UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JUAN DUARTE and BETSY DUARTE, On Behalf of Themselves and all Others Similarly Situated,

Plaintiffs,

-against-

UNITED STATES METALS REFINING COMPANY, *et al*.,

Defendants.

Civil No.: 2:17-cv-01624-EP-MAH

Honorable Evelyn Padin
Honorable Michael A. Hammer

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Defendants United States Metals Refining Company ("USMR"), Freeports Minerals Corporation ("FMC"), Freeport McMoran, Inc. ("FMI") and Amax Realty Development, Inc. ("Amax") (collectively "Defendants") and Plaintiffs Juan Duarte and Betsy Duarte, individually and on behalf of those similarly situated, (collectively, "Plaintiffs") by and through their respective undersigned counsel, hereby submit this Memorandum in Support of the parties' Joint Motion for Preliminary Approval of the Class Action Settlement they have reached in this case.[1]

BACKGROUND

This is a Civil Action to secure redress from the Defendants for damages allegedly suffered by Plaintiffs as a result of the Defendants' alleged wrongful emission, release, discharge, handling, storage, transportation, processing, disposal and/or failure to remediate toxic and hazardous waste, 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, Middlesex County, New Jersey (the "Smelter") and/or their alleged failure to test, identify, disclose, remove and/or properly remediate contamination and toxic substances related to such operations from Plaintiffs' properties ("Smelter Contaminants").

Plaintiffs allege that USMR owns or formerly owned the Smelter and that USMR is directly liable to Plaintiffs for its wrongful emission, release, discharge, handling, storage, transportation, processing, disposal and/or failure to remediate Smelter Contaminants onto Plaintiffs' properties across the Class Area during its years of operations of primary and secondary copper smelting and metals refining from the early 1900s to approximately 1991.

[1] Capitalized terms used in this Memorandum but not defined herein shall have the definitions prescribed in the Settlement Agreement (Attachment A).

Plaintiffs allege that Amax, as an owner and operator of the Smelter and the Smelter property, is directly liable to Plaintiffs for its release of Smelter Contaminants onto Plaintiffs' properties across the Class Area and for its failure to properly test and remediate Smelter Contaminants across the Class Area. Plaintiffs further allege that Amax is liable to Plaintiffs as a successor to USMR.

Plaintiffs allege that FMI is directly liable to Plaintiffs for deficiencies in its testing and remediation of Smelter Contaminants across the Class Area. Plaintiffs further allege that FMI is liable to Plaintiffs through its acquisition of USMR, FMC, and Amax.

Plaintiffs allege that FMC is directly liable to Plaintiffs for deficiencies in its testing and remediation of Smelter Contaminants across the Class Area.

Defendants deny that they are liable for any of Plaintiffs' claims, and deny that Plaintiffs have suffered any damages, including but not limited to invasion of their properties with Smelter Contaminants, any loss of use of enjoyment of their properties or any diminution in their property values as a result of Smelter Contaminants.

In the current operative complaint (Fifth Amended Complaint, ECF No. 266), Plaintiffs allege causes of action for private nuisance, strict liability, trespass, and negligence.[2]

The Fifth Amended Complaint defines the Class as follows (¶157):

> All persons who own or owned any Residential Property (as that term is defined by N.J. Admin. Code § 18:12-2.2(b) and includes 'dwelling house[s] and the lot or parcel of land on which the dwelling house is situated [where the] dwelling is functionally designed for use and enjoyment by not more than four families and includes residential condominiums') and (ii) vacant lots zoned for residential use in each case located within the geographical boundary defined by Exhibit A [to the Settlement Agreement] (the

[2] Plaintiffs also originally sought medical monitoring but abandoned this claim in the Second Amended Complaint and in all subsequent Complaints, including the current operative Fifth Amended Complaint.

> "Class Area") at any time during the Class Period, but excluding (i) properties owned by the Defendants or employees of Defendants, and (ii) properties owned by any federal, state, or local government or any subdivision of such government entities. The Class Area is generally bounded by Peter J. Sica Industrial Highway to the East, Romanowski Street to the North-East Cypress Street to the North, Arthur and East Grant Streets to the West, and Middlesex Ave. to the South. The Class includes Residential Properties located on both sides of the boundary streets. The Class Period is from January 30, 2017, to March 27, 2023.

The Class relates to Class 2 Residential Properties (1-4 family)[3] and vacant lots zoned for residential use within the vicinity of the Smelter. The proposed Settlement Agreement resolves the claims by owners of Class 2 Residential Property and vacant lots zoned for residential use within the Class.

Plaintiffs and proposed Settlement Class Representatives Juan Duarte and Betsy Duarte own Residential property at 3-A Salem Avenue, Carteret, New Jersey, which is within the Class Area. Juan Duarte and Betsey Duarte allege that, as a result of Smelter Contaminants, their use and enjoyment of their property has been interfered with and the value of their property has declined.

The Parties have engaged in arms-length settlement negotiations to resolve this matter and believe that the Settlement Agreement reached is fair to all concerned while recognizing the uncertainty of litigation. Accordingly, the Parties respectfully request that the Court preliminarily approve the proposed settlement and authorize that notice of the settlement be provided to the Class Members, as set forth below.

THE PROPOSED SETTLEMENT

The proposed Settlement Agreement was negotiated in good faith, by experienced counsel who vigorously advocated for their respective clients. Negotiations extended over several years

[3] N.J. Admin. Code § 18:12-2.2(b).

and included two unsuccessful rounds of direct settlement discussions, an unsuccessful formal mediation process before an independent neutral, The Hon. Diane M. Welsh, and two additional days of direct settlement negotiations, at which time a settlement was reached directly between counsel for the parties.

The proposed Settlement would provide significant monetary relief to Plaintiffs and Class Members that is favorable considering the uncertainties of litigation, including class certification, trial and appeals, and the asserted defenses. The detailed class action Settlement Agreement is attached as Attachment A. A summary of the proposed Settlement is set forth below. However, in the event of any conflict between the summary and the detailed Settlement Agreement, the Settlement Agreement controls.

Cash Payments - $42,000,000

Under the proposed Settlement, Defendants would establish a Settlement Fund in the amount of Forty-Two Million Dollars ($42,000,000). Defendants will additionally pay up to $250,000 in claims administration costs. The Settlement Fund will cover all fees, reimbursement of costs, payments, and claims administration costs over $250,000 associated with the Settlement Agreement, including the following payments in order of priority: (i) approved attorneys' costs and expenses, (ii) approved fee award to Class Counsel; (iii) approved Claims Administration Expenses above $250,000; (iv) incentive awards or other compensation to the proposed Settlement Class Representatives; and (v) payments to eligible Class Members.

In addition, Defendants and Plaintiffs' Counsel have also negotiated a separate proposed settlement with certain property owners outside of the Class Area (the "Settling Individual Homeowners"). In the event that the total aggregate of payments to all Settling Individual Homeowners (which include Settlement Individual Homeowners' attorneys' fees and costs) is less

than $2 million, USMR will also pay the remaining amount to reach a total of $2 million to the class action Settlement Fund (e.g., payments to Settling Individual Homeowners plus this potential payment to the class action Settlement Fund equal $2 million).

The payments described in this section represent the total limit and extent of Defendants' cash payment obligations to the Class under the Settlement Agreement.

Residential Soil Cleanup - $61,000,000

In addition to cash payments, Defendants have incurred more than $61 million in a residential soil cleanup program which includes community outreach, sampling and analysis, environmental remediation, and reporting, all of which is subject to NJDEP oversight (the "NJDEP Program"). The Class Settlement Benefits include the Plaintiffs' Counsel's contribution to the NJDEP Program including, but not limited to, technical review, comments, oversight, monitoring of the NJDEP Program, and an extensive deposition of the responsible oversight authority for the program (the "LSRP") which ultimately influenced and enhanced the USMR residential cleanup program within the Area of Concern ("AOC"). The majority of the cost for the NJDEP Program has been incurred during the course of this litigation.

Settlement Class Definition

Solely for purposes of settlement, the Parties agree to certification of the following Settlement Class under Fed. R. Civ. P. 23(b)(3), as set forth in the Settlement Agreement:

Settlement Class:

> All persons who own or owned any Residential Property (as that term is defined by N.J. Admin. Code § 18:12-2.2(b) and includes 'dwelling house[s] and the lot or parcel of land on which the dwelling house is situated [where the] dwelling is functionally designed for use and enjoyment by not more than four families and includes residential condominiums') and (ii) vacant lots zoned for residential use in each case located within the geographical boundary defined by Exhibit A [to the Settlement Agreement] (the "Class Area") at any time during the Class Period, but excluding (i) properties owned by the Defendants or employees of Defendants, and (ii)

> properties owned by any federal, state, or local government or any subdivision of such government entities. The Class Area is generally bounded by Peter J. Sica Industrial Highway to the East, Romanowski Street to the North-East Cypress Street to the North, Arthur and East Grant Streets to the West, and Middlesex Ave. to the South. The Class includes Residential Properties located on both sides of the boundary streets.[4] The Class Period is from January 30, 2017, to March 27, 2023.

The Class Ownership Period constitutes the period beginning on January 30, 2017, and ending on March 27, 2023.

[4] The map at Exhibit A to the Settlement Agreement (the Settlement Agreement is Attachment A to this pleading) outlines the geographic boundaries of the Settlement Class. The Class Area is generally bounded as follows: Starting at and just west of the parcel at 1 Edwin Street, near the intersection of Bergen and Edwin Street, head north along Edwin Street to Port Reading Avenue

- Left (west) at Port Reading Avenue to East Grant Street
- Right (north) on East Grant Street to Spruce Street
- Right (east) on Spruce Street to Arthur Avenue
- Left (north) on Arthur Avenue to Ash Street
- Right (east) on Ash Street which becomes Cypress Street to Washington Avenue
- Right (southeast) on Washington Avenue to Whittier Street
- Left (northeast) on Whittier Street to Romanowski Street
- Right (southeast) on Romanowski Street to Cooke Avenue
- Right (southwest) on Cooke Avenue to 26 Cooke Avenue
- Left (southeast) and north of the 26 Cooke Avenue parcel and south of parking lots of St. Elias Byzantine Catholic Church and Columbian Club (164 High Street) to Locust Street
- Right (southwest) on Locust Street to Irving Street
- Left (southeast) on Irving Street to Roosevelt Avenue
- Left (northeast) on Roosevelt Avenue to Peter J Sica Industrial Highway
- Right (south to southwest) on Peter J Sica Industrial Highway to the north edge of the parking lot of 300 Middlesex Avenue
- Right (west) along the parking for 300 Middlesex Avenue to the intersection of Pershing Avenue and Bergen Street
- Left (south) on Pershing Avenue to Bergen Street
- Right (west) along Bergen Street to and ending at Edwin Street.

The Class Area includes properties on both sides of the boundary streets. In the event of any conflict, the descriptions set forth above take precedence over the map.

In exchange for Settlement Class Members releasing Defendants from all claims, including dismissal with prejudice of all claims relating to the Settlement Class, and Class Members providing proof of ownership to the subject Eligible Property as defined in the Settlement Agreement, Class Members will each be entitled to a monetary payment. The monetary payment will be allocated as follows:

1. After initial distributions are made to Class Counsel for attorney's fees and expenses, and to any Settlement Class Representatives as incentive payments, the remaining monies shall be allocated to the Settlement Class. This amount is referred to as the "Settlement Fund."
2. The Parties have computed that the Settlement Class consists of approximately 1205 "Eligible Properties") (including single family residential properties, vacant residential lots, condominiums, and apartments with 4 or less units). For example, if the Settlement Fund consists of approximately $21,000,000 each Eligible Property will be allocated approximately $17,500.
3. After the Settlement Administrator determines that all valid and timely Claim Forms have been adjusted and paid the Eligible Property Payment Amount, any remaining monies in the Class Settlement Fund, if any, shall revert to USMR. Notwithstanding the above, however, the reversion to USMR shall not exceed 30% of the amount in the Settlement Fund after deduction of Class Counsel's attorneys' fees, costs and expenses, and payment of approved incentive awards. If there are remaining monies after payment of this reversion amount to USMR, such monies shall be distributed to Class Members filing valid and timely Claim Forms, pro rata.

4. If the Eligible Property changed ownership during the Class Period, then the Eligible Property Payment Amount will be divided among the owners/owner groups for the Eligible Property on a time weighted basis over the Class Period. For example, if the Class Ownership Period is six- and one-half years (6.5) and owner X owned an Eligible Property for 39 months, and Y owned the same property for 39 months, each would receive one-half of the Eligible Property Payment Amount or approximately $8,775.00 each (based upon the above example of a total Eligible Property Payment Amount of $17,500). Record title ownership and the time period of ownership are subject to verification through the Claims Administration process. If there are multiple owners of record title at the same time for a single Eligible Property, a single payment for the property will be issued to all record title owners as a group. Any subsequent allocation of that payment among those record title owners will be for the record title owners to determine and will not be determined in the Claims Administration process.

As described above, Defendants have also negotiated a separate proposed settlement with the "Settling Individual Homeowners." If the total aggregate of payments to all Settling Individual Homeowners (which include Settlement Individual Homeowners' attorneys' fees and costs) is less than $2 million, USMR will also pay the remaining amount to reach a total of $2 million to the Settlement Fund Escrow Account. USMR shall make such payment (if any) to the Settlement Fund Escrow Account on or before the date 10 business days after the later date of (i) the Effective Date, or execution of formal settlement documents and payments to all Settling Individual Homeowners.

Cash benefits will be distributed to the Settlement Class Members from the Settlement Fund Escrow Account by the Settlement Administrator. The payment structure to the Settlement

Class Members is based on a per-property payment of the Eligible Property Payment Amount that is the same for each Eligible Property in the Class Area. [5] All payments from the Settlement Fund shall be pursuant to the terms of the Escrow Agreement.

The Settlement Administrator shall calculate the Eligible Property Payment Amount after (i) there is a final, non-appealable order on the amount of Settlement Class Counsel's attorneys' fees and costs, Settlement Class Representative incentive awards, and settlement administration costs to be deducted from the Settlement Fund, (ii) receipt of the Settling Individual Homeowners payments are complete, and (iii) the Settlement Administrator completes a list of all Eligible Properties and that list has been approved by Defendants and Settlement Class Counsel.

The amount allocated to each Class Member will depend upon the number of valid claimants for each Eligible Property and the amount awarded for Settlement Class Counsel's fees and costs, Settlement Class Representatives incentive awards, and settlement administration costs (if any), and thus it is impossible to discern the exact amount each Class Member will receive until the final approval hearing, at which time the deadline for the submission of claims will have passed. In any event, each Eligible Property will be allocated the same amount,[5] respectively, and where a particular Eligible Property has multiple owners over the Class Period, the Eligible Property Payment Amount will be divided on a time-weighted basis.

In the event that the owner or owner group for an Eligible Property during all or a portion of the Class Period opt(s) out; or fail(s) to complete the Claim and Release Form; or provides a Claim and Release Form with incomplete or inaccurate ownership documentation and fails to correct or supply such information after given reasonable notice of and an opportunity to do so,

[5] There are a handful of Eligible Properties that changed use from "residential" to an excluded land classification during the Class Period. Owners of these properties will be eligible for a payment that is proportional to the time period the property was classified as residential.

the settlement payment that such owner or owner group would have been entitled to will be considered unclaimed funds and will be subject to the reversion to USMR (as described above) and then, if the reversion cap is met, allocated to Class Members, as set forth above.

All payments issued to Class Members via check will state, on the face of the check, that the check will expire and become null and void unless cashed within ninety (90) days after the date of issuance. To the extent that a check issued to a Class Member(s) is not cashed within ninety (90) days after the date of issuance, the check will be void, and such funds shall revert to the Settlement Fund, to be distributed as unclaimed funds. To the extent that no claim is made for an Eligible Property within the claims period, the unclaimed funds shall be distributed to the reversion to USMR (as described above) and then, if the reversion cap is met, allocated to the Class Members who have filed complete and accurate claim forms pro rata.

ARGUMENT

I. THE COURT SHOULD ORDER PRELIMINARY APPROVAL OF THE SETTLEMENT

Granting preliminary approval requires the Court to consider whether "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). If, after consideration of those factors, a court concludes that the settlement should be preliminarily approved, "an initial presumption of fairness" is established. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003).

The preliminary approval decision is a determination that "there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Professional Billing & Management Services, Inc.*, No. 06-4453, 2007 WL 4191749, at *1 (D.N.J. 2007); Manual for

Complex Litigation, § 21.632 (4th ed. 2006). "Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient." *Jones v. Commerce Bancorp, Inc.*, 05-5600 RBK, 2007 WL 2085357, at *2 (D.N.J. July 16, 2007). Once a settlement is preliminarily approved by the Court, notice of the proposed settlement and the fairness hearing is provided to class members. *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438-39 (E.D. Pa. 2008).

Applying these considerations demonstrates that the proposed Settlement Agreement exceeds the preliminary threshold for reasonableness.

First, the settlement was reached after arm's length negotiations both with, and without, the aid of a neutral. These negotiations took place after Defendants and Plaintiffs engaged in extensive discovery, class certification briefing, and *Daubert* motions, as set forth below.

Second, both Plaintiffs and Defendants have undertaken extensive fact and expert discovery in this litigation, which has enabled each side to properly evaluate the merits and limitations of their respective positions. Specifically, the Parties have engaged in over five years of discovery into class certification and related merits issues. Fact discovery has included, among other things, the production of millions of pages of documents by Defendants regarding the history of Smelter operations, alleged contamination, status of remediation efforts, residential sampling and monitoring data, photographs, depositions and exhibits from prior Carteret Smelter related litigations, regulatory reports and correspondence with regulatory agencies, and other materials for the Smelter Site at issue in the litigation. After the exchange of document discovery, there were numerous fact witness depositions and 30(b)(6) depositions of Defendants. In addition, there has been significant non-party document and deposition discovery, including the depositions of Defendants' technical consultants and depositions of the NJDEP's Licensed Site Remediation Professional ("LSRP"); and depositions of each of the named Plaintiffs. Expert discovery has been

extensive including the exchange of seven plaintiff expert reports, nine defense expert reports, and depositions of each. There also has been significant motion practice, including eight *Daubert* Motions (including renewed Motions), Plaintiffs' Motion to Certify the Class (including renewed Motion), motions to dismiss, motions for leave to amend, a motion to quash subpoena, and an appeal to the District Court of Judge Mannion's denial of Plaintiffs' Motion for Leave to Amend.

Moreover, since the inception of the case six years ago, Plaintiffs' claims have been challenged, more fully developed, and narrowed. For example, Plaintiffs' original complaint filed on January 30, 2017, brought claims for both medical monitoring and property damages. Since then, Plaintiffs have amended their complaint several times, and as a result, Plaintiffs' case has been considerably narrowed. Plaintiffs have withdrawn their claims for medical monitoring and have more precisely defined the allegations against each respective Defendant. Thus, the extensive discovery and motions practice conducted to date have provided the Parties with sufficient evidence to evaluate the merit and value of the Plaintiffs' case against Defendants and have enabled the Parties to reach a reasonable settlement.

Third, counsel for Plaintiffs and Defendants are experienced in toxic tort and complex class litigation. Plaintiffs' counsel, Mark Lanier, is a nationally recognized trial lawyer who has served as lead trial counsel in countless mass tort, toxic tort, class action, and environmental cases. He is widely regarded as one of the foremost toxic tort trial lawyers in the United States. *See* https://www.lanierlawfirm.com/attorney/w-mark-lanier/. In addition, this Court has found that Steven J. German, of German Rubenstein LLP, "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). Christopher T. Nidel, of Nidel and

Nace PLLC, earned his Masters Degree in Chemical Engineering from M.I.T. and a J.D. from the University of Virginia School of Law. 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. Defendants have been represented by David R. Kott of McCarter & English, LLP and James D. Thompson, III of Vinson & Elkins LLP, each experienced trial lawyers and firms with national class action and toxic tort legal practices.

Fourth, the named Class Representatives have voluntarily agreed to enter the proposed Settlement Agreement and there have been no objections to date.

The proposed Settlement Agreement provides a fair and favorable result for the Settlement Class Members. Counsel recognize and acknowledge the expense and likely duration of continued proceedings necessary to prosecute the case through the remainder of class certification, summary judgement, trial, and appeals. Plaintiffs' counsel is mindful of the potential problems of proof and possible defenses of the Defendants. Defendants contend that there are genuine issues regarding whether the Smelter is the source of any contaminant within the Settlement Class Area and whether the property values in the Settlement Class Area have been negatively affected by the Smelter or any contaminant emanating from the Smelter. Nevertheless, Defendants recognize that the Settlement Class Representatives have alleged that the presence of Smelter Contaminants at, and originating from, the Smelter has impacted their use and enjoyment of their properties, and further recognize and acknowledge the expense and likely duration of continued proceedings necessary to defend the case through class certification, summary judgement, trial, and appeals and the potential risks associated with continued litigation. Thus, the Settlement Agreement would enable eligible Class Members to recover a significant monetary (~$17,500 per Eligible Property) award to compensate them for their claims without the risk of continued litigation. The Settlement

Agreement is not only reasonable but provides a favorable result to Class Members and should be preliminarily approved.

II. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Where the Court has not already certified a class, in addition to making a preliminary determination that the settlement is fair, the Court must also determine whether the proposed settlement class satisfies the requirements of Rule 23. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see also* Manual for Complex Litigation at § 21.632 ("The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)."). Plaintiffs therefore assert that the requirements of Rule 23 have been met for the reasons set forth in this Section II, and Defendants do not oppose that the Settlement Class can, for these purposes, be certified on these grounds.[6]

A. The Proposed Settlement Class Meets All the Requirements for Class Certification Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

Rule 23(a) requires that the parties moving for class certification demonstrate the following: "(1) the class is so numerous that joinder of all members is impracticable ["numerosity"], (2) there are questions of law or fact common to the class ["commonality"], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"], and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"]." Fed. R. Civ. P. 23(a).

[6] Defendants reserve the right to oppose class certification for trial if the proposed settlement set forth herein is not fully and finally approved. If the Settlement Agreement is approved, the proposed Settlement Class and the propriety of class certification for settlement purposes only shall have no binding or preclusive effect in any future actions.

1. Numerosity

No specific number is needed to satisfy the numerosity requirement of Rule 23(a)(1); rather, an application of the rule is to be considered in light of the particular circumstances of the case. *In re Modafinil Antitrust Litigation*, 837 F.3d 238, 249-50 (3d Cir. 2016); *Szczubelek v. Cendant Mortgage Corp.*, 215 F.R.D. 107, 116 (D.N.J. 2003).

Here, the Parties have identified over 1,200 properties in the Settlement Class. Given that the Settlement Class can cover multiple owners of a single property (*e.g.*, if the property was sold on or between January 30, 2017, and March 27, 2023), the number of actual Class Members is likely to be slightly higher. The Settlement Class is sufficiently numerous to make joinder of all members impractical, and thus satisfies the numerosity requirement.

2. Commonality

The proposed Settlement Class also meets the commonality requirement of Rule 23(a)(2), which requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and that the claims arising from that injury depend on a "common contention of such a nature that it is capable of class-wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

Plaintiffs' claims focus on alleged Smelter-related contamination of their properties, all stemming from the historical operations at the Smelter, and Defendants' alleged failure to properly remediate such Smelter-related contaminants. All Plaintiffs contend that a) Defendants engaged in abnormally dangerous activity by emitting Smelter Contaminants and for failing to properly remediate Smelter Contaminants, for which Defendants are strictly liable, b) Defendants acted negligently by failing to meet applicable standards of care in emitting, disposing, transporting, and

remediating alleged Smelter Contaminants, and c) Defendants' activities have caused a nuisance to the putative Class Members. Thus, evidence regarding Defendants' respective historic Smelter operations, remedial investigations, the extent of historic contamination in Carteret, and the nature of Defendants' remediation program will be common to each class member, and the nature of Defendants' conduct is common to all Class Members and "capable of class-wide resolution." Thus, for settlement purposes, the commonality requirement is satisfied.

3. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented. *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994). Typicality is satisfied in cases involving a single course of conduct resulting in the same alleged harm. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998) (typicality requirement satisfied because representatives and members were injured by same types of deceptive practices and suffered same generic type of economic harm); *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 130 (3d Cir. 1987) (noting that "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory").

Here, Settlement Class Representatives Juan Duarte and Betsy Duarte allege that the use and enjoyment of their property has been impacted by the presence of alleged Smelter Contaminants allegedly emanating from the Smelter and that their property values have been

diminished as a result. Because the Smelter Contaminants about which the Class Representatives complain is alleged to have emanated from a single source -- the Smelter -- and is alleged to stem from the same course of alleged conduct by the respective Defendants, the facts and legal theories upon which the Settlement Class Representatives ground their claims are typical of the Class they intend to represent. Thus, for settlement purposes, the requirement of typicality is satisfied.

4. Adequacy

The fourth and final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy of representation requires that the class representative must not have interests antagonistic to those of the class, and that class counsel must be qualified, experienced, and generally able to conduct the proposed litigation. *Szczubelek*, 215 F.R.D. at 119.

Here, Juan Duarte and Betsy Duarte allege that their properties have been negatively impacted by Smelter Contaminants and seek the same type of relief from Defendants; money damages. Thus, there is no conflict between the Class Representatives and the putative Class Members. With respect to class counsel, the Duartes have retained counsel qualified and experienced in the prosecution of complex environmental, toxic tort and class action litigation, as demonstrated above.

In sum, for settlement purposes, each Rule 23(a) prerequisite to class certification has been met.

B. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3).

Plaintiffs seek to certify the Settlement Class under Rule 23(b)(3). In order to certify an opt-out class under Rule 23(b)(3) as part of the settlement, the Court must make two additional findings: predominance and superiority. That is, "[i]ssues common to the class must predominate

over individual issues, and the class action device must be superior to other means of handling the litigation." *In re Prudential*, 148 F.3d at 313-14.

Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The "nature of the evidence that will suffice to resolve a question determines whether the question is common or individual." *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005). Thus, where proof of the essential elements of the cause of action do not require individual treatment, predominance is satisfied. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008).

Here, Plaintiffs assert that common questions concerning Defendants' alleged liability predominate over individual issues for settlement purposes. Plaintiffs' claims against the Defendants derive from their alleged generation, emission, disposal, and failure to properly remediate Smelter Contaminants and from Defendants' alleged conduct in releasing, emitting, disposing, transporting, and allegedly failing to remediate Smelter Contaminants. "'The focus of the predominance inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct.'" *Halley* 2016 WL 1682943, at *8, quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 298 (3rd Cir. 2011) (Finding predominance and granting final approval in environmental class action settlement where "[p]laintiffs' claims stem from [Defendants'] alleged conduct involving disposal, transportation, and remediation (or lack thereof)" of pollutants). Moreover, this Court has held that even if damages must be calculated on an individual basis, where, like here, issues of liability predominate, class certification is appropriate. *See Udeen v. Subaru of Am., Inc.*, No. 18-17334 (RBK/JS), 2019 U.S. Dist. LEXIS 172460, at *12 (D.N.J. Oct. 4, 2019). Moreover, the Settlement Agreement provides for the class payments to be determined by a common method for all Class

Members. For settlement purposes, Plaintiffs assert that common issues sufficiently predominate over individual issues as required under Rule 23(b)(3). Defendants acknowledge that their belief that individual issues related to the presence and source of alleged smelter contaminants on the individual Eligible Properties that would be critical if this case were litigated at trial are not impediments to the proposed class settlement, and Defendants do not oppose that the Settlement Class can be certified under Rule 23(b)(3) for settlement purposes only on these grounds.

Superiority is satisfied for settlement purposes as well. Under Rule 23(b)(3), the Court must also determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Rule sets forth several factors relevant to the superiority inquiry: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). In effect, "[t]he superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *In re Prudential*, 148 F.3d at 316 (citation omitted).

A class action settlement is the superior method of resolving Plaintiffs' claims. First, considering the amount of recovery to each putative Class Member (~$17,500) compared with the significant costs and complexity of this litigation (over $1 million to date), individuals are likely to be less inclined to file individual actions on their own or to be able to settle and recover on individual actions on their own. Concentrating the litigation in this forum is appropriate because

the claims all arise in New Jersey. Finally, trial manageability issues are not relevant here because the proposed Class is a settlement class.

III. THE COURT SHOULD APPROVE THE PROPOSED FORM AND METHOD OF CLASS NOTICE

A. The Proposed Notice Provides for the Best Notice Practicable.

In a Rule 23(b)(3) settlement such as this one, the Court must direct that class members be given "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010); *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

The Parties have agreed to a Notice plan that will provide the best notice that is practicable under the circumstances, similar to the notice approved in other environmental property damage cases. *See e.g*., *Halley*, *17-18.

First, Notice will be mailed by First Class Mail directly to each Class property owner at his or her mailing address, as reflected in the electronic tax database maintained by the Borough of Carteret. Where the electronic property records indicate that the property owner does not live at the subject property, Notice will be mailed both to the property owner's current mailing address listed in these databases, as well as to the address of the subject Property. In addition, the Parties will investigate the historical ownership records maintained and consolidated at Rutgers University (http://modiv.rutgers.edu/search -data/ for the Eligible Properties for prior owners during the Class Period and mail the Notice by First Class Mail to prior owners whose identity and current address can be determined with reasonable effort. The Settlement Administrator also shall mail copies of

the Individual Notice to any other potential members of the Settlement Class that request copies or that otherwise come to its attention.

In addition to mailing individual notices, Notices will also be published in the print and digital versions of the Home News Tribune, which is a newspaper of general circulation in Middlesex County, New Jersey. The Publication Notice will run once a week for four consecutive weeks commencing on the Notice Date announcing the Settlement. Notice will also be provided on a dedicated settlement website and made available in both English and Spanish.

The individual mailed Notices (Exhibit 1 to the Proposed Preliminary Approval Order included as Attachment B) briefly describe the litigation and the terms of the Settlement, provide a map and street boundaries for the Settlement Class Area, and include copies of the Claim and Release Form. The Publication Notice will provide similar information and will direct a potential Class Member to a website to obtain copies of the Claim and Release Form. (Exhibit 2 to the Proposed Preliminary Approval Order included as Attachment B to the Settlement Agreement). Finally, the Settlement Administrator shall establish a toll-free phone number to answer questions by the Settlement Class Members and shall leave such toll-free line open until the deadline for submission of Claim Forms.

To assist with the notice and claims procedure, the Parties recommend JND Legal Administration, an experienced class settlement administrator, to be appointed Settlement Administrator. A copy of JND's qualifications is attached as Attachment C. JND will assist with Settlement Class Notice by mailing individual Notices, re-mailing returned notices to forwarding addresses, assisting with Publication Notice, and maintaining a website on which the Notice and Claim and Release Forms will be available as well as a toll-free number to respond to questions

from potential class members. JND will also be responsible for processing and verifying claims, calculating payment amounts, and mailing checks.

B. The Proposed Form of Class Notice Adequately Informs Class Members of Their Rights in This Lawsuit.

Rule 23(b)(3) also requires that the notice provided to Class Members must "clearly and concisely state in plain, easily understood language" the nature of the action; the class definition; the class claims, issues, or defenses; that the class member may appear through counsel; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on Class Members. *See* Fed. R. Civ. P. 23(c)(2). The proposed class Notices, attached as Exhibits to the Proposed Preliminary Approval Order (Attachment B), comply with these requirements.

Both the method for disseminating the Notice to class members and the content of the proposed Notices meet the requirements of due process and the Federal Rules of Civil Procedure. Here, because the Settlement Class is defined by geographic boundaries, notice sent to the eligible properties as well as to the addresses listed for eligible class members in the municipality's property tax records if such addresses differ from the property address, is likely to reach most of the class members. Publication Notice will supplement that mailed notice and increase the likelihood of Class Members being informed of their rights and obligations.

The content of the Notice provides all of the required information concerning Class Members' rights and obligations under the proposed Settlement. It details the procedures for opting out, submitting claims, and filing objections, and notifies Class Members of the consequences of their choices. The Notice also explains the nature of the claims covered under the Settlement Agreement and the possible relief available. Under these circumstances, the proposed Notice is consistent with the requirements of due process and the Federal Rules.

IV. PROPOSED SCHEDULE OF EVENTS

If the Court grants preliminary approval, the Parties propose the following schedule, which is incorporated into the proposed Order Granting Preliminary Settlement Approval attached hereto as Attachment B.

Event	Schedule
Deadline for mailing, publishing, and posting Class Notice.	Preliminary Approval date + 30 days.
Deadline for filing attorneys' fee petition.	Preliminary Approval date +30 days.
Deadline for opting out, objecting, or submitting claim.	Class Notice Date +45 days.
Fairness hearing to be held at any time 75 days after the Notice Date.	To be scheduled on a date at least 75+ days after Notice Date.
Establishment of Settlement Fund	Effective Date (as defined by the Settlement Agreement) + 10 days.

CONCLUSION

For the reasons stated above, Plaintiffs request that the Court certify a Rule 23(b)(3) class for settlement purposes only (Defendants are unopposed), and the Parties jointly request that the Court preliminarily approve the Parties' proposed Class Action Settlement, approve the proposed class notice and order notice of the Settlement to eligible Class Members, and grant such other relief and orders as the Court deems necessary and appropriate.

Respectfully submitted this 28th day of March 2023.

SIGNATURES ON FOLLOWING PAGE

/s/ David R. Kott
David R. Kott, Esq.
McCARTER & ENGLISH
100 Mulberry Street
Four Gateway Center
Newark, NJ 07102
(973) 639-2056
dkott@mccarter.com

James D. Thompson III, Esq. (*pro hac vice*)
Lewis C. Sutherland, Esq. (*pro hac vice*)
VINSON & ELKINS LLP
845 Texas Avenue, Suite 4700
Houston, TX 77002

Attorneys for Defendants

/s/ Steven J. German
GERMAN RUBENSTEIN LLP
Steven J. German, Esq.
19 West 44th Street, Suite 1500
New York, NY 10036
Telephone: (212) 704-2020
sgerman@germanrubenstein.com

Counsel for Plaintiffs