Settlement Class includes 1,205 properties, based on public property records. Despite the complexity of this case, Class Counsel obtained a significant settlement of $42,000,000 providing the members of the Settlement Class with very significant compensation for their property damage claims, *i.e*., at least $17,466 per property. In fact, as explained above, the Fund

and the per-property payments are all but certain to increase as the claims process proceeds. Considering the substantial per-property recovery, this factor weighs in favor of approving the requested fee.

Also as demonstrated above, in addition to cash payments, USMR incurred more than $61 million in the NJDEP Program for the testing, remediation, and restoration of residential properties. The Class Settlement Benefits include Class Counsel's contribution to that Program including, but not limited to, technical review, comments, oversight, monitoring, independent soil testing, and extensive discovery of the LSRP which ultimately influenced and enhanced the Program. *See* D.E. 267-2, p.18.

For instance, during the LSRP deposition Class Counsel discovered that USMR had not provided certain sampling data to the LSRP (the "transect data"), which was later considered by NJDEP in its decision-making on the aerial extent of the NJDEP Program. *See* McNally Tr., 31-35 (Pl. Ex. 1). Likewise, Class Counsel discovered that USMR was using certain data averaging techniques ("compliance averaging") that could influence the amount of Smelter Contaminants requiring excavation. *Id*., Tr. 105-106-120. Class Counsel also critiqued USMR's communication with the public concerning these issues. 215:8-224:15 (Pl. Ex. 2). Over the past five years USMR's projected cleanup expenditures increased from approximately $30,000,000-$45,000,000 to $61,000,000. *See* Brunner (Vol. 2) Tr., 391-92 (Pl. Ex. 3); *see also* D.E. 267-2, p.18 ($61,000,000 in ongoing cleanup expenditures).

Plaintiffs' contributions hardly proceeded in the vacuum of discovery and depositions. The very essence of Plaintiffs' expert reports challenged USMR's scientific positions as they were originally communicated to NJDEP and the LSRP without relevant input by anyone representing the homeowners. Moreover, in an exceptional commitment to the Class, Class counsel developed their own residential soil testing program. Class Counsel hired environmental consultants and scientists to physically test Class properties in areas that USMR was not required to test and to analyze the results

to better delineate the extent of Smelter impacts. German Decl. ¶12. Class Counsel also spent considerable time evaluating protective cleanup levels for Smelter Contaminants to protect the public. *Id.* Plaintiffs' expert Dr. Rosenfeld raised the prospect of evolving, more stringent, health-based lead cleanup standards than those considered by the NJDEP. *Id; see also* Rosenfeld Expert Report (Pl. Ex. 4). Plaintiffs' soil and smelter expert, Dr. Flowers, challenged USMR's contention that the sources of Smelter Contaminants were from some place other than the USMR Smelter. German Decl. ¶12; *see also* Flowers Report (Pl. Ex. 5). In fact, one of the most contentious motions in this case was Plaintiffs' successful opposition to Defendants' Consultants' Motions to Quash subpoenas issued to USMR's consultants who presented their version of data to the NJDEP. D.E. 97-98. Plaintiffs' air modeler likewise provided expert opinion that the Smelter's airborne emissions traveled farther than the distance portrayed by USMR. German Decl. ¶12; *see also* Sullivan Report Pl. Ex. 6. While many of these opinions were naturally contested, the important fact is that Class Counsel's discovery and development of this vital information educated the public and better informed the LSRP and the NJDEP with information to help guide USMR's ongoing cleanup obligations.[3] Class Counsel also advocated for Carteret residents whose homes were subjected to inspections, excavation, and restoration on daily concerns such as ingress, egress, timing, and other practical implications of the NJDP Program which unsurprisingly caused inconvenience. German Decl. ¶12. Thus, Class Counsel's contribution to the NJDEP program was significant.

There Has Been No Objection to the Settlement or the Fees Requested by Counsel

"The absence of substantial objections by Settlement Class members to the fees requested by Class Counsel strongly supports approval." *In re Ins. Brokerage*, 297 F.R.D. at 154. "The absence of

[3] As in *Halley*, "[t]he settlement does not affect claims for remediation under the New Jersey Spill Act, N.J.S.A. § 58:10-23.11 et seq. The Spill Act authorizes the New Jersey Department of Environmental Protection to direct cleanup of hazardous waste spills and recover the costs of cleanups from the discharger. *See* N.J.S.A. § 58:10-23.11f(a)." 861 F.3d at 493.

large numbers of objections mitigates against reducing fee awards." *Yong Soon*, 225 F.R.D. at 152; *In re Cendant Corp., Derivative Action Litig*., 232 F. Supp. 2d 327, 337-38 (D.N.J. 2002); *see also In re Rite Aid*, 396 F.3d at 305. Although the deadline for class members to object has not been reached, the Settlement has been public for one month and subject to media coverage. Yet, as of the time of this filing, plaintiffs are aware of no objections to the Settlement or the requested fees. German Decl. ¶34. However, since the time for objecting remains open, the Court may reserve judgment on this factor until the deadline has passed, prior to the Fairness Hearing. If the deadline to object passes with no filed objections, this factor would further suggest the requested fee is fair and reasonable.

The Attorneys Involved have Demonstrated their Outstanding Skill and Litigated this Complex Case Efficiently

"Environmental litigation is an identifiable practice specialty that requires distinctive knowledge." *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991). In addition to the skills and ability required in smaller cases, the complexity and demands of class actions, as well as environmental claims, often require unique legal skills and abilities from class counsel. Those skills are called upon to litigate and successfully resolve a complex class action. *See Sullivan*, 667 F.3d at 303.

This case presents complex questions of scientific facts, such as the forensic reconstruction of the Smelter, modeling of the off-site migration of Smelter Contaminants, and risk-based cleanup levels. It also involves complex questions of law such as *Daubert*, class certification, and scientific causation. Class Counsel, who vigorously prosecuted this complex case, was responsible for a resoundingly successful outcome for the Class. As set forth fully in the German Decl., the attorneys of German Rubenstein LLP, the Lanier Law Firm and Nidel & Nace are highly capable and experienced attorneys in the areas of environmental, toxic tort, and class action litigation and demonstrated their capabilities in this case. *See generally* German Decl. ¶52. Additionally, the Middlesex County law firm of Vlasac & Shmaruk participated in the early investigation of the case, providing local resources. *Id.*

Class Counsel's skill and efficiency have been apparent throughout the case. Class Counsel assembled a team of lawyers with extraordinary experience in the relevant fields. For instance, Mark Lanier is a nationally recognized trial lawyer who has served as lead trial counsel in countless mass tort, toxic tort, multi-district, class action, and environmental cases. He is widely regarded as one of the foremost toxic tort trial lawyers in the United States. *See* German Decl. ¶52. In addition, this Court has found that Steven German "is qualified, having experience with complex environmental litigation, toxic tort litigation, and class action litigation." *Halley v. Honeywell Int'l, Inc.*, No. CV103345 ES-JAD, 2016 WL 1682943, at *7 (D.N.J. Apr. 26, 2016) (Salas, J.), aff'd in part, vacated in part, remanded, 861 F.3d 481 (3d Cir. 2017); *see also* German Decl. ¶52. Christopher Nidel earned his M.S.in Chemical Engineering from M.I.T. and a J.D. from the University of Virginia School of Law. *Id*. Over the past 20 years, Mr. Nidel has combined his science and legal background to bring leadership to dozens of environmental, toxic tort and class action cases involving air, groundwater, and soil pollution. *Id.*

Class Counsel took great care to divide work in such a way that focused on each attorney's strengths, skill and experience, so as to complete tasks efficiently and reduce duplication of effort. German Decl. ¶55. For instance, Mr. German, with his 20-plus years of environmental experience in this District, guided the case through every court conference and hearing, and spearheaded the pleadings, written discovery, and motion practice. *Id.* Mr. Nidel guided the plaintiffs' expert case and conducted the technical depositions. *Id.* The Lanier Law Firm ensured that the case was developed to proceed to trial, if necessary. *Id.*

Class Counsel's exceptional legal skill, tenacity and familiarity with the facts could be seen in our legal arguments such as our compelling class certification briefing, *Daubert* opposition briefs, and our successful appeal to the District Judge of Magistrate Judge Mannion's ruling forbidding expert rebuttal reports. Class Counsel employed our skill and experience to control paper discovery and

depositions that otherwise could have become unwieldy given the history of the Smelter and sheer volume of paper, persons, and institutions with relevant information. Perhaps most importantly, our skill and experience informed our expert work and allowed us to ultimately achieve this settlement.

This skill and experience have proven to be particularly important here because of the quality, skill, and experience of defendants' counsel. *See In re Ins. Brokerage*, 297 F.R.D. at 154 (considering defendants' attorneys high level of experience, prominent firms, and background in the relevant matters); *Hall*, 2010 WL 4053547, at *19 ("The quality of opposing counsel is also important in evaluating the quality of counsel's work."); *In re Datatec Sys., Inc. Sec. Litig*., No. 04-CV-525 (GEB), 2007 WL 4225828, at *7 (D.N.J. Nov. 28, 2007) (taking into account that "Defendants were represented by highly skilled attorneys from a prominent firm with experience in these matters").

Here, defendants' attorneys are from McCarter & English, LLP and Vinson & Elkins LLP, prestigious law firms with national class action and toxic tort legal practices. Vinson & Elkins, in particular, has extensive experience defending USMR in smelter lawsuits and addressing scientific, administrative and remedial issues with the NJDEP. It has counseled USMR for many years on related issues, sometimes involving the same defense experts, and thereby possesses unique institutional knowledge and strategic advantages in litigating USMR smelter cases. *E.g., Briggs v. Freeport McMoran Copper & Gold, Inc*., Civ. No. 13-1157-M (W.D. Okl.); *Coffey v. Freeport McMoran Copper & Gold, Inc*., Civ. No. 08-0640-HE (W.D. Okl.).

Here, the experience, reputation, and ability of Class Counsel, coupled with their success "in the face of formidable legal opposition further evidences the quality of their work" and weighs strongly in favor of the requested fee. *See In re Corel Corp. Inc. Sec. Litig*., 293 F. Supp. 2d 484, 496 (E.D. Pa. 2003).

<u>The Litigation is Extremely Complex and of Long Duration</u>

As demonstrated above, this litigation was hard fought and complex. Over the past five years

the parties exchanged millions of pages in paper discovery; sat for 34 depositions; conducted property inspections; exchanged 16 expert reports, rebuttal reports, and conducted expert depositions; and attended 23 court conferences and hearings. Plaintiffs defended seven *Daubert* Motions (including renewed Motions), briefed Plaintiffs' Motion to Certify the Class (including renewed Motion), defended motions to dismiss, motions to quash subpoenas, and successfully appealed Judge Mannion's denial of Plaintiffs' 1) Motion for Leave to Amend and 2) to exchange rebuttal expert reports.

At the time of Settlement, plaintiffs were facing numerous challenges had the case continued. First, Plaintiffs' Motion to Certify the Class was pending and there is no guarantee that this Court would have certified all, or any, of plaintiffs' claims. *See, e.g., Mays v. Tennessee Valley Auth*., 274 F.R.D. 614 (E.D. Tenn. 2011). Second, plaintiffs faced a barrage of *Daubert* motions on all causation issues. Even if plaintiffs survived all of the *Daubert* motions and successfully certified the class, defendants likely would have moved for summary judgment on causation. Causation can be difficult to prove in some environmental cases. Here, for example, defendants have argued that the alleged presence of certain "background" levels of copper, arsenic, and lead or their release from other sources such as lead-based paint, pesticides, leaded gasoline, historic farming, or other regional emissions could be the source of Smelter Contaminants on plaintiffs' properties. *See generally* Defendants' Opposition to Plaintiffs' Motion to Certify Class (D.E. 164). While Class Counsel believe our scientific proofs would have prevailed and demonstrated that the magnitude, trend, pattern, and co-appearance of certain Contaminants at levels substantially above background defies any argument that an alternate source is to blame for the pollution of plaintiffs' properties, defendants' arguments could have presented obstacles to proving causation and liability. *See e.g., In re Ins. Brokerage*, 297 F.R.D. at 155; *In re Rite Aid*, 396 F.3d at 304 (considering "risks of establishing liability" in deciding fee award). Given the technical nature of the claims, these proofs were both expensive and complex.

Reaching a settlement was also difficult. As demonstrated above, settlement discussions failed

in April 2018 and again in August 2020, even with the assistance of Judge Welsh, an experienced mediator.

In sum, several important factors are present here including "extensive discovery and motion practice" and the litigation being a "costly and lengthy process for all" (*In Re Ins. Brokerage*, 297 F.R.D. at 154); "the volume of documents, the shifting factual sands that required several amended complaints, * * * the duration of the litigation, * * * and "[c]omplicated settlement negotiations." *In re Lucent Technologies, Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 434-35 (D.N.J. 2004). Considering these facts, this factor weighs heavily in favor of approving the requested award.

<u>The Case Presented a Significant Risk of Nonpayment</u>

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004)). Class Counsel undertook this case on a contingent fee basis, assuming a substantial risk that the litigation would yield no or potentially little recovery and leave us uncompensated for our significant investment of time, as well as our substantial expenses. German Decl. ¶65. This Court has consistently recognized that this risk is an important factor favoring an award of attorney's fees. *In re Ins. Brokerage*, 297 F.R.D. at 155 ("Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees."); *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. CIV.A. 08-1432 DMC, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) ("Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval."). An attorney is entitled to a larger fee when the compensation is contingent rather than being fixed on a time or contractual basis. *Pro v. Hertz Equip. Rental Corp.*, No. CIV.A. 06-3830 DMC, 2013 WL 3167736, at *6 (D.N.J. June 20, 2013) ("Courts have recognized that where counsel's compensation is contingent on recovery, a premium above counsel's hourly rate may be appropriate."); *see also Vizcaino*, 290 F.3d at 1051 (citation omitted) ("It is an established practice in the private legal

market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases * * * as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.").

As described above, plaintiffs would have faced numerous challenges had the case continued to trial, including class certification, summary judgment, causation issues, and expert challenges. This case has been proceeding for over five years and Class Counsel has already devoted an enormous amount of time, money, and other resources to litigating it. *See* German Decl. ¶53-54; 58-59. Such a complicated case could span many additional years and involve a lengthy, expensive trial and appeals that plaintiffs are not guaranteed to win. The risk of nonpayment in complex environmental cases such as this one is very real. Due to these potential challenges, and others, the risk that plaintiffs could have recovered less, and possibly nothing, had a settlement not been reached weighs heavily in support of granting the requested fee.

Class Counsel Devoted a Very Substantial Amount of Time to the Case

As demonstrated above, Class Counsel expended a substantial amount of time prosecuting the claims. As evidenced by their contemporaneous time records, Class Counsel devoted 8,406.32 hours[4] to this case and incurred $992,396.59 in litigation expenses. *See* German Decl. ¶53-54; 58-59. This is a substantial amount of time and money, but actually demonstrates the efficiency that Class Counsel brought to this case through their unique scientific credentials and environmental litigation experience in this District.

For instance, Mr. Nidel's training as a chemical engineer likely spared Class Counsel many hours of effort in comprehending the myriad complex scientific issues in this case. Likewise, Mr.

[4] Class Counsel also devoted hundreds of non-submitted attorney hours on issues such as this fees briefing and other administrative tasks.

German's 20+ years' experience litigating complex environmental cases in this District provided Class Counsel a great resource of procedural knowledge that informed our ability to advance the case efficiently, resolve disputes cooperatively, and minimize Court intervention. Litigation of this case by less experienced counsel could easily have generated thousands more hours of work given the complex scientific, procedural, and legal issues involved.

Class Counsel dedicated 8,406.32 hours to prosecuting these claims (excluding several hundred hours spent on this fee petition and administrative tasks) including factual investigations; client communications and legal research even before filing this lawsuit; litigating motions to dismiss; amending the complaint; working with scientific consultants and experts, both before filing the case, during discovery and in preparing expert reports; class certification briefing and *Daubert* briefing; fact discovery, including managing, reviewing, and analyzing documents from plaintiffs, defendants, and non-parties, attending property inspections, defending, taking or otherwise participating in depositions, and litigating discovery motions; issuing and litigating non-party subpoenas; attending court conferences and hearings; class certification and *Daubert* briefing; client communications and updates; legal research; and mediation and settlement, including the preparation of settlement materials and our work with defendants, JND, and Class Members to facilitate a smooth claims administration process. *See* German Decl. ¶58. Our commitment continues. *Id*. Accordingly, the amount of time devoted to the case heavily favors approval of the requested fee.

<u>The Requested Fee Award is in Line with Awards in Similar Cases</u>

"Awards utilizing the percentage-of-recovery method can reasonably range from nineteen percent to forty-five percent of a settlement fund." *In re AremisSoft*, 210 F.R.D. at 129; *see also In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F. Supp. 445, 461 (E.D. Pa. 1995) (same) (citations omitted).

When comparing the proposed fee award to similar cases, the court should "(1) compare the

actual award requested to other awards in comparable settlements; and (2) ensure that the award is consistent with what an attorney would have received if the fee were negotiated on the open market." *In re Ins. Brokerage*, 297 F.R.D. at 155.

In the New Jersey environmental case of *Rowe v. E.I. DuPont de Nemours & Co*., this Court awarded a fee equal to 33.33% of the settlement fund, finding such an award reasonable once the skill of counsel, complexity of the issues, the risks shouldered by counsel, and customary fees in similar cases were considered. No. CIV. 06-1810 RMB/AMD, 2011 WL 3837106 (D.N.J. Aug. 26, 2011). In *Halley*, this Court found that "the [28%] fee-request is satisfactory in light of the fees typically awarded in this Circuit and the fees typically awarded in environmental cases such as this one." 2016 WL 1682943 at *25. Notably, the *Halley* case was not nearly as advanced as this one; no expert reports were exchanged; class certification was not briefed; and no *Daubert* Motions were filed. The per property payments were also far less. In *Stanley v. U.S. Steel Co*., No. 04-74654, 2009 WL 4646647 (E.D. MI Dec. 8, 2009), the Court awarded a 30% fee in a pollution case due to the case's complexity, skill of counsel, and the four-year duration of the case. Likewise, in *Martin v. Foster Wheeler Energy Corp*., No. 3:06-CV-0878, 2008 WL 906472 (M.D. Pa. Mar. 31, 2008) the Court awarded a 30% fee award in an environmental case involving approximately 147 plaintiffs and a $1,600,000 settlement fund. *See also In re Ins. Brokerage*, 297 F.R.D. 136 (33% of $10.5 million); *In re Par Pharm. Sec. Litig*., No. CIV.A. 06-3226 ES, 2013 WL 3930091 (D.N.J. July 29, 2013) (30% fee on $8.1mm securities fraud settlement); *Hall*, 2010 WL 4053547 (awarding 33.3% plus from an $18 million fund).

As demonstrated above, to "fully value the entire Settlement the value of the Monetary Award Fund needs to be combined with the value created by [its] other provisions." *In re NFL*, 2018 WL 1635648, at *5. Here, reasonably assuming Class Counsel enhanced the cleanup by 1/3, Class Counsel's request of a $19,900,000 fee equates to 31.95% of the $62,280,936.70 benefit to the Class, after the deduction of costs, as required by *Halley*. This fee is well within the range of awards in

similar cases.

Finally, had Class Counsel been able to negotiate a fee contract with the Class members at the outset of litigation, Class Counsel likely would have requested at least a 33% fee after reimbursement of all litigation expenses.[5] This factor weighs in favor of the award.

B. The *Prudential* Factors

The "*Prudential* Factors" are also relevant.

First, all of the benefits accruing to the Class are attributable to the efforts of Class Counsel and this litigation. To be sure, there has been administrative action by NJDEP and the Borough of Carteret to address the presence of Smelter Contaminants in the Class Area. Importantly, however, none of these actions has resulted in any form of money payments to the Class. *See Halley,* 2016 WL 1682943 at *26 ("although there have been numerous government investigations and attempts by administrative agencies to address the contamination * * *, this Settlement will result in actual money payments—which has not occurred from the investigations and administrative agency efforts."). Indeed, government enforcement has been lackluster since concerns about the Smelter surfaced over 20 years ago. With the threat of Court-ordered injunctive relief looming in this private lawsuit, USMR's residential property investigations and remediation have proceeded apace. Over the past five years homes have been tested, contaminated soil excavated, hardscapes re-paved, yards re-planted and restored, and USMR's projected cleanup expenditures have increased.

Moreover, this was not a case "where government prosecutions [laid] the groundwork for private litigation." *In re Diet Drugs*, 582 F.3d 524, 544 (3d Cir. 2009) (citation omitted). This case required a pioneering effort by Class Counsel. Class Counsel re-examined the existing government efforts (such as applicable cleanup standards and compliance averaging to guide remediation) through discovery of

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[5] Based on the complexity of this case and the time and resources involved, Class Counsel would have been permitted, pursuant to N.J. Rule 1:21-7, to seek an increased fee, beyond 33%.

the LSRP, by hiring experts, developing a soil testing program of their own, conducting new research, and briefing complex scientific issues without the benefit of robust government groundwork. *See In re NFL*, 2018 WL 1635648, at *7. Plaintiffs' efforts constituted administrative challenges and oversight, rather than acceptance and reliance. This factor weighs heavily in favor of the award.

Second, as stated above, had Class Counsel been able to negotiate a fee contract with the members of the Class at the outset of litigation, Class Counsel likely would have requested at least a 33% fee after reimbursement of all litigation expenses, with the right to seek an increase of such fee. This factor weighs in favor of the award.

IV. THE LODESTAR CROSS-CHECK IS ACCEPTABLE

The multiplier to reach the $19,900,000 fee award is 3.27, well within the range of appropriate multipliers.

Although a lodestar analysis is not typically required, here the lodestar cross-check demonstrates the reasonableness of Class Counsel's requested fee award. *See Sullivan*, 667 F.3d at 330; *In re AT&T Corp*., 455 F.3d at 164 (lodestar cross check "recommended") (citations and internal quotations omitted); *Rite Aid*, 396 F.3d at 300, 305; *see also Varacallo*, 226 F.R.D. at 249, 253. As demonstrated above, because Class Counsels' contribution to the NJDEP Program "evades [] precise evaluation needed for the percentage of recovery method," the court may resort to the lodestar method (*Petruzzi's*, 983 F. Supp. at, 599) which is "strongly presumed to yield a reasonable fee." *Washington*, 89 F.3d at 1035.

Under this method, a court should first determine how many hours were reasonably expended in the litigation, and then multiply those hours by the prevailing local rate for an attorney of the skill required to perform the litigation. *Blum v. Stenson*, 465 U.S. 886, 888, 895 (1984); *In re Insurance Brokerage*, 297 F.R.D. at 156 (quoting *In re Rite Aid*, 396 F.3d at 305) ("The lodestar analysis is performed by 'multiplying the number of hours reasonably worked on a client's case by a reasonable

hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys.'"). "The reasonable attorney rate is determined by reference to the marketplace." *In re Ins. Brokerage*, 297 F.R.D. at 157 (the starting point for calculating fees is "an attorney's customary billing rate."). In the *Halley* Class Counsel's 2015 fee petition this Court applied a $750 hourly billing rate for Ms. Berezofsky, a New Jersey environmental attorney with 20+ years' experience. *See* 2:10-cv-03345-ES-JSA, D.E. 430; *see also In re Merck & Co., Inc. Vytorin Erisa Litig.,* No. CIV.A. 08-CV-285DMC, 2010 WL 547613, at *13 (D.N.J. Feb. 9, 2010) ($825 hourly billing rate); *McGee v. Cont'l Tire N. Am., Inc.*, No. CIV. 06-6234(GEB), 2009 WL 539893, at *17 (D.N.J. Mar. 4, 2009) ($700 hourly rate); *In re Schering-Plough/Merck Merger Litig.*, No. CIVA09-CV-1099DMC, 2010 WL 1257722, at *18 (D.N.J. Mar. 26, 2010) ("overall hourly lodestar non-weighted average ranging from $465.68 to $681.15 is not unreasonable in light of similar rates charged in the [2010] market* * *."). The marketplace rate reflects the rate at the time the fee request is submitted. *In re Ins. Brokerage*, 297 F.R.D. at 157; *McGee*, 2009 WL 539893, at *17. Once the burden for establishing the "community market rate" has been met, if the opposing party does not provide contradictory evidence, then the court "does not have discretion to adjust the requested rate downward." *In re Ins. Brokerage*, 297 F.R.D. at 157.

After determining the lodestar, the Court divides the total fees sought by the lodestar to arrive at a multiplier, which is used to account for the risk Class Counsel assumes when they take on contingent-fee cases. *In re Rite Aid*, 396 F.3d at 305-06; *see also Vizcaino v. Microsoft Corp.*, 142 F.Supp.2d 1299, 1305 (W.D. Wash. 2001) ("Vizcaino II") ("To restrict Class Counsel to the hourly rates they customarily charge for non-contingent work-where payment is assured-would deprive them of any financial incentive to accept contingent-fee cases which may produce nothing. Courts have therefore held that counsel are entitled to a multiplier for risk."). If the multiplier is too high, that is cause for the court to reconsider the reasonableness of the award, if necessary. *Id*. at 306; *In re Ins.*

Brokerage, 297 F.R.D. at 156. On the other hand, if the multiplier is low, this may confirm the reasonableness of the award. *In re Schering-Plough Corp*., 2013 U.S. Dist. LEXIS 147981, 96-97 (D.N.J. Aug. 27, 2013). The multiplier does not need to fall within a "pre-defined range," but the court's analysis should justify the award. *In re Rite Aid*, 396 F.3d at 306; *In re Ins. Brokerage*, 297 F.R.D. at 156. Multipliers of one to four are commonly found to be appropriate in complex cases. *See In re Prudential Ins*., 148 F.3d at 341 ("[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."); *In re Schering-Plough Corp*., 2013 WL 5505744, at *34 ("lodestar multipliers * * * up to four are often used in common fund cases."); *In re AremisSoft*, 210 F.R.D. at 135 (4.3 multiplier); *see also Rite Aid*, 146 F. Supp. 2d at 736 and 362 F. Supp. 2d at 589 (multipliers between 4.5 and 8.5); *AT&T*, 455 F.3d at 172 (lodestar multiplier of 2.99 in a case that "was neither legally nor factually complex.").

The Class law firms dedicated 8,406.32 hours to prosecuting these claims (excluding several hundred hours spent on this fee petition and administrative tasks). German Decl. ¶58. Applying an $800 maximum hourly rate for attorneys with 20+ years of experience and a blended billing rate of $722.22 to those hours results in a lodestar of $6,071,231.11. *Id*. ¶59. Thus, the multiplier to reach the $19,900,000 fee award is 3.27, well within the range of appropriate multipliers. *Id*.

V. CLASS COUNSEL SHOULD BE REIMBURSED FOR LITIGATION COSTS

Fed. R. Civ. P. 23(h) authorizes the award of nontaxable costs in class action litigation. Counsel in common fund cases is "entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Cendant,* 232 F. Supp. 2d at 343; *In re Ins. Brokerage*, 297 F.R.D. at 157 (citing *In re Safety Components, Inc. Sec. Litig*., 166 F. Supp. 2d 72, 108 (D.N.J. 2001)). Courts have approved litigation costs expended for experts and witness fees; Westlaw and legal research; service of process; consultants and investigators; document imaging, scanning and coding; photocopying; postage; transportation, hotel, and travel

expenses; deposition services and transcripts; discovery databases, and telephone costs. *E.g., Abrams v. Lightolier Inc*., 50 F.3d 1204, 1225 (3d Cir. 1995); *In re Ins. Brokerage*., 297 F.R.D. 136, 158 (D.N.J. 2013); *Varacallo*, 226 F.R.D. at 256; *Demmick v. Cellco P'ship*, No. 06-CV-2163 (JLL) (D.N.J. May 1, 2015) citing *Dewey*, 728 F.Supp.2d at 611-12.

To prosecute this case to settlement, Class Counsel advanced $992,396.59 in necessary and reasonable expenses. German Decl. ¶54.[6] These expenses include: $802,906.43 in fees and costs for experts and consultants in scientific fields such as air transport of contaminants, soil chemistry, statistics, smelter operations and forensic reconstruction, property valuation and economics; $85,980.75 in deposition services, transcripts, and videos; $52,388.10 in travel costs for out-of-town depositions, hearings, client meetings, expert meetings, property inspections, site visits, court conferences, and co-counsel meetings, including $30,567.53 in airfare, $19,522.43 in ground transportation, lodging, gas, tolls, taxis, and car rentals, and $2,298.14 in travel meals; $25,370.41 in document repository; and the balance of costs advanced for printing and copying; PACER/court fees, Westlaw/online legal research, process service, medical records, postage/FedEx/courier, case management software; conference calls and facility rentals for community meetings. *Id.*

These expenses were advanced by Class Counsel with no guarantee of reimbursement and were necessary to develop and prosecute these claims for the benefit of the Class. Cost summaries are provided to the Court for *in camera* review and itemized invoices will be furnished upon the Court's request. *See Halley*, 861 F.3d at 501 (*in camera* review permitted).

VI. INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

Incentive awards are typical in class actions. *See* 4 William B. Rubenstein *et. al*., Newberg on

[6] Each firm independently maintained its own expense records and can alone verify the expenses for which it seeks reimbursement. The Lanier Law Firm respectfully requests reimbursement of $955,422.51 in expenses Nidel & Nace $19,198.56; German Rubenstein LLP $14,775.52; Vlasac & Shmaruk $3,000. German Decl. n.4.

Class Actions §11:38 (4th ed. 2008); Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 U.C.L.A. L. Rev. 1303 (2006). They award class representatives for their service to the class in bringing the lawsuit, including any financial or reputational risks undertaken in bringing the action. *Bredbenner v. Liberty Travel, Inc*., No. CIV.A. 09-1248 MF, 2011 WL 1344745, at *22-23 (D.N.J. Apr. 8, 2011); *In re Imprelis Herbicide Mktg., Sales Practices & Products Liab. Litig*., 296 F.R.D. 351, 371 (E.D. Pa. 2013). In cases where the class receives a monetary settlement, the awards may be paid from the common fund. *E.g., Dewey*, 728 F. Supp. 2d at 610; *Bredbenner*, 2011 WL 1344745, at *22.

As demonstrated above, each Class representative was subjected to invasive written discovery, electronic discovery, document production, and deposition. Each spent considerable time communicating with counsel and other class members, opened their homes for Rule 34 inspections, undertook thorough document searches, and incurred out-of-pocket expenses directly related to representation of the Class. German Decl. ¶60. Due to these efforts, Class Counsel recommends an award of $15,000 for each of Betsey Duarte and Juan Duarte.

In addition, Counsel recommends an award of $15,000 for each of former Class Representatives (and current Class members) Betty Nobles and Leroy Nobles. Before moving out of Carteret in 2019, the elderly Mr. and Mrs. Nobles were subjected to the same invasive discovery as the Duartes. They, too, were subjected to invasive written discovery, electronic discovery, document production, and deposition. Each spent considerable time communicating with counsel and other class members and helped Counsel learn about the facts of this case and the Carteret community. *Id.* ¶61.

These incentive awards are not conditioned on the individuals' support for the settlement, and thus, do not cause the interests of the named plaintiffs to diverge from those of unnamed plaintiffs nor undermine the adequacy of the Class representation. *Cf. Radcliffe v. Experian Info. Solutions Inc*., 715 F.3d 1157 (9th Cir. 2013). The awards are for the purpose of compensating plaintiffs for their service

to the Class in bringing the lawsuit. Further, the incentive payments are not disproportionately large compared to the payments to individual class members. *See* 2 McLaughlin on Class Actions § 6:28 (11th ed.) (It is fair and reasonable to compensate class representatives from the recovery for the efforts they make and financial and reputational risks they incur in obtaining a recovery on behalf of the class; the range is usually $1,000-$20,000, though a proposed incentive award that is at or near one percent of the common fund requires exceptional justification). Here, the requested award of $15,000 to each of these four individuals constitutes .1% of the common fund and are similar to incentive awards in other class actions. *See e.g.*, *Bredbenner*, 2011 WL 1344745, at *22 (awarding $10,000 to each of the eight named plaintiffs); *Halley*, 2016 WL 1682943 at *28 ($10,000 to each of the three class representatives). In light of the Class-wide benefits, these incentive awards are appropriate.

VII. CONCLUSION

For the foregoing reasons, Class Counsel's application for an award of $19,900,000 in fees, $992,396.59 in costs, and $60,000 in incentive awards should be granted.

Dated: May 18, 2023,

Respectfully submitted,

s/ Steven J. German
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Settlement Class Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JUAN DUARTE and BETSY DUARTE, on Behalf of Themselves and all Others Similarly Situated,	**Civ. No. 2:17-cv-01624-EP-MAH**
Plaintiffs,	
vs.	
UNITED STATES METALS REFINING COMPANY, *et al*.,	**DECLARATION OF STEVEN J. GERMAN IN SUPPORT OF CLASS COUNSEL'S MOTION SEEKING AN AWARD OF REASONABLE COSTS, ATTORNEY FEES AND INCENTIVE AWARDS**
Defendants.	

1. I am an attorney duly licensed and in good standing in the states of New York, New Jersey, and the District of Columbia. I am also admitted to the U.S. District Court for the District of New Jersey, as well as the Southern, Eastern and Northern Districts of New York, the Eastern District of Michigan, and numerous Courts of Appeals. I am the founding member of the law firm German Rubenstein LLP and am counsel for plaintiffs and the Settlement Class in this case. I have personal knowledge of the facts set forth in this Declaration and can and would testify competently thereto.

2. This Declaration is made in support of Class Counsel's Motion Seeking an Award of Reasonable Costs, Attorney Fees, and Incentive Awards.

The Settlement

3. The Settlement Agreement is the result of contested litigation and extensive negotiations on the part of Class Counsel and defendants' counsel, all of whom have substantial experience in litigating class actions involving environmental and toxic tort claims. The Settlement represents a significant accomplishment for the Class, the Court, defendants, and Class Counsel.

4. The Settlement establishes a $42,000,000 fund that provides compensatory relief directly to the Class. D.E. 267-2, p.18.

5. Based on public property records, the Class consists of 1,205 property owners of Class 2 Residential (1-4 family) private property in Carteret, New Jersey, whose property has been or may have been impacted by exposure resulting from USMR's release and failure to properly remediate lead, arsenic, and copper ("Smelter Contaminants") originating at its former Carteret Smelter.

6. Thus, the Settlement provides a per-property cash payment of at least $17,466 from the $42,000,000 (or greater, as explained below) common fund to the owners of 1-4 family residential property in the Class Area who allege that Smelter Contaminants interfered with their use and enjoyment of property and caused a diminution in their property value. D.E. 267-2, p.18.

7. In addition, the parties negotiated a separate $2,000,000 settlement with certain property owners outside of the Class Area (the "Settling Individual Homeowners"). *Id*. If the total aggregate of payments to all Settling Individual Homeowners is less than $2 million, USMR will also pay the remaining amount to the class action Settlement Fund and will increase the per property payment to a higher amount, to be determined. *Id*.

8. Administration expenses up to $250,000 will be paid directly by USMR. *Id*., p. 26. Based on my personal discussions with the Claims Administrator, JND Class Action and Claims Solutions, Inc. ("JND"), I am advised that JND expects this to cover all administration costs, with no deduction from the Settlement Fund.

9. After the Settlement Administrator determines that all valid and timely Claims have been adjusted and paid the Eligible Property Payment Amount, any remaining monies in the Class Settlement Fund, if any, shall revert to USMR. *Id*., p.23. However, this reversion shall not exceed

30% of the amount in the Settlement Fund after deduction of Class Counsel's attorneys' fees, costs, expenses, and payment of incentive awards. *Id*. If there are remaining monies after payment of this reversion to USMR, there will be a second distribution to Class Members filing valid claims, pro rata. *Id*.

10. In addition to cash payments, USMR has incurred more than $61,000,0000 in a residential soil cleanup program which includes community outreach; sampling and analysis; environmental remediation and property restoration; and reporting, all of which is subject to NJDEP oversight (the "NJDEP Program"). As detailed below, the Class Settlement Benefits include Class Counsel's contribution to the NJDEP Program including, but not limited to, technical review, comments, monitoring, an independent soil testing program, and the discovery and deposition of the responsible oversight authority for the program (the "LSRP"), which ultimately influenced and enhanced the NJDEP Program. *Id*., p.18.

11. For instance, during the LSRP deposition Class Counsel discovered that USMR had not provided certain sampling data to the LSRP (the "transect data"), which was later considered by NJDEP in its decision-making on the aerial extent of the NJDEP Program. *See* McNally Tr., 31-35 (Pl. Ex. 1). Likewise, Class Counsel discovered that USMR was using certain data averaging techniques ("compliance averaging") that could influence the amount of Smelter Contaminants requiring excavation. *Id*., Tr. 105-106-120. Plaintiffs also critiqued USMR's communication with the public concerning these issues. 215:8-224:15 (Pl. Ex. 2). Over the past five years USMR's projected cleanup expenditures increased from approximately $30,000,000-$45,000,000 to $61,000,000. *See* Brunner (Vol. 2) Tr., 391-92 (Pl. Ex. 3); *see also* D.E. 267-2, p.18 ($61,000,000 in ongoing cleanup expenditures).

12. Plaintiffs' contributions hardly proceeded in the vacuum of discovery and depositions. The very essence of Plaintiffs' expert reports challenged USMR's scientific positions as they were originally communicated to NJDEP and the LSRP without relevant input by Class Counsel or anyone representing the homeowners. Moreover, in an exceptional commitment to the Class, Class counsel developed their own residential soil testing program. Class Counsel hired environmental consultants and scientists to physically test Class properties in areas that USMR was not required to test and to analyze the results to better delineate the extent of Smelter impacts. Class Counsel also spent considerable time evaluating protective cleanup levels for Smelter Contaminants to protect the public. Plaintiffs' expert Dr. Rosenfeld raised the prospect of evolving, more stringent, health-based lead cleanup standards than those considered by the NJDEP. *See* Rosenfeld Report (Pl. Ex. 4). Plaintiffs' soil and smelter expert, Dr. Flowers, challenged USMR's contention that the sources of Smelter Contaminants were from some place other than the USMR Smelter. S*ee* Flowers Report (Pl. Ex. 5). In fact, one of the most contentious motions in this case was Plaintiffs' successful opposition to Defendants' Consultants' Motions to Quash subpoenas issued to USMR's consultants who presented their version of data to the NJDEP. D.E. 97-98. Plaintiffs' air modeler likewise provided expert opinion that the Smelter's airborne emissions traveled farther than the distance portrayed by USMR. S*ee* Sullivan Report (Pl. Ex. 6). Plaintiffs' Counsel also advocated for Carteret residents whose homes were subjected to inspections, excavation, and restoration on daily concerns such as ingress, egress, timing, and other practical implications of the NJDP Program which unsurprisingly caused inconvenience.

13. The settlement does not resolve any personal injury or medical monitoring claims, or the claims of owners of property other than 1-4 family residential property. D.E. 267-2, p.18.

14. This litigation involved substantial risks and difficulties. Environmental and toxic tort claims such as those brought here are routinely expert-driven, expensive and specialized. This matter included highly technical claims associated with airborne contaminant release and migration and allegations of improper remediation impacting property values.

15. Discussions in earnest leading to this Settlement began after the exchange of class-phase expert reports, *Daubert* briefing, and class certification briefing. The parties continued to litigate the case while also engaging in settlement negotiations off and on until the parties reached a preliminary agreement. Such dual-track case management is generally recognized as constituting best practices.

16. This Settlement was reached at arms' length, directly between the parties, after earlier efforts with the assistance of a highly respected mediator, Hon. Diane M. Welsh (Ret.) failed. The settlement is a good result because it promptly and reasonably resolves trespass, nuisance, negligence, and other tort claims for property damages.

Value of the Settlement / Benefits Provided to the Classes

17. As demonstrated above, the Settlement provides a per-property cash payment of at least $17,466 from the $42,000,000 common fund to the owners of 1-4 family residential property in the Class Area. In addition, if the total aggregate of payments to all Settling Individual Homeowners is less than $2 million, USMR will also pay the remaining amount to the class action Settlement Fund and will increase the per property payment to a higher amount, to be determined.

18. In addition to cash payments, the Class Settlement Benefits include Class Counsel's contribution to the NJDEP Program.

19. Thus, the value of the entire Settlement is $42,000,000 + Settling Individual Homeowner cash additions + value of enhancement of NJDEP Program. The Class Members will receive fair and reasonable compensation for their damages under the circumstances of this case.

20. The Settlement Agreement received preliminary approval on April 19, 2023. D.E. 276.

21. If for any reason the Court rejects the Settlement, Class Counsel is ready, willing, and able to try the case on the merits and/or explore a different settlement.

Internal Management

22. I have been personally and extensively involved in this case to ensure a high-quality and efficient prosecution, as well as a full and fair culmination of the litigation. I have personally or telephonically appeared to address all matters before this Court.

23. At all times, the efforts of the team of Class Counsel were disciplined and coordinated to avoid waste and to maximize the best possible result for the Class.

24. All assignments and information were regularly coordinated among Class Counsel (and the attorneys and staff in their firms). Class Counsel used case management software, document review platforms, and other technologies to make this information exchange run efficiently. Class Counsel worked efficiently and effectively.

25. All Class Counsel were required to keep and submit time and expense records.

Settlement Negotiations

26. I have litigated numerous environmental and toxic tort cases, including in this District and in the Third Circuit. Defendants' attorneys are from McCarter & English, LLP and Vinson & Elkins LLP, prestigious law firms with national class action and toxic tort legal practices. Vinson & Elkins, in particular, has extensive experience defending USMR in smelter lawsuits and

addressing scientific, administrative and remedial issues with the NJDEP. It has counseled USMR for many years on related issues, sometimes involving the same defense experts, and thereby possesses unique institutional knowledge and strategic advantages in litigating USMR smelter cases. E.g., *Briggs v. Freeport McMoran Copper & Gold*, Inc., Civ. No. 13-1157-M (W.D. Okl.); *Coffey v. Freeport McMoran Copper & Gold, Inc*., Civ. No. 08-0640-HE (W.D. Okl.). Defendants' counsel ably deployed their litigation team.

27. Class Counsel's focus in approaching settlement was on balancing the strength of a claim against the payment offered to resolve it, which is a key factor in assessing the adequacy of the proposed settlement (*e.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Circ. 1999)), but does not require the fact-finding of trial.[1] One purpose of a settlement is to avoid having to reach the merits of a case. Definitive statements on the merits should be avoided as a settlement may fail and the case may come to trial. *Managing Class Action Litigation: A Pocket Guide for Judges* (2d ed.) Federal Judicial Center (2009), at 11.

28. Plaintiffs and USMR participated in three separate rounds of settlement negotiations. In April 2018 the parties engaged in initial direct settlement discussions, which proved unsuccessful. In April 2020 the parties began settlement discussions with the aid of Hon. Diane M. Welsh (Ret.) of JAMS.[2] Judge Welsh held an unsuccessful formal mediation on August

[1] A Rule 23 Evaluation should avoid findings on the underlying facts relevant to the claim and instead consider or estimate a range of possible outcomes, along with some estimation of the probabilities of each. *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Circ. 2002). Whatever method one uses to assess the strength of the case, that effort must not transform the Rule 23 fairness hearing into a trial on any of the merits or findings about them.

[2] The parties began working with Prof. Francis McGovern as mediator in 2019 until his untimely death in early 2020.

20, 2020. In December 2022 counsel engaged in two days of direct settlement negotiations, at which time a settlement was reached directly between counsel for the parties.

29. On February 7, 2023, the settling parties advised the Court of their agreement in principle to settle. Each Class Representative, as well as representatives of USMR, reviewed and approved the Settlement Agreement.

30. On March 28, 2023, the parties filed their Joint Motion for Preliminary Approval of Class Action Settlement. D.E. 267.

31. On April 19, 2023, the Court issued an Order Certifying Settlement Class, Preliminarily Approving Class Action Settlement and Approving Form and Manner of Notice. D.E. 276.

32. Class Counsel devoted significant time to the mediation and settlement of the claims, including the preparation of settlement materials, four days of direct negotiation and mediation, and work with USMR and JND to coordinate a smooth claims administration process.

Claims Administration

33. Pursuant to the Settlement Agreement notice to the Class was mailed and posted on the Settlement website beginning May 10, 2023. Notice was also published on May 10, 2023, in the Home News Tribune, a local newspaper of general circulation (print and on-line editions) in Middlesex County, New Jersey. Additionally, personnel from JND are available for telephonic consultations. The time period for objecting, opting out and/or filing a claim shall expire June 26, 2023. D.E. 267-2.

Reaction of Class

34. The Settlement has been public for one month and subject to media coverage. We are aware of no objections to the Settlement at this time. The objection period will remain open until June 26, 2023.

Pre-Suit Investigation

35. Prior to initiating this litigation, Class Counsel and their scientific consultants investigated and reviewed voluminous (i) documents discussing the historic and present conditions at and around the Smelter; (ii) documents made public in prior lawsuits concerning USMR's production operations, Smelter Contaminant releases from its Smelter, and the environmental fate and toxicity of Smelter Contaminants; (iii) peer-reviewed and scientific literature concerning Smelter Contaminants and their fate in the environment; (iv) studies and reports concerning appropriate medical tests and screening for the early detection of serious latent disease in populations exposed to Smelter Contaminants; and (v) case law concerning class certification of property damage and medical monitoring claims in the Third Circuit and nationwide. Counsel relied on that work during the litigation. Class Counsel also met extensively with Carteret residents to understand their concerns and interest in pursuing a case against USMR.

36. The pre-suit investigations led to the strategy employed in our prosecution of this case, including selection of appropriate class representatives, determination of appropriate class scope, pursuit of needed discovery and the claims for relief upon which we chose to rely.

Litigation

37. This case involves allegations that USMR generated, released, and failed to properly remediate Smelter Contaminants on properties in Carteret, thereby causing plaintiffs to suffer damage to their properties, loss of use and enjoyment of their properties and diminution in property value.

38. USMR's generation, emission, and failure to properly remediate Smelter Contaminants in Carteret has been the subject of prior lawsuits and administrative actions. The topic presents complex scientific and fact issues involving the emission of Smelter Contaminants and its airborne spread across Carteret; the chemistry of Smelter Contaminants and their toxicity; their migration potential in the environment; other potential sources of Smelter Contaminants; their impact on human health and the environment; the proper cleanup methods; and their impact on property values in Carteret.

39. Litigation commenced on January 30, 2017, when plaintiffs filed a complaint in Middlesex County Superior Court. D.E. 1.

40. USMR removed the case to the District of New Jersey pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 1109-2, 119 Stat. 4 (codified in 28 U.S.C. §§ 1332(d), 1453, 1711-1715). D.E. 1.

41. USMR filed a Motion to Dismiss (D.E. 6), which plaintiffs opposed. D.E. 27. Defendants' Motion was resolved with an Order on consent granting Plaintiffs' leave to file an Amended Complaint (D.E. 50), which they did. D.E. 51.

42. In August 2017, the parties began discovery in earnest. Fed. Civ. P. Rule 26 disclosures were exchanged. The parties exchanged Interrogatories and Requests for Production of Documents.

43. In response to Defendants' Requests, plaintiffs produced hundreds of pages of property records, financial records, medical records, and other personal information. They also underwent invasive and (somewhat destructive) Rule 34 property inspections and physical testing.

44. In response to Plaintiffs' Requests for Production of Documents and Interrogatories, defendants produced several million pages of documents in 28 separate rolling

productions between August 2017 and March 2022. Defendants additionally provided ongoing access to a live document database containing voluminous environmental testing and remediation files in real-time. Many of these documents consisted of highly technical environmental reports such as soil sampling data, investigation reports, and remediation records.

45. Plaintiffs also served OPRA requests and subpoenas on the NJDEP, the LSRP, and other non-party environmental consultants. They collectively produced tens of thousands of additional documents.

46. The parties appeared for 34 depositions including class representatives, 30(b)6 deponents, non-party environmental consultants and engineers, the LSRP, and 15 experts (some multiple days). The Class Representatives appeared for lengthy and sometimes difficult and emotional depositions.

47. Before settlement, the parties appeared for 23 court conferences, including extensive in-person full-day oral argument before Judge Salas on June 23, 2021. The Court issued numerous Scheduling Orders, which, due to the complexity and magnitude of the case, were periodically amended and deadlines were extended.

48. Expert discovery was extensive including the exchange of seven affirmative plaintiff expert reports, nine defense expert reports, plaintiff rebuttal expert reports, and depositions of each – sometimes multi-day. These experts were in highly technical fields such as environmental science, medicine, toxicology, statistics, soil chemistry/geochemistry, smelter operations, air modeling, forensic microscopy, economics, property valuation, and appraisal.

49. There was significant motion practice, including seven *Daubert* Motions to preclude plaintiffs' experts (including renewed Motions) (D.E. 136-142; 160; 245), Plaintiffs' Motion to Certify the Class (including renewed Motion) (D.E. 144, 248) motions to dismiss,

motions for leave to amend, motions to quash subpoenas, and plaintiffs' successful appeals to the District Judge of Judge Mannion's denial of Plaintiffs' 1) Motion for Leave to Amend and 2) to exchange rebuttal expert reports.

50. As the case progressed and plaintiffs learned new information during discovery, plaintiffs amended their Complaint four times to narrow the scope of the litigation. The Complaint was also amended to conform the Class definition to the Settlement Agreement. These amendments were not always by consent and required plaintiffs to brief a Motion for Leave to Amend. *E.g.,* D.E. 70.

51. As demonstrated above, the parties' pre-trial work resulted in significant substantive development of this case. Throughout this time, the parties explored settlement opportunities.

Experience of Class Counsel

52. Class Counsel has successfully handled class actions and mass torts throughout the United States in both state and federal courts.

German Rubenstein LLP has served as class counsel, lead counsel, and co-lead counsel in numerous environmental and toxic tort matters, include allegations of trespass, private nuisance, strict liability, and negligence arising from defendants' improper disposal and failure to remediate contaminants, resulting in interference with the use and enjoyment of property, diminution in property value, and property damage.

Steven J. German, with 20+ years of experience, has represented environmental plaintiffs in a dozen states. Representative matters include: Appointed Special Counsel to the State of New Jersey by Governor Christie in natural resource damage case against ExxonMobil ($225mm settlement); Court-appointed Class Counsel in *Pere v. Town of Fallsburg*, representing New York

lake owners with toxic algae in their lake from sewage releases (NY Supreme, 2019); Court-appointed Settlement Class Counsel in *Halley v. Honeywell*, alleging property damage caused by hexavalent chromium in Jersey City, NJ (Salas, J.); Plaintiffs' counsel in *Jerue v. Drummond*, representing Florida residents with radiation from mining and reclamation activities on their properties (MDFL, 2017); Plaintiffs' counsel in *Cole v. Marathon*, representing Detroit residents alleging injuries from refinery emissions (EDMI, 2016; 6th Cir. 2017); Plaintiffs' counsel in *Latta v. Hannibal Board of Public Works*, a class action settlement providing cash payments and medical monitoring in connection with contaminated drinking water (MO, 2016); Plaintiffs' counsel in *Roeder v. Atlantic Richfield*, a $20mm class action settlement providing water extension to desert community and cash payments for mining waste in drinking water wells (DNV, 2014); Court-appointed Co-Lead Class Counsel in *In Re Behr Dayton* (SDOH), representing homeowners with toxic vapor intrusion from groundwater contamination beneath 500+ homes in Dayton, Ohio. From 2004 through 2008, Mr. German played a lead role in MDL 1358: *In Re MTBE Products Liability Litigation* (S.D.N.Y.). Mr. German represented drinking water providers nationwide for damages resulting from the contamination of their water wells with the gasoline additive Methyl Tertiary Butyl Ether. In a 2008 settlement, he and his co-counsel recovered $423,000,000 for their clients nationwide for the filtration of drinking water. In 2006, Mr. German was appointed as Special Counsel for the State of New Mexico for MTBE groundwater litigation. Mr. German also represented the Suffolk County Water Authority – the nation's largest provider of drinking water from groundwater – in its MTBE lawsuit. From 1999 until 2003 Mr. German played a lead role in the litigation and trial of *Interfaith Community Organization v. Honeywell* (D.N.J. 1995) (Cavanaugh, J.), concerning chromium in Jersey City. Mr. German has successfully represented numerous other environmental plaintiffs including private citizens, landowner's, community

groups and environmental organizations. Mr. German served as a law clerk to the United States Department of Justice, Environmental Enforcement Section, Region 5 and the USEPA Region II, New Jersey Superfund Branch. He has 23 years of class action, complex litigation, and trial experience. He was appointed Adjunct Professor at the Pace Law School in 2014 where he teaches Environmental Litigation and Toxic Torts. He has lectured at other law schools and professional symposia nationwide. He earned his J.D. from the Benjamin N. Cardozo School of Law in 1999.

Joel M. Rubenstein, with 20+ years of experience, currently represents the victims of toxic exposure nationwide. Like his partner Mr. German, Mr. Rubenstein currently represents plaintiffs in the *Behr Dayton* and *Jerue* matters and played a lead role in the settlement of the *Roeder* matter. He previously represented plaintiffs in the *Sher v. Raytheon* groundwater contamination case in the Middle District of Florida, the victim of radon exposure in *Gates v. W.R. Grace & Co., et al*. (M.D. Fl.), and other environment exposure personal injury cases. He served as a member of a nationwide consortium of firms representing the victims of cancer caused by hormone therapy and another consortium of firms representing those injured by defective medical devices. Prior to forming German Rubenstein, Mr. Rubenstein spent six years at one of Wall Street's most prestigious law firms. He earned his J.D. from Fordham University Law School in 2001.

The Lanier Law Firm, with offices in Houston, New York, and Los Angeles, represents plaintiffs nationwide in mass tort, class action, complex personal injury and business litigation. Its principals are among the nation's leading trial lawyers who have achieved record setting verdicts and settlements including, but not limited to: a $4.69 billion verdict for 22 women and their families who alleged that use of Johnson & Johnson's asbestos-laden talcum powder caused ovarian cancer; a $247 million verdict against DePuy Orthopaedics Inc., over Pinnacle metal-on-metal hip implants; $9 billion against Takeda Pharmaceutical Co. Ltd. and Eli Lilly & Co. over

the diabetes drug Actos; a $483 million verdict for a small oil company in a business-fraud case against one of the nation's largest oil providers; and a $258 million verdict in the nation's first trial over the painkiller Vioxx.

Alex Brown, with 20+ years of experience, Mr. Brown has been the leader of Mark Lanier's trial team in numerous class action, environmental, and mass tort matters including: trial committee of a joint venture organized to pursue environmental litigation on behalf of the State of New Jersey; outside counsel for the State of New Jersey in natural resource damage litigation; represented landowners whose oil and gas properties were damaged by a multinational oil company; represented the State of Texas in an anti-trust case against Google; Leader of Mark Lanier's trial team in two medical device cases in 2016 that resulted in a $1 billion jury verdict and a $502 million jury verdict, respectively; Leader of Mark Lanier's trial team for the Actos drug trial in 2014 that resulted in a $9 billion jury verdict; Talc MDL trial committee; represented a Texas energy company in ICC and ICSID arbitration proceedings against the Federal Government of Nigeria; represented a coalition of sugar farmers and producers in their suit against agribusiness conglomerates for false advertising; first chair trial counsel for a national real estate investment trust. Mr. Brown was named a "Texas Rising Star" by Texas Monthly Magazine and Thomson Reuters; Recognized as a "Texas Super Lawyer" by Thomson Reuters; Named to the Lawdragon 500 Leading Lawyers in America; Recognized by The Legal 500; selected as American Lawyer's list of Top Rated Lawyers for International Law & International Trade; and is Rated AV Preeminent® by Martindale-Hubbell. He earned his J.D. from the University of Houston Law Center in 2000, where he served as an Articles Editor on the Journal of International Law.

Christopher Gadoury, with 20+ years of experience, has handled all aspects of trials and appeals of complex business litigation, as well as shareholder derivative litigation, fraud, including

securities and bank fraud, stock options back-dating, bribery, and kickbacks, contract disputes, business torts, fiduciary litigation, environmental crimes, intellectual property infringement, class actions, trade secret theft, antitrust, employment litigation, qui tam actions under the False Claims Act, and Foreign Corrupt Practices Act violations. Mr. Gadoury also has extensive experience representing clients in all sectors of the oil and gas industry, including exploration and production companies, drilling companies, oilfield equipment manufacturers, pipelines, seismic companies, and refineries. His vast experience of representation spans that of Fortune 100 companies, small businesses, individuals, and hedge funds and institutional investors with billions in assets. Mr. Gadoury has litigated various state and federal environmental cases, representing both individuals as well as state governments seeking Natural Resources Damages, involving contamination from radiation caused by radium 226, benzene, trichloroethylene (TCE), perchloroethylene (PCE), methyl tert-butyl ether (MTBE), various hydrocarbons, and numerous other contaminants. Mr. Gadoury earned his J.D. from the University of Houston Law Center, *cum laude*, in 2002.

Nidel & Nace PLLC has served as class counsel, lead counsel, and co-lead counsel in numerous environmental and toxic tort matters. By combining top-tier science and engineering background with legal experience, Nidel & Nace PLLC has led some of the most complex environmental, toxic injury, and pharmaceutical litigation nationwide.

Christopher T. Nidel, with 20 years of experience, has represented myriad private individuals and government entities in their environmental, toxic tort, and pharmaceutical lawsuits. For instance, Mr. Nidel represented drinking water providers nationwide for damages resulting from the contamination of their water wells with the gasoline additive Methyl Tertiary Butyl Ether. He previously represented plaintiffs in the *Sher v. Raytheon* groundwater contamination case in the Middle District of Florida and the victim of radon exposure in *Gates v. W.R. Grace & Co., et al.*

(M.D. Fl.); Detroit residents in *Cole v. Marathon*, alleging injuries from refinery emissions (EDMI, 2016; 6th Cir. 2017); and homeowners in *Latta v. Hannibal Board of Public Works*, a class action settlement providing cash payments and medical monitoring in connection with contaminated drinking water (MO, 2016). He is currently plaintiffs' counsel in *Jerue v. Drummond* and *Cruz v. Mosaic*, both Middle District of Florida cases representing Florida residents with radiation from mining and reclamation activities on their properties. Mr. Nidel earned a bachelor's degree in chemical engineering from the University of Virginia and a Masters from M.I.T. Prior to his return to attend law school at Virginia, Mr. Nidel worked as a chemical engineer doing research and development in the pharmaceutical industry. Mr. Nidel started his career in complex environmental litigation in 2003 at Baron and Budd in Dallas, Texas. Since 2006, Mr. Nidel has been managing his own complex environmental practice handling cases on behalf of states, individuals, and non-profits. This practice has involved the handling of a number of complex environmental class action cases on behalf of hundreds to thousands of class members. He is a 2003 graduate of the University of Virginia Law School.

Jonathan B. Nace, with 17 years of experience, Jonathan Nace practices environmental law and complex civil litigation. Like his partner Mr. Nidel, Mr. Nace has represented individuals in mass torts harmed by exposure to toxic substances from water, soil, and air pollution. He has been certified as class counsel in environmental class litigation, including most recently in the United States District Court for the District of Oregon. He handles civil litigation at all stages including trials where he has acted as lead counsel on multiple complex cases including complex medical malpractice matters before both state and federal courts. He is a 2006 graduate of Tulane Law School.

Zachary Kelsay, with one year of legal experience, is an attorney at Nidel & Nace where he supports the partners' environmental and complex consumer protection practices. Prior to joining Nidel & Nace, he clerked for Judge Debra McLaughlin in the 23rd Circuit Court in West Virginia. Before clerking, he worked for the Maryland Attorney General's Consumer Protection Division and assisted in several investigations into illegal housing practices and consumer fraud. He is a 2022 graduate of the University of Kansas School of Law.

Vlasac & Shmaruk

John M. Vlasac, Jr. Esq., with 20+ years of experience, has won millions of dollars for his clients as an established and aggressive trial attorney who has handled personal injury and other civil matters in virtually every county in New Jersey. He is Certified by the Supreme Court of New Jersey as a Civil Trial Attorney, a designation achieved by only 2% of all practicing attorneys in New Jersey. In 2005 Mr. Vlasac was lead plaintiff's counsel in a matter that changed the way commercial automobile polices would be written from that point forward. In 2010 Mr. Vlasac received the 11th highest award in the State of New Jersey achieved for an injury victim and is consistently in New Jersey's top reported awards. He has been admitted to practice law by the New Jersey Supreme Court and by the United States Federal District Court. He is a member of the New Jersey State Bar Association, New Jersey Association for Justice and the Middlesex County Bar Association. He also serves on the Foundation Board of Directors for Robert Wood Johnson – Hamilton. Mr. Vlasac is the head of all civil litigation at Vlasac & Shmaruk and handles a wide range of personal injury cases including auto, truck and motorcycle accidents, construction, slip and falls, product liability, medical malpractice, and work-related accidents. He also handles residential real estate, real estate litigation, commercial litigation, municipal court, and toxic/mass tort matters. Jack graduated from West Virginia University in 1997 with a Bachelor of Science in

Finance and was a Sigma Chi fraternity member. He earned his J.D. from Quinnipiac University School of Law in 2000, where he was a member of the Moot Court Honor Society and was awarded the Deans Awards for Outstanding Legal Scholarship and Service to the University.

Boris Shmaruk, Esq., with 20+ years pf experience, founded Vlasac & Shmaruk with John M. Vlasac, Jr. in 2006. He is the head of the workers' compensation department at the firm. He is admitted to practice law in New Jersey, District of Columbia, New York, by the New Jersey Supreme Court and by the United States Federal District Court. In 1996, Boris graduated from Rutgers University with a Bachelor of Arts in History and Political Science. Following graduation, Boris was employed as a paralegal with the firm of Thacher, Proffitt & Wood in New York City, working primarily on civil litigation issues. While attending New York Law School, Boris interned in the Rackets Division of the Kings County District Attorney's Office in Brooklyn, New York. In 2000 he received his J.D. from New York Law School. Boris Shmaruk is a proud member of the American Bar Association and the New York State Bar Association. Boris' practice consists of all aspects of workers' compensation, Federal Employees' Compensation Act (FECA), Federal Employers' Liability Act (FELA), construction, slip and falls, medical malpractice, and municipal court matters.

Request for Award of Reasonable Costs and Attorney Fees

53. Class Counsel request an award of reasonable attorneys' fees and costs totaling $20,952,396.60, consisting of $992,396.59 in costs, $60,000 in incentive awards ($15,000 each) for the two named Class Representatives, Betsy Duarte and Juan Duarte, as well as former Class Representatives Betty Nobles and Leroy Nobles, and $19,900,000 in attorneys' fees.

54. The Class firms have advanced $992,396.59 in costs including, but not limited to: $802,906.43 in fees and costs for experts and consultants in scientific fields such as air transport

of contaminants, soil chemistry, statistics, smelter operations and forensic reconstruction, property valuation and economics; $85,980.75 in deposition services, transcripts, and videos; $52,388.10 in travel costs for out-of-town depositions, hearings, client meetings, expert meetings, property inspections, site visits, court conferences, and co-counsel meetings (including $30,567.53 in airfare, $19,522.43 in ground transportation, lodging, gas, tolls, taxis, and car rentals, and $2,298.14 in travel meals); $25,370.41 in document repository; and the balance of costs advanced for printing and copying; PACER/court fees (*pro hac vice* fees excluded), Westlaw/online legal research, process service, medical records, postage/FedEx/courier, case management software; conference calls and facility rentals for community meetings. All of these costs were necessary and reasonable in prosecuting plaintiffs' claims.[3]

55. All efforts were made to avoid duplicative assignments and, where appropriate, assignments were given to associate attorneys or paralegals to increase efficiency and lower costs. We took great care to divide work in such a way that focused on each attorney's strengths, skill, and experience, to resolve tasks efficiently and reduce duplication of effort. For instance, Mr. German with his 20-plus years of environmental litigation experience in this District, guided the case through every court conference and hearing, and spearheaded the pleadings, written discovery, and motion practice. Mr. Nidel guided the plaintiffs' expert case and conducted the technical depositions. The Lanier Law Firm ensured that the case was developed to proceed to trial, if necessary. Counsel exercised reasonable discretion to eliminate unnecessary or duplicative billing and expenses. All work was done on a contingency basis.

[3] Each firm independently maintained, submits, and can alone verify its own costs in connection with this Application. The Lanier Law Firm requests reimbursement of $955,422.51 in expenses; Nidel & Nace $19,198.56; German Rubenstein LLP $14,775.52; Vlasac & Shmaruk $3,000.

56. In determining the reasonableness of attorneys' fees, "[t]o fully value the entire Settlement the value of the Monetary Award Fund needs to be combined with the value created by [its] other provisions." *In re Nat'l Football League Players' Concussion Inj. Litig.*, No. 2:12-MD-02323-AB, 2018 WL 1635648, at *5 (E.D. Pa. Apr. 5, 2018), aff'd in part, remanded in part, 814 F. App'x 678 (3d Cir. 2020).

57. When analyzing the requested $19,900,000.00 fee award using the percentage-of-recovery method, the $19,900,000.00 fee award sought equates to 48.59% of the initial $42,000,000 cash fund, after the deduction of costs ($42,000,000 (fund) - $992,396.59 (costs) - $60,000 (incentive awards) = $40,947,603.40), as required by *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 501 (3d Cir. 2017).[4] Assuming Class Counsel enhanced the cleanup by 1/3, that percentage would equal 31.95% of the $62,280,936.70 benefit flowing to the Class ($41,947,603.40+ $20,333,333.33).

58. The Class law firms dedicated 8,406.32 hours to prosecuting these claims (excluding several hundred hours spent on this fee petition and administrative tasks) including factual investigations, client communications and legal research even before filing this lawsuit; litigating motions to dismiss; amending the complaint; working with scientific consultants and experts, both before filing the case, during discovery and in preparing expert reports; class certification briefing and *Daubert* briefing; fact discovery, including managing, reviewing, and analyzing documents from plaintiffs, defendants, and non-parties, attending property inspections,

[4] Based on the number of Settling Individual Homeowner retainers, all counsel estimate an ~$1,000,000 Settling Individual Homeowner surplus for the Class Fund, totaling $41,947,603.40. The $19,900,000 fee equates to 47.44% of the enlarged $41,947,603.40 cash fund. Class Counsel should be allowed a proportionate fee on the enhanced Class Fund from the Settling Individual Homeowner surplus, within the Settlement Agreement's fee limits.

defending, taking or otherwise participating in depositions, litigating discovery motions; issuing and litigating non-party subpoenas; court conferences and hearings; class certification and *Daubert* briefing; client communications and updates; legal research; and mediation and settlement, including the preparation of settlement materials and our work with defendants and JND to facilitate a smooth claims administration process. Our commitment continues.[5]

59. Class Counsel applied an $800 hourly rate for attorneys with 20+ years of experience; $650.00 for attorneys with 11-19 years of experience; and $250.00 for attorneys with 1-3 years of experience. This resulted in blended billing rate of $722.22/hour for the nine attorneys who worked on this case, as set forth in the table below. Applying that blended rate to those hours results in a lodestar of $6,071,231.11, also set forth in the table below. Thus, the multiplier to reach the $19,900,000 fee award is 3.27, well within the range of appropriate multipliers in this Circuit.

Staff	Position	Years Experience	Rate	Total Hours	Total $
SJG	Partner	20+	$800.00	2,845.30	$2,276,240.00
JMR	Partner	20+	$800.00	429.49	$343,592.00
Total German Rubenstein LLP				3,274.79	$2,619,832.00
CTN	Partner	20+	$800.00	3,218.40	$2,574,720.00
JN	Partner	11-19	$650.00	268.30	$174,395.00
ZK	Associate	1-3	$250.00	107.03	$26,757.50
Total Nidel & Nace				3,593.73	$2,775,872.50
AB	Partner	20+	$800.00	46.35	$37,080.00
CG	Associate	20+	$800.00	319.60	$255,680.00
Total Lanier Law Firm				365.95	$292,760.00
JV	Partner	20+	$800.00	609.58	$487,664.00
BS	Partner	20+	$800.00	562.27	$449,816.00
Total Vlasac & Shmaruk				1,171.85	$937,480.00
GRAND TOTAL			**$722.22**	**8,406.32**	**$6,071,231.11**

[5] Each firm independently maintained, submits, and can alone verify its time records in connection with this Application. German Rubenstein LLP devoted 3,274.79 hours; Nidel & Nace PLLC 3,593.73; The Lanier Law Firm 365.95; Vlasac & Shmaruk 1,171.85.

60. Class Counsel recommends an incentive award of $15,000 for each of Betsey Duarte and Juan Duarte, the Class Representatives. Each Class Representative was subjected to invasive written discovery, electronic discovery, document production, and deposition. Each spent considerable time communicating with counsel and other class members, opened their homes for Rule 34 inspections, undertook thorough document searches, and incurred out-of-pocket expenses directly related to representation of the Class.

61. In addition, Counsel recommends an award of $15,000 for each of former Class Representatives (and current class members) Betty Nobles and Leroy Nobles. Before moving out of Carteret in 2019, the elderly Mr. and Mrs. Nobles were subjected to the same invasive discovery as the Duartes. They, too, were subjected to invasive written discovery, electronic discovery, document production, and deposition. Each spent considerable time communicating with counsel and other class members and helped Counsel learn about the facts of this case and the Carteret community.

62. These incentive awards are not conditioned on the individuals' support for the settlement, and thus, do not cause the interests of the named plaintiffs to diverge from those of unnamed plaintiffs nor undermine the adequacy of the Class representation. *Cf. Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157 (9th Cir. 2013). The awards are for the purpose of compensating plaintiffs for their service to the Class in bringing the lawsuit. Further, the incentive payments are not disproportionately large compared to the payments to individual class members. Here, the requested award of $15,000 to each of these four individuals constitutes .1% of the common fund.

63. Class Counsel submits that this fee request is fair and reasonable in light of (1) the size of the fund created and the number of persons benefitted; (2) the absence of substantial

objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the extraordinary skill and efficiency of the attorneys involved; (4) the complexity and long duration of the litigation; (5) the significant risk of nonpayment; (6) the significant amount of time devoted to the case by Class Counsel; and (7) the awards in similar cases. *See Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000).

64. Class Counsel believes that this Settlement is in the best interest of the Class based on the negotiations and a detailed knowledge of the issues in this action. Specifically, Class Counsel balanced the terms of the proposed Settlement against the possible outcomes if the case proceeded through trial and appeals.

65. This action was filed in January 2017. To properly handle and prosecute active class-action litigation such as this case, Class Counsel was often precluded from accepting or working on both other potential contingency fee cases and hourly fee-producing cases. This case was taken on a purely contingent basis, with Class Counsel advancing all costs at considerable risk with the ultimate result unknown. Practicing in this area of law involves a great deal of risk as these cases may fail at the pleading stage, on class certification, on *Daubert* challenges, motions for summary judgment, at trial, or on appeal. Routinely, defendants are represented by highly skilled and experienced local and national defense firms, as was the case here.

66. These cases require the constant engagement of Class Counsel. Extensive work is required to obtain and distill data and documents associated with the environmental operations at issue, the progress of administrative action, to support liability, to develop appropriate scientific evidence, to maintain contact with Class Representatives, other Class Members, and regulators, and to effectively defend against defendants' efforts to minimize these claims. Substantial written

and oral discovery and motion practice is also required, as well as the research, technical knowledge, and drafting requisite to obtain class certification and then to prepare for trial.

67. The risks of taking on a class-action are enormous. Litigating a class action against a $50 billion corporation, like defendant here, through class certification and trial often takes years and requires a large investment with no guarantee of recovery.

68. Class Counsel has not yet received any fees in this case and has advanced all costs. By contrast, defendants' firms can bill their clients monthly and regularly receive payment.

Conclusion

I declare under penalty of perjury under the law of the State of New Jersey that the foregoing is true and correct.

Dated May 18, 2023,

Respectfully submitted,

/s/ Steven J. German

Steven J. German
German Rubenstein LLP

Settlement Class Counsel