DeNITTIS OSEFCHEN PRINCE, P.C.
James A. Barry, Esq. (027512008)
525 Route 73 North, Suite 410
Marlton, NJ 08053
(856) 797-9951
jbarry@denittislaw.com

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action **NOTICE OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; APPROVAL OF AWARD OF ATTORNEY FEES AND COSTS; AND APPROVAL OF INCENTIVE AWARD FOR LEAD PLAINTIFFS**

To: Clerk, Gloucester County

Return date of motion: Monday, November 30, 2026 at 10:00 a.m.
(per Court's July 31, 2026 Order attached hereto)

Place: Gloucester County Justice Complex
70 Hunter Street
Woodbury, NJ 08096

Please take notice that the undersigned, attorney for the plaintiff herein, will apply to the above-named court at the Gloucester County Justice Complex located at 70 Hunter Street, Woodbury, NJ 08096 on Monday, November 30, 2026 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an Order granting final approval of class action settlement, approval of award of attorney fees and costs and approval of incentive award for lead Plaintiffs.

Counsel will reply upon the attached certifications as part of this motion.

Pursuant to the Rules, the undersigned:

Does not request oral argument at this time unless an opposition is filed.

This matter is not currently scheduled for a trial.

Dated: November 9, 2026

DeNITTIS OSEFCHEN PRINCE, P.C.

By: _____

James A. Barry, Esq. (027512008)
Stephen P. DeNittis, Esq. (031981997)
Joseph A. Osefchen, Esq. (024751992)
Shane T. Prince, Esq. (022412002)
525 Route 73 North, Suite 410
Marlton, New Jersey 08053
JBarry@Denittislaw.com
SDenittis@Denittislaw.com
JOsefchen@Denittislaw.com
SPrince@Denittislaw.com
(856) 797-9951

FILED JULY 31, 2026
SUPERIOR COURT
CHANCERY DIVISION
Robert Malestein, P.J.CH.

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action ~~[PROPOSED]~~ **ORDER GRANTING PRELIMINARY APPROVAL OF CLASS SETTLEMENT AGREEMENT AND DIRECTING DISSEMINATION OF CLASS NOTICE**

Before the Court is the Motion for Preliminary Approval of Class Settlement Agreement and for Direction of Class Notice Pursuant to N.J. Ct. R. 4:32-2 ("Motion"), filed by Plaintiffs. Plaintiffs and Defendant Shieldalloy Metallurgical Corporation have entered into a Class Settlement Agreement, dated July 15, 2026 ("Settlement Agreement"). Having thoroughly reviewed the Settlement Agreement, including the proposed forms of class notice and other exhibits thereto, the Motion, and the papers and arguments in connection therewith, and good cause appearing, the Court hereby ORDERS as follows:

1. Capitalized terms not otherwise defined herein have the meanings set forth in the Settlement Agreement.

2. This Court has subject matter jurisdiction over this matter, and has personal jurisdiction over the Parties and the Settlement Class Members for purposes of this settlement. Venue is proper in this Court.

PRELIMINARY APPROVAL

3. The Motion is GRANTED.

4. The Court hereby preliminarily approves the Settlement Agreement, and the terms

embodied therein pursuant to N.J. Ct. R. 4:32-2.

5. The Court finds that it will likely be able to approve the Settlement Agreement under N.J. Ct. R. 4:32-2 and to certify the Settlement Classes for purposes of judgment on the proposed Settlement.

6. The Court preliminarily finds that the Settlement Agreement is fair, reasonable, and adequate as to the Settlement Class Members under the relevant considerations. The Court finds that Plaintiffs and proposed Class Counsel have adequately represented, and will continue to adequately represent, the Settlement Classes. The Court further finds that the Settlement Agreement is the product of arms' length negotiations by the Parties with the assistance of an experienced mediator, Hon. Peter E. Doyne, A.J.S.C. (Ret.), and comes after significant litigation, investigation, and discovery. The Court preliminarily finds that the relief provided—a non-reversionary common settlement fund of $1.325 million—is adequate taking into account, *inter alia*, the costs, risks, and delay of trial and appeal for all Parties, the legal issues presented in this Action, the interests of the proposed Settlement Classes, and the proposed method of distributing payments to the Settlement Classes (*i.e.*, direct payments by checks and electronic payments). The Court preliminarily finds that the Settlement Agreement treats the Settlement Class Members equitably relative to each other, and that the proposed allocation of settlement funds to Settlement Class Members is reasonable and equitable. Under the terms of the Settlement Agreement, all Settlement Class Members are eligible to submit claims for settlement payments via a simple claim form. The Court will fully assess any request for attorneys' fees and litigation expenses after receiving a motion from Class Counsel supporting such request. At this stage, the Court finds that the plan to request fees and litigation expenses to be paid from the common settlement fund creates no reason not to direct notice to the Settlement Classes; should this Court find any aspect of the

requested attorneys' fees or expenses unsupported or unwarranted, such funds will not revert to Defendants.

7. The Court hereby provisionally certifies, for settlement purposes only, two "Settlement Classes," pursuant to N.J. Ct. R. 4:32-1(b)(3) and 4:32-2, consisting of:

- The "WRA Class" which is defined to include all owners of residential properties which received a CEA notice which are also within the Well Restriction Area delineated by the USEPA in 1986. A list of all properties within this class are attached as Exhibit B to the Settlement Agreement.
- The "Non-WRA Class" which is defined to include all owners of residential properties which received a CEA notice which are not within the Well Restriction Area delineated by the USEPA in 1986. A list of all properties within this class are attached as Exhibit B to the Settlement Agreement.

Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Classes.

Also excluded from the Settlement Classes are those persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

8. The Court finds that, for settlement purposes only, the Settlement Class, as defined above, meets the requirements for class certification under N.J. Ct. R. 4:32-1—namely, that (1) the Settlement Class Members are sufficiently numerous such that joinder is impracticable; (2) there are common questions of law and fact; (3) Plaintiffs' claims are typical of those of the Settlement Class Members; (4) Plaintiffs and Class Counsel have adequately represented, and will

continue to adequately represent the interests of the Settlement Class Members; and (5) for purposes of settlement only, the Settlement Class meets the predominance and superiority requirements of N.J. Ct. R. 4:32-1(b)(3).

9. Certification of the Settlement Classes and appointment of the Settlement Class Representatives and Class Counsel shall be solely for settlement purposes and without prejudice to the Parties in the event the Settlement is not finally approved by this Court or otherwise does not take effect. If the Settlement is not finally approved by this Court or otherwise does not take effect for any reason, certification of the Settlement Classes and any Settlement Class Representative or Class Counsel appointments, and all findings in support thereof, shall be deemed void and vacated. The Parties reserve all rights and defenses as they existed prior to the execution of the Settlement Agreement and this Order in the event the Settlement is not finally approved by this Court or otherwise does not take effect.

10. The Court hereby appoints Plaintiffs in the caption set forth above as Settlement Class Representatives to represent the Settlement Class.

11. The Court hereby appoints the following attorneys as Class Counsel for the Settlement Class:

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

12. The Court hereby appoints Angeion Group as Settlement Administrator and directs Angeion Group to carry out all duties and responsibilities of the Settlement Administrator as specified in the Settlement Agreement and herein.

NOTICE PROGRAM

13. Pursuant to N.J. Ct. R. 4:32-2(b), the Court approves the proposed Notice Program set forth at Section VI of the Settlement Agreement. The Court finds that the proposed Notice Program meets the requirements of Due Process under the U.S. Constitution and N.J. Ct. R. 4:32-2; and that such Notice program, which includes individual direct notice to Settlement Class Members via mail, and the establishment of a Settlement Website and Toll-Free Number is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

14. The Court further finds that the proposed forms and content of the Notice (including Exhibit C to the Settlement Agreement) are adequate and will give the Settlement Class Members sufficient information to enable them to make informed decisions as to the Settlement Classes, the right to object or opt out, and the proposed Settlement and its terms. The Court finds that the Notice clearly and concisely states in plain, easily understood language, inter alia: (i) the nature of the Action; (ii) the definition of the Settlement Classes; (iii) the class claims and issues; (iv) that a Settlement Class Member may enter an appearance through an attorney if the member so desires; (v) that the Court will exclude from the Settlement Classes any member who timely and validly requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on Settlement Class Members under N.J. Ct. R. 4:32-1 and 4:32-2.

15. The Court directs the Settlement Administrator and the Parties to implement the Notice program as set forth in the Settlement Agreement.

CLAIMS PROCEDURE

16. The Court approves the form and content of the proposed Claim Form, in the form attached as Exhibit A to the Settlement Agreement, approves the Claims Process set forth in the

Settlement Agreement for Settlement Class Members to submit Claims, and directs the Parties and the Settlement Administrator to implement the Claims Process.

PROCEDURES FOR REQUESTING EXCLUSION OR OBJECTING TO THE SETTLEMENT

17. Members of the Settlement Classes may exclude themselves from the Settlement Class by mailing to the Settlement Administrator, at the address provided in the Website Notice, a request for exclusion that is postmarked no later than sixty (60) days after the Notice Date (the "Exclusion Deadline").

18. To be effective, the request for exclusion must include (1) the Settlement Class Member's full name, telephone number, mailing address, and email address; (2) a clear statement that the Settlement Class Member wishes to be excluded from the Settlement Classes; (3) the name of this Action: "Cavagnaro v. Shieldalloy Corporation, et al."; and (4) the Settlement Class Member's original signature. Requests for exclusion furthermore must be made on an individual basis; "mass," "class," or other purported group opt outs are not effective.

19. Any member of the Settlement Classes who submits a timely and valid request for exclusion is foreclosed from objecting to the Settlement or to Class Counsel's motion for attorneys' fees, costs, and service awards. If a member of the Settlement Class submits both a timely and valid request for exclusion and an objection, the request shall be treated as a request for exclusion.

20. Any Settlement Class Member who does not submit a timely and valid request for exclusion as set forth in the Settlement Agreement shall be bound by all subsequent proceedings, orders, and judgments in this Action, including, but not limited to, the Release as defined in the Settlement Agreement, regardless of whether the Settlement Class Member has any pending claims or causes of action against Defendants.

21. Any Settlement Class Member who does not submit a timely and valid request for exclusion shall have the right to object to the proposed Settlement and/or to Class Counsel's motion for attorneys' fees, costs, or service awards, only by complying with the objection provisions set forth herein and in the Settlement Agreement.

22. Settlement Class Members who object shall remain Settlement Class Members and shall be subject to the Release set forth in this Settlement Agreement if this Settlement is approved by the Court and becomes effective. To be considered valid, an objection must be in writing, must be filed with the Court or mailed to the Court at the address listed in the Website Notice, postmarked/filed no later than sixty (60) days after the Notice Date (the "Objection Deadline"), and must include the following: (1) the name of this Action: "Cavagnaro v. Shieldalloy Corporation, et al."; (2) the full name, mailing address, telephone number, and email address of the objector; (3) the objector's original signature; (4) a description of the specific reasons for the objection; (5) the name, address, bar number and telephone number of counsel for the objector, if the objector is represented by an attorney; and (6) state whether the objector intends to appear at the Final Approval Hearing either in person or through counsel. Any Settlement Class Member who does not timely submit an objection in accordance with this section shall waive the right to object or to be heard at the Final Approval Hearing and shall be forever barred from making any objection to the proposed Settlement or to Class Counsel's motion for attorneys' fees, costs, and service awards. Any Settlement Class Member who objects to the Settlement shall nevertheless be eligible for all benefits of the Settlement if it is approved and becomes final.

FINAL APPROVAL HEARING

23. The Court will hold a Final Approval Hearing on November 30, 2026 at the Superior Court of New Jersey, Gloucester County located at 70 Hunter Street Woodbury, New Jersey.

24. The purposes of the Final Approval Hearing will be to: (i) determine whether the proposed Settlement Agreement should be finally approved by the Court as fair, reasonable, adequate, and in the best interests of the Settlement Class; (ii) determine whether judgment should be entered pursuant to the Settlement Agreement, dismissing the Action with prejudice and releasing all Released Claims; (iii) determine whether the Settlement Class should be finally certified; (iv) rule on Class Counsel's motion for attorneys' fees, costs, and service awards; (v) consider any properly filed objections; and (vi) consider any other matters necessary in connection with the final approval of the Settlement Agreement.

25. By no later than forty-five (45) days after the Notice Date, Plaintiffs and Class Counsel shall file their: (a) motion for final approval of the Settlement Agreement, requesting entry of the Final Approval Order and Judgment; and (b) motion for attorneys' fees, costs, and service awards. Promptly after they are filed, these document(s) shall be posted on the Settlement Website.

26. By no later than twenty-one (21) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Co-Lead Class Counsel for filing with the Court) copies of any objections received by the Settlement Administrator.

27. By no later than seven (7) days before the Final Approval Hearing, the Parties shall file any responses to any Settlement Class Member objections, and any reply papers in support of the motion for final approval of the Settlement and/or in support of Class Counsel's motion for attorneys' fees, costs, and service awards.

28. By no later than fourteen (14) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Co-Lead Class Counsel for filing with the Court) a declaration providing a complete and final list of Class Members who submitted timely and valid requests for exclusion.

29. The Court may, in its discretion, modify the date and/or time of the Final Approval Hearing, and may order that this hearing be held remotely or telephonically. In the event the Court changes the date, time, and/or the format of the Final Approval Hearing, Class Counsel shall ensure that the updated information is posted on the Settlement Website.

30. Only Settlement Class Members who have submitted timely and valid objections, in accordance with the requirements of this Preliminary Approval Order, may be heard at the Final Approval Hearing.

OTHER PROVISIONS

31. If the Settlement Agreement, including any amendment made in accordance therewith, is not approved by the Court or shall not become effective for any reason whatsoever, the Settlement Agreement and any actions taken or to be taken in connection therewith (including this Preliminary Approval Order and any judgment entered herein), shall be terminated and shall become null and void and of no further force and effect except for (i) any obligations to pay for any expense incurred in connection with Notice and administration as set forth in the Settlement Agreement, and (ii) any other obligations or provisions that are expressly designated in the Settlement Agreement to survive the termination of the Settlement Agreement, including the Parties' agreement to cooperate in asking the Court to set a reasonable schedule for the resumption of this Action.

32. Other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement Agreement, all proceedings in this Action are hereby stayed and suspended until further order of this Court.

33. Pending final determination of whether the Settlement Agreement should be finally approved, Plaintiffs and all members of the Settlement Classes are barred and enjoined from

instituting, maintaining, prosecuting, continuing, or otherwise asserting any Released Claim, excluding any efforts in furtherance of the Settlement or pursuant to the Settlement Agreement. This bar and injunction is necessary to protect and effectuate the Settlement Agreement and this Preliminary Approval Order, and this Court's authority to effectuate the Settlement, and is ordered in aid of this Court's jurisdiction.

34. The Court retains jurisdiction over this Action to consider all further matters arising out of or connected with the Settlement, including enforcement of the Release provided for in the Settlement Agreement.

35. The Parties are directed to use all reasonable efforts to implement and accomplish the terms and conditions of the Settlement Agreement should it be finally approved.

36. The Court may, for good cause, extend any of the deadlines set forth in this Preliminary Approval Order without further notice to Settlement Class Members. Without further order of the Court, the Parties may agree to make non-material modifications in implementing the Settlement that are not inconsistent with this Preliminary Approval Order.

IT IS SO ORDERED.

Date: 7/31/26

The Honorable Robert Malestein, P.J.Ch.

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action **[PROPOSED] ORDER GRANTING FINAL APPROVAL OF CLASS SETTLEMENT AGREEMENT AND DISMISSAL OF ACTION WITH PREJUDICE**

The Court preliminarily approved the Settlement Agreement in this case on July 31, 2026 and amended that order on August 21, 2026. Since that time, Plaintiffs and Shieldalloy Metallurgical Corporation (the "Settling Parties") have completed the Notice process and now seek final approval of the Settlement Agreement ("Settlement Agreement"). Through a Motion For Final Approval of Class Settlement Agreement and Motion for Fees and Costs (the "Motions"), the Settling Parties seek, among other things, from the Court: (1) a granting of final certification of the Settlement Class; (2) approval of the Settlement Agreement as fair, reasonable, and adequate; (3) a ruling that the Notice process was reasonable and the best practicable under the circumstances; and (4) a granting of Plaintiffs' unopposed request for attorneys' fees and costs and Settlement Class Representative awards. A hearing was held on the Motions on _____, 2026. For the reasons stated below, the Motions are granted.

On _____, 2026, the matter of the Court's final approval of the Settlement Agreement came before the Court for consideration by way of the unopposed Motions filed by Class Counsel. Appearing on behalf of Settlement Class Representatives, Raymond and Diane Cavagnaro and Anthony Alimenti, and the Settlement Class were Stephen P. DeNittis and James

A. Barry of DeNittis Osefchen & Prince, P.C., 5 Greentree Centre, 525 Route 73 North, Suite 410, Marlton, NJ 08053; appearing on behalf of Defendant, Shieldalloy Metallurgical Corporation were Phil Cha, Esq., Lindsay A. Brown, Esq. and James Hearon, Esq. of Duane Morris, LLP 40 Lake Center Drive 401 Route 73 North, Suite 200 Marlton, NJ 08053.

WHEREAS, the Settlement Class Representatives, Raymond and Diane Cavagnaro and Anthony Alimenti, on behalf of themselves and the proposed Settlement Class, and Defendant, Shieldalloy Metallurgical Corporation ("Defendant," as defined in the Settlement Agreement), have executed and filed the Settlement Agreement with the Court on July 15, 2026; and

WHEREAS, unless otherwise defined herein, all capitalized terms used herein shall have the same meaning as set forth in the Settlement Agreement and are hereby incorporated by reference; and

WHEREAS, the Court, on July 31, 2026, entered the Order Granting Preliminary Approval of Class Settlement and Directing Dissemination of Class Notice ("Preliminary Approval Order") (amended on August 21, 2026), preliminarily approving the proposed Settlement Agreement and conditionally certifying this Action, for settlement purposes only, as a class action; and

WHEREAS, Raymond and Diane Cavagnaro and Anthony Alimenti were approved in the Preliminary Approval Order as the Settlement Class Representatives; and

WHEREAS, the Court, as part of its Preliminary Approval Order, directed that a plan for disseminating notice of the settlement ("Notice Plan") be implemented, and scheduled a hearing to determine whether the proposed settlement should be finally approved as fair, reasonable and adequate; and

WHEREAS, Class Counsel have satisfactorily demonstrated to the Court that the Notice Plan was followed; and

WHEREAS, all interested persons were given an opportunity to be heard, and all objections to the proposed Settlement Agreement, if any, were duly considered;

NOW, THEREFORE, the Court, having read and considered all submissions and having heard all arguments made in connection with the proposed Settlement Agreement, including the Motions, and having reviewed and considered the files and records herein, finds and concludes as follows:

1. The Complaint filed in this Action alleges generally that defendants diminished the value of Class Properties due to the establishment of groundwater Classification Exception Areas covering the Class Properties. As part of the Preliminary Approval Order, the Court certified the Settlement Class, for settlement purposes only, consisting of:

> All Persons that/who, as of the Execution Date, owns a Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as Exhibit B (the "Class Properties") to the Settlement Agreement.
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

2. The Court hereby affirms the Settlement Class for purposes of this Order Granting Final Approval of Class Settlement Agreement and Dismissal of Action With Prejudice ("Final Order").

3. For purposes of settlement, the Plaintiffs possess standing and the Settlement Class is adequately defined. The Settlement Class is adequately defined because the class definition is clear and precise, is based on objective criteria, and is not overbroad.

4. For purposes of settlement, the Settlement Class is sufficiently numerous, there are questions of law and fact common to the Settlement Class and Settlement Class Representatives' claims are typical of the Settlement Class. In addition, both Settlement Class Representatives and Class Counsel are adequate representatives of the Settlement Class and have fairly and adequately protected and will continue to protect the interests of the Settlement Class. Thus, the requirements to certify a class prescribed by the New Jersey Rules of Civil Procedure are satisfied as to the Settlement Class for purposes of settlement.

5. For purposes of settlement, the Settlement Class is certifiable under the New Jersey Rules because common issues predominate over individual issues and class treatment is superior to other alternatives for adjudicating the claims at issue.

6. The Settlement Class Representatives and Defendant have entered into the Settlement Agreement which has been filed with the Court. The Settlement Agreement provides for the settlement and dismissal of this Action with Defendant on behalf of the Settlement Class Representatives and the Settlement Class Members, subject to approval by the Court of its terms. The Court scheduled a hearing to consider the approval of the Settlement Agreement and directed that the Class Notice be disseminated in accordance with the terms of the Preliminary Approval Order.

7. In accordance with the terms of the Settlement Agreement and the Preliminary Approval Order, the Settling Parties implemented the Notice Plan approved by the Court. Class Counsel have confirmed to the Court that the Settling Parties complied with the Notice Plan.

8. The Court hereby finds that the Notice Plan and the Class Notice constituted the best notice practicable under the circumstances, and constituted valid, due and sufficient notice to the Settlement Class Members.

9. The Settlement Class Representatives have applied to the Court for final approval of the terms of the Settlement Agreement and for the entry of this Final Order and dismissal of Plaintiffs' claims in the Action on the merits with prejudice and without leave to amend.

10. The Court hereby finds that approval of the Settlement Agreement will result in substantial savings of time and money to the Court and the litigants and will further the interests of justice.

11. The Court hereby finds that the Settlement Agreement is the result of good faith arm's length negotiations by the Settling Parties thereto, and is fair, reasonable, and adequate.

NOW, THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED, ADJUDGED AND DECREED THAT:

12. The Court possesses jurisdiction over the subject matter of this Action, the Plaintiffs, the Settlement Class Members, Defendant, the Releasing Parties and the Released Parties.

13. [4] Class Members have filed requests for exclusion. All remaining Settlement Class Members are therefore bound by this Final Order and by the Settlement Agreement, including the Releases.

14. All provisions and terms of the Settlement Agreement are hereby found to be fair, reasonable and adequate as to the Settlement Class Members and the Settlement Class Representatives, are in compliance with due process and New Jersey law, and all provisions and terms of the Settlement Agreement are hereby finally approved in all respects.

15. The Settling Parties are hereby directed to consummate the Settlement Agreement in accordance with all its terms.

16. The Plaintiffs' Claims in this Action, individually and on behalf of the Settlement Class, as well as the Action itself, are dismissed in their entirety on the merits with prejudice and without leave to amend, and all members of the Settlement Class and all Releasing Parties shall be forever barred and permanently enjoined from asserting, either directly or indirectly, individually or in a representative capacity or on behalf of or as part of a class, whether under State or Federal statutory or common law, any Released Claim against any of the Released Parties.

17. As of the Effective Date, by operation of the entry of the Final Order, the Releasing Parties shall be deemed to have fully released, waived, relinquished and discharged, to the fullest extent permitted by law, all Released Claims that the Releasing Parties may have against all the Released Parties.

18. "Released Claims" means:

> to the fullest extent that the law permits their release, waiver and discharge, for, of and from any and all manner of past, present, and/or future claims, causes of action, cross-claims, counter-claims, charges, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, remedies, and/or liabilities, under any legal or factual theory, whether class or individual, in law or in equity, or arising under domestic or foreign law, constitution, statute, regulation, ordinance, contract, or otherwise in nature, for any and all fees, costs, penalties, fines, debts, expenses, attorneys' fees, damages (including but not limited to compensatory damages, economic damages, property damages, diminution in value damages, stigma damages, loss of use damages, loss of enjoyment damages, consequential damages, incidental damages, ancillary damages, statutory damages, exemplary damages, punitive damages, special damages, multiple damages, treble damages, restitution

damages, and/or disgorgement damages), biomonitoring or medical monitoring, declaratory or injunctive relief, equitable relief, whenever or however incurred, and liabilities of any nature or kind whatsoever (including joint and several liability and strict liability), known or unknown, suspected or unsuspected, matured or unmatured, accrued or unaccrued, asserted or unasserted, arising from, concerning, or relating in any way to: (i) any conduct, act, event, omission, fact, legal or equitable theory alleged or that could have been alleged in the Action; (ii) any release, discharge, leak, spill, emission and/or dumping of any hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) at, on, under, above, from, and/or migrating from any property, parcel, building, plant, structure, business, action, omission, conduct and/or operation at, on, under, about, adjacent to and/or near 35 South West Boulevard, Newfield, New Jersey 08344, also known or referred to as Block 1002, Lots 1, 4, and 18 on the tax map of the Borough of Newfield, Gloucester County, New Jersey and Block 502, Lots 1 and 2 and Block 505, Lot 23 on the tax map of the City of Vineland, Cumberland County, New Jersey ("SMC Property"); (iii) any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, touching, under, above, within and/or affecting the CEAs, any future classification exception area, Settlement Class and/or the Class Properties; and (iv) the investigation, remediation, and/or cleanup (including delineation, proposal and establishment of institutional controls such as a classification exception area or a well restriction area) of, for and/or related to any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, migrating from, migrating to, touching, under, above, within and/or affecting the SMC Property, the CEAs, any future classification exception area, and/or any and all of the Class Properties (the "Released Claims"). To avoid any doubt, the only claims and/or liabilities that are not Released Claims are personal injury claims for damages by the Releasing Parties concerning or relating to alleged human exposure to contamination from the SMC Property and are expressly excluded from this Release. The Released Parties expressly reserve all rights, arguments, remedies, objections, and defenses available under, based on, or as a result of, any fact, finding, law, statute, regulation, judicial or administrative order, plan of reorganization, bankruptcy plan, and/or bankruptcy discharge, related to or against any claims, demands and/or liabilities, including for personal injury, asserted by Releasing Parties.

19. "Released Parties" means:

Defendants Shieldalloy Metallurgical Corporation, AMG Critical Materials N.V., and TRC Companies, Inc. and each of their past, present, and/or future administrators, advisors, affiliated business entities, affiliates, agents, assigns, attorneys, constituent corporation or entity (including constituent of a constituent), counsel, directors, divisions, employee benefit plans, employee benefit plan participants or beneficiaries, employees, executors, heirs, insurers, managers, members, officers, owners, direct or indirect corporate parents, partners,

partnerships, predecessors, principals, resulting corporation or entity, servants, shareholders, subrogees, subsidiaries, successors, trustees, trusts, joint ventures, and any other representatives, individually or in their corporate or personal capacity, and anyone acting on their behalf, including in a representative or derivative capacity.

20. "Releasing Parties" means:

Plaintiffs and the Settlement Class Members that/who do not otherwise timely submit a valid request for exclusion from the Settlement Class, each of their respective heirs, predecessors, successors, assigns, family members, personal representatives, attorneys, officers, stockholders, shareholders, corporate parents, subsidiaries, affiliates, directors, managers, partners, principals, owners, agents, fiduciaries, spouses, children, dependents, parents, creditors, judgment creditors, representatives, employees, employers, executors, administrators, conservators, receivers, subrogees, trusts, trustees, members, servants, independent contractors, lessors, lessees, tenants, legally authorized representatives, insurers or reinsurers, and on behalf of anyone else who or which could or might assert any claim under or through any of the foregoing. Releasing Parties does not include government entities, including, without limitation, the United States, State of New Jersey, the NJDEP, and any other department of the State of New Jersey.

21. It is hereby determined that the Notice and method of distribution thereof constituted the best notice practicable under the circumstances to the Settlement Class Members and is therefore finally approved as reasonable. Due and adequate notice of the pendency of this Action and of the Settlement Agreement has been provided to all the Settlement Class Members, and this Court hereby finds that the Notice complied fully with the requirements of due process, the New Jersey Rules and all other applicable laws.

22. Within 30 days after all of Defendant's obligations under this Settlement Agreement are effectuated, Class Counsel and any Settlement Class Member or their counsel shall destroy all confidential information provided by Defendant to Class Counsel or anyone they employed or retained in this Action, either in discovery, during mediation, or in connection with this Settlement Agreement. Class Counsel shall deliver a letter to Defendant's Counsel certifying their compliance with this paragraph. Further, neither Class Counsel, nor anyone employed with, retained by, or otherwise associated with Class Counsel, nor any other attorney or Person who

shall have access to such confidential information, shall use any of such confidential information in any other litigation or proceeding, current or future, or for any other purpose whatsoever.

23. The Settlement Agreement and this Final Order are not to be deemed admissions of liability or fault by Defendant, or a finding of the validity of any claims in the Action or of any wrongdoing or violation of law by Defendant. The Settlement Agreement is not a concession by the Defendant and, to the extent permitted by law, neither this Final Order nor the Settlement Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be utilized or offered as evidence or received in evidence in any pending or future civil, criminal, or administrative action or proceeding, for any purpose including to establish any liability or admission by Defendant, except in any proceedings by Plaintiffs to enforce the Settlement Agreement or the Final Order or otherwise with the written consent of Defendant at its sole discretion; however, the Released Parties may use the Settlement Agreement and/or the Exhibits thereto, and/or any related document, in any action that may be brought by any of the Releasing Parties against any of the Released Parties in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion relating to the Released Claims set forth in the Settlement Agreement.

24. Only to the extent that it is otherwise not violative of any applicable rules governing the practice of law, Class Counsel agree that any representation, encouragement, solicitation or other assistance, including, but not limited to, referral to other counsel, of any Class Member that submitted a valid and timely request for exclusion, or any other person seeking to litigate with any of the Released Parties over any of the Released Claims or to represent any form of class of Persons that excluded themselves from the Settlement Agreement, could place Class Counsel in an

untenable conflict of interest with the Settlement Class Members. Accordingly, Class Counsel and their respective firms shall not (only to the extent that it is otherwise not violative of any applicable rules governing the practice of law) represent, encourage, solicit or otherwise assist, in any way whatsoever (including, but not limited to referrals to other counsel) any Class Member that submitted a valid and timely request for exclusion or any form of opt-out class, except that referring such person to the Notice or suggesting to any such person the option of obtaining separate counsel, without specifically identifying options for such counsel, shall be permitted.

25. The Court has considered the request for Settlement Class Representative service awards, and hereby approves and awards Raymond and Diane Cavagnaro an amount of $_____ and Anthony Alimenti an amount of $_____, to be paid out of the Gross Settlement Fund.

26. The Court has considered Class Counsel's request for an attorneys' fees award for the prosecution of this action and hereby makes an attorneys' fees award in the amount of $_____, to be paid out of the Gross Settlement Fund. Class Counsel shall also be reimbursed reasonable out-of-pocket costs in the amount of $_____, to be paid out of the Gross Settlement Fund.

27. This Final Order is a final order and judgment in the Action within the meaning and for the purposes of the New Jersey Rules of Civil Procedure as to all claims between Defendant on the one hand, and the Plaintiffs/Settlement Class Representatives and all Settlement Class Members, on the other hand, and there is no just reason to delay enforcement or appeal. This Final Order does not apply to the defendants' respective cross-claims, which shall continue and over which the Court shall retain jurisdiction.

28. The Clerk of this Court is directed to enter a judgment of dismissal with prejudice and without leave to amend and to close Plaintiffs' Action against the defendants.

29. Without in any way affecting the finality of this Final Order, this Court shall retain continuing jurisdiction over this Action for purposes of:

a. Enforcing this Final Order and the Settlement Agreement;

b. Hearing and determining any application by any Settling Party for a settlement bar order;

c. Presiding over the defendants' respective cross-claims; and

d. Any other matters related or ancillary to any of the foregoing.

IT IS SO ORDERED.

DATED: _____, 2026

_____

DeNITTIS OSEFCHEN PRINCE, P.C.
James A. Barry, Esq. (027512008)
525 Route 73 North, Suite 410
Marlton, NJ 08053
(856)797-9951
jbarry@denittislaw.com

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action

DECLARATION OF JAMES A. BARRY IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL

I, James A. Barry, upon my oath certify as follows:

1. I am a partner with the law firm DeNittis Osefchen Prince, P.C. ("DOP"), counsel of record for Plaintiffs and the class in this matter. I am an attorney-at-law in the State of New Jersey, the Commonwealth of Pennsylvania, the Supreme Court of the United States, the United States Court of Appeals for the Third Circuit, the United States District Courts for the District of New Jersey, and the Eastern District of Pennsylvania. I respectfully submit this declaration in support of Plaintiffs' motion for final approval of the settlement of the above-captioned class action.

2. I fully support the proposed settlement in the case at bar and believe it is fair, reasonable, and in the best interest of the class. The class representatives in this matter also fully support the proposed settlement.

3. I and the other attorneys in my firm have conducted extensive legal research regarding the various claims and potential defenses in this matter.

4. I and the other attorneys in my firm also have conducted an extensive investigation of the facts relating to this case, including substantial review of DEP files, coordination with a consulting expert and a review of informal discovery produced by Defendant.

5. I and the other attorneys in my firm have diligently prosecuted this case for approximately two years by, inter alia, thoroughly investigating Plaintiffs' claims, as well as the claims of class members; preparing and serving a class action complaint on Defendants; successfully briefing a motion to dismiss; preparing and serving discovery on Defendants; coordinating with a consulting expert; reviewing informal discovery produced by Defendants; participating in a full day of mediation followed by months of settlement negotiations; and ultimately successfully negotiating the proposed class settlement with Defendants.

6. During the pendency of this case, the parties participated in arms-length negotiations over a period of several months, as well as a full day of mediation before the Hon. Peter E. Doyne, A.J.S.C. (ret.).

7. I believe the foregoing has provided me with a firm basis for evaluating the risks of this case, the relative strengths and weaknesses of the parties' positions, and the reasonableness of the proposed settlement.

8. It is my opinion that, given the current state of the law and the facts which are now known regarding this action, the proposed settlement is not only fair and reasonable, but represents an excellent result for the class.

9. The parties have concluded that settlement is desirable in order to avoid the time, expense, and inherent uncertainties of protracted litigation, and to resolve finally and completely all pending and potential claims of Plaintiffs and all members of the class.

10. Substantial arm's-length settlement negotiations have taken place between the parties.

11. Plaintiffs and their counsel recognize the costs and risks of further prosecuting this litigation, and believe that Plaintiffs' best interests, and the interests of all class members, are best served by the proposed class settlement as memorialized in the attached Settlement Agreement.

12. I have served in leadership positions in a number of class actions and mass torts including the following cases: Caprarola v. Wells Fargo, Docket No. CAM-L-3570-13 (Super Ct. N.J. 2015); Martinez-Santiago v. Public Storage, 1:14-cv-00302-JBS-AMD (D.N.J.); Castro v. Sovran Self Storage, Inc., 1:14-cv-06445-RBK-JS (D.N.J.) In re Experian Data Breach Litigation, 8:15-cv-01592-AG-DFM (C.D.CA.); In re Yapstone Data Breach Litigation, 4:15-cv-04429-JSW (N.D. Cal); Dickens v. Sedgwick Claims Management, MID-L-5305-16 (Super Ct. N.J.); Morrow v. Quest Diagnostics, 2:17-cv-0948 CCC JBC (D.N.J.); Stechert v. The Travelers Home and Marine Insurance Co., 2:17-cv-000784-KSM (E.D.Pa.); Gamez v. PCS Revenue Control Systems, Inc., 2:21-cv-08991-JXN-AME (D.N.J.): In Re Physiomesh Litigation (Flexible Composite Mesh), MCL 627 (Atlantic County); In re Proceed Mesh Litigation (Proceed Surgical Mesh and Proceed Ventral Patch Hernia Mesh), MCL 630 (Atlantic County); In re Prolene Hernia System Mesh Litigation, MCL No.

633 (Atlantic County); Ogelsby v. Johnson & Johnson and Ethicon, 3:18- cv -16079 (D.N.J.); Thompson v. Travelers Indemnity Company, MID-L-2108-23 (Super Ct. N.J.).

I also have also published on the issue of class actions in New Jersey State and Federal Court, co-authoring the Chapter entitled "New Jersey Class Actions" in the 2020 New Jersey Mass Torts & Class Actions Treatise published by the New Jersey Institute of Continuing Legal Education with the Hon. Joel Schneider, U.S.M.J. (ret.).

I have presented and/or lectured to attorneys on the following class action and/or mass tort topics at the following Continuing Legal Education seminars:

- **New Jersey Association for Justice**
  Jamesburg, New Jersey – May, 2015
  Compulsory Arbitration Provisions in Consumer Contracts

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – April, 2016
  Rising Stars Panel

- **American Lawyer Media, Inc.**
  Philadelphia, Pennsylvania – October 2016
  The Locks Law Firm Presents The ABCs of Complex Litigation: Asbestos, Benzene, CRPS and More

- **Lightstream Communications CLE**
  Bryn Mawr, Pennsylvania – April, 2017
  David vs. Goliath: What Can We Learn from Class Action Lawsuits?

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – April, 2017
  Boardwalk Seminar
    Data Breach: Who is Looking at What?
    TCCWNA Update
    Forced Arbitration Update

- **HarrisMartin Publishing**
  Atlanta, Georgia – November 2017
  HarrisMartin's Equifax Data Breach Litigation Conference
    Damages

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – May, 2018
  Boardwalk Seminar
  TCCWNA Update

- **New Jersey State Bar Association (ICLE)**
  New Brunswick, New Jersey – May, 2019
  How the Latest Consumer Protection Laws Impact Your Clients and Practice
  A look at health club cases – contracts, cancellation and other provisions

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – May, 2019
  Boardwalk Seminar
  Data Breach Litigation

- **New Jersey State Bar Association (ICLE)**
  New Brunswick, New Jersey – October, 2019
  Class Action Playbook
  Case Selection
  Filing Your Complaint

- **Mass Torts Made Perfect**
  Las Vegas, Nevada – April, 2021
  Ethicon Hernia Mesh – Key theories of Liability, and the Path to Trials in 2022

- **New Jersey Association for Justice**
  Atlantic City, New Jersey - April 2023
  Boardwalk Seminar
  Data Breach and Privacy Litigation – Common Issues

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – May 2025
  Boardwalk Seminar
  Class Action Update

13. I have also appeared and/or argued in the following New Jersey Appellate Division and/or Supreme Court cases on issues relevant to class actions:

- Fazio v. Altice USA, 261 N.J. 90 (2025)(argued)
- Kernahan v. Home Warranty Administrator of Florida, Inc., 236 N.J. 301 (2019)(argued)
- Moore v. Atlantic County, 2018 N.J. Super Unpub. LEXIS 2064 (App. Div. Sept. 13, 2018)(argued)
- Spade v. Select Comfort, 232 N.J. 504 (2018)(argued)

- Mellett v. Aquasid, LLC, 452 N.J. Super. 23 (App. Div. 2017) cert. den. 231 N.J. 224 (2017)
- Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017)
- Roach v. BM Motoring, LLC, 228 N.J. 163 (2017)
- Morgan v. Sanford Brown Institute, 225 N.J. 289 (2016)(argued)

14. Notice of this proposed Settlement was provided to the Settlement Class as provided in the Court's Preliminary Approval Order. A certification from the Claims Administrator shall be provided 14 days prior to the final approval hearing per the Settlement Agreement.

15. Out of 301 class properties, none have objected to the proposed class settlement prior to the filing of the present motion (the current deadline for objections is November 19, 2026, and the owners of two class properties have requested exclusion from the class. The opt-out deadline in this matter was October 30, 2026..

16. To date a total of 62 claims have been filed with the Administrator to date.

17. Pursuant to the Settlement Agreement (¶II(A)(7) Class Members will have until December 29, 2026 (120 days after the Notice Date) to file claims in the settlement. A copy of the fully-executed Settlement Agreement in this matter is attached as Exhibit 1.

18. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of Navid Zivari of Angeion Group, LLC Regarding Settlement Administration dated November 6, 2026.

19. Attached hereto as Exhibit 3 is a true and correct copy of the opinion Texas v. Organon USA Inc. (In re Remeron End-Payor Antitrust Litig.), 2005 U.S. Dist. LEXIS 27011 at *62 (D.N.J. Sep. 13, 2005).

20. Attached hereto as Exhibit 4 is a true and correct copy of the opinion Lubitz v. DaimlerChrysler Corp., 2006 WL 3780789 (Law Div. Dec. 21, 2006).

21. Attached hereto as Exhibit 5 is a true and correct copy of the opinion Educ. Station Day Care Ctr., Inc. v. Yellow Book USA, Inc., 2007 N.J. Super Unpub. LEXIS 1607 (App. Div. 2007).

22. Attached hereto as Exhibit 6 is a true and correct copy of the opinion Alves v. Main, 2012 U.S. Dist. LEXIS 171773 (D.N.J. Dec. 4, 2012).

23. Attached hereto as Exhibit 7 is a true and correct copy of the opinion Canupp v. Sheldon, 2009 U.S. Dist. LEXIS 113488 (M.D. Fla. Nov. 23, 2009).

24. Attached hereto as Exhibit 8 is a true and correct copy of the opinion Gurriere v. Bloomfield Condo. Assocs., LLC, 2015 N.J. Super. Unpub. LEXIS 2137 (Ch. Div. July 20, 2015).

25. Attached hereto as Exhibit 9 is a true and correct copy of the opinion Yedlowski v. Roka Bioscience, Inc., 2016 U.S. Dist. LEXIS 155951 (D.N.J. Nov. 10, 2016).

26. Attached hereto as Exhibit 10 is a true and correct copy of the opinion Glaberson v. Comcast Corp., 2015 U.S. Dist. LEXIS 127370 (E.D. Pa. Sept. 22, 2015).

27. Attached hereto as Exhibit 11 is a true and correct copy of the Order for final approval in Sutton v. Hoffman La-Roche, ESX-L-08724-14 (Law Div. June 24, 2022).

28. Attached hereto as Exhibit 12 is a true and correct copy of the opinion Collins v. Olin Corp., 2010 U.S. Dist. LEXIS 39862, *15 (D.Ct. April 21, 2010).

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

Respectfully submitted,

Dated: November 9, 2026

DeNITTIS OSEFCHEN PRINCE, P.C.

BY: _____
James A. Barry

Exhibit 1

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY
	:	DOCKET NO. GLO-L-000816-24
v.	:	
	:	Civil Action
SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants	:	

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement ("Settlement Agreement") is entered into by, between, and among the named Plaintiffs, Raymond Cavagnaro and Diane Cavagnaro, and Plaintiff, Anthony Alimenti (collectively, "Plaintiffs"), on behalf of themselves and the Settlement Class Members, and Defendant Shieldalloy Metallurgical Corporation ("Defendant" or "SMC" and collectively with Plaintiffs, the "Settling Parties"), by and through their respective counsel of record. This Settlement Agreement seeks to settle and resolve Plaintiffs' alleged damages as a result of establishment of certain groundwater classification exception areas and the Class Members' regulatory disclosure obligations associated with the inclusion of their respective properties within such classification exception area(s). This Settlement Agreement is conditioned upon and subject to approval of the Court as required by New Jersey Court Rule 4:32-2. The Settling Parties stipulate and agree that, in consideration of the promises and covenants set forth in this Settlement Agreement and upon the Effective Date, this Action, and the Released Claims shall be finally and fully settled, compromised, dismissed, resolved, and released, on the following terms and conditions:

I. RECITALS

A. On or about June 26, 2024, Raymond Cavagnaro and Diane Cavagnaro initiated the Action by filing a civil class action complaint captioned Raymond Cavagnaro and Diane Cavagnaro v. Shieldalloy Metallurgical Corporation, AMG Critical Materials, N.V. i/p/a AMG Critical Minerals, N.V. ("AMG"), and TRC Companies, Inc. ("TRC") (SMC, AMG and TRC are collectively referred to herein as the "Defendants") in the Superior Court of New Jersey, Gloucester County (Law Division) under docket number GLO-L-000816-24 (the "Complaint").

B. Plaintiffs allege that the Class Members suffered property damages in the form of diminution in property values arising from Class Members' regulatory disclosure obligations associated with the inclusion of their properties within certain groundwater classification exception area(s) proposed and established by TRC in or around 2018 as part of TRC's contractual remediation obligations to SMC.

C. On August 14, 2025, the Settling Parties[1] and their respective counsel jointly participated in a full-day mediation overseen by The Honorable Peter E. Doyne, A.J.S.C. (Ret.), former Assignment Judge of the Superior Court of New Jersey, Bergen County.

D. Following the mediation, and after months of further extensive arms-length negotiations in good faith, and with additional assistance of the mediator, the Settling Parties ultimately reached an agreement in principle to settle and resolve the Action on behalf of themselves and the Settlement Class Members on the terms and conditions embodied in this Settlement Agreement.

E. Class Counsel state that they have performed substantial work in the prosecution of the claims of the Plaintiffs and the Settlement Class Members. Class Counsel also state that they have conducted extensive factual investigation and legal research into the various claims and various defenses asserted in the Action and have engaged in substantial motion practice, including defending against Defendant's motion to dismiss or in the alternative to strike Plaintiffs' class allegations. Class Counsel believe that the proposed settlement of the Action, as set forth herein, is fair, reasonable, and adequate, and in the best interest of the Settlement Class Members, and that this Settlement Agreement should be approved by the Court under New Jersey Court Rule 4:32-2.

[1] TRC declined SMC's request to participate in mediation and settlement negotiations with Plaintiffs.

F. Based upon their review, investigation, and evaluation of the facts and law relating to the matters alleged in the Complaint, Plaintiffs and Class Counsel, on behalf of Plaintiffs and the Settlement Class Members, have agreed to settle this Action pursuant to the provisions of this Settlement Agreement, after considering, among other things: (1) the substantial benefits to the Settlement Class Members under the terms of this Settlement Agreement; (2) the risks, costs, and uncertainty of protracted litigation and potential litigation in bankruptcy court, especially in complex class actions such as this, as well as the difficulties and delays inherent in such litigation; (3) the lack of environmental sampling performed by Plaintiffs demonstrating contamination on or under any of the Class Properties; and (4) the desirability of consummating this Settlement Agreement promptly in order to provide expeditious and effective relief to the Plaintiffs and the Settlement Class Members.

G. Defendant has denied and expressly continues to deny any wrongdoing or liability whatsoever. Defendant disputes the factual, legal, and scientific bases for Plaintiffs' claims against it, and does not admit or concede any fault, wrongdoing, or liability in connection with any allegations or claims that have been asserted against it in the Action or any violation of any law or duty alleged against it in the Action. Defendant denies that Plaintiffs and/or the Settlement Class Members are entitled to any form of damages or other relief against Defendant. Defendant has maintained and continues to maintain that it has meritorious defenses to all causes of action against it alleged in the Action. Defendant has maintained and continues to maintain that certification of a class for litigation purposes based on Plaintiffs' allegations against it would be improper. Defendant is prepared to vigorously defend against the claims alleged against it in the Action and has maintained and continues to maintain that the claims asserted against it in the Action are meritless.

H. After carefully considering the facts and applicable law and the risks, costs, delay, inconvenience, and uncertainty of continued and protracted litigation, and after engaging in extensive, arm's-length negotiations, with the assistance of a mediator, the Settling Parties seek to resolve the Action on the terms stated herein.

I. This Settlement Agreement reflects a compromise by, between, and among the Settling Parties, and shall in no event be construed as or deemed an admission, concession, or contention by any of the Settling Parties of the truth of any of the allegations in the Complaint, or of any fault on the part of Defendant, and all such allegations and claims asserted in the Complaint or released by this Settlement Agreement are expressly denied by Defendant.

II. DEFINITIONS

A. As used in this Settlement Agreement, including the exhibits attached hereto, the following terms have the following meanings, unless this Settlement Agreement specifically provides otherwise:

1. "Action" means the above-captioned class action Raymond Cavagnaro and Diane Cavagnaro v. Shieldalloy Metallurgical Corporation, et al., GLO-L-000816-24 (Superior Court of New Jersey, Gloucester County – Law Division).

2. "Administrative Costs" means the reasonable costs, fees, and expenses of the Settlement Administrator associated with establishing and maintaining the Settlement Fund Account, providing Notice to the Settlement Class, implementing the Claim Process, and carrying out all other actions and responsibilities required by and consistent with this Settlement Agreement. Administrative Costs shall be paid from the Gross Settlement Fund, subject to Court Approval in the Preliminary Approval Order, and Settlement Payments to Eligible Claimants shall be made in accordance with the Final Approval Order.

3. "Check-Cashing Period" shall have the meaning assigned to it in Section IV.C.3.d of this Settlement Agreement.

4. "Claim For Payment" means a claim for a Settlement Payment submitted by a Settlement Class Member via the submission of a Claim Form pursuant to the procedures set forth in Section IV.C.1 of this Settlement Agreement.

5. "Claim Deadline" means the last day of the Claim Period.

6. "Claim Form" means the document substantially in the form attached as **Exhibit A** to this Settlement Agreement, which shall be used by Settlement Class Members to submit a Claim For Payment pursuant to this Settlement Agreement.

7. "Claim Period" means one hundred and twenty (120) days following the Notice Date.

8. "Claim Process" means the process for submitting, reviewing, and paying Claims For Payment as described in Section IV.C. of this Settlement Agreement.

9. "Claimant" means a Settlement Class Member who submits a Claim Form to the Settlement Administrator pursuant to the procedures set forth in Section IV.C.1 of this Settlement Agreement.

10. "Class Counsel" means Stephen P. DeNittis, James A. Barry, and the law firm of DeNittis Osefchen Prince, P.C.

11. "Class Member" means any Person that/who, as of the Execution Date, owns a Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about

September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** (the "Class Properties"). Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection ("NJDEP"), and any other department of the State of New Jersey or municipal entity are not Class Members.

12. "Class Property" or "Class Properties" means each and every Residential Property located within either CEA (or both CEAs) identified on **Exhibit B**.

13. "Complaint" means the civil complaint as defined in Section I.A of this Settlement Agreement.

14. "Court" means the Superior Court of New Jersey, Gloucester County (Law Division).

15. "Defendant" or "SMC" means Shieldalloy Metallurgical Corporation.

16. "Defendant's Counsel" means Phil Cha, Esq., Dana B. Klinges, Esq., Lindsay A. Brown, Esq. and James Hearon, Esq. of the law firm Duane Morris LLP.

17. "Effective Date" means (i) if there are no objectors to final approval of the Settlement, the date of entry of the Final Approval Order; or (ii) if there are any objectors to the final approval of the Settlement, the later of (a) the day following the expiration of the thirty-day deadline for appealing the Final Approval Order, if no appeal is filed, and (b) if any appeal regarding the Final Approval Order is filed, the date upon which such appeal is dismissed or concluded with affirmance of the Final Approval Order and further appellate review of the Final Approval Order has been exhausted.

18. "Eligible Claimant" means a Claimant who has submitted a valid and timely Claim For Payment pursuant to this Settlement Agreement as determined by the Settlement Administrator. To be timely, a Claim For Payment must be submitted on or before the Claim Deadline.

19. "Exclusion Deadline" shall have the meaning assigned to it in Section IX.A of this Settlement Agreement.

20. "Execution Date" means the date on which the last of the signatories for the Settling Parties provides its signature on this Settlement Agreement.

21. "Final Approval Hearing" means the hearing set by the Court under New Jersey Court Rule 4:32-1, *et seq.*, at or after which the Court shall make a final decision regarding whether to finally approve the Settlement as fair, reasonable, and adequate, and to enter the Final Approval Order.

22. "Final Approval Order" means the Court's Order, the proposed form of which has been agreed to by the Settling Parties and attached hereto as **Exhibit C**, finally approving the Settlement, as described in Section XI.A herein.

23. "Gross Settlement Fund" means the Settlement Amount plus any interest that accrues in the Settlement Fund Account.

24. "Net Settlement Fund" means the Gross Settlement Fund minus Administrative Costs, service awards to Plaintiffs, and payment of attorneys' fees and reimbursement of costs and expenses for Class Counsel.

25. "Notice" means the notice of the proposed Settlement set forth in Section VI of this Settlement Agreement. The Notice shall be substantially in the form attached hereto as **Exhibit D**.

26. "Notice Date" means thirty (30) days following the entry of the Preliminary Approval Order.

27. "Notice Plan" means the plan for providing notice of the Settlement to the Settlement Class, as approved by the Court in its Preliminary Approval Order.

28. "Objection Deadline" shall have the meaning assigned to it in Section X.A of this Settlement Agreement.

29. "Payment Date" shall have the meaning assigned to it in Section IV.C.3.d of this Settlement Agreement.

30. "Payment List" shall have the meaning assigned to it in Section IV.C.3.c of this Settlement Agreement.

31. "Person," whether in the singular or plural, means a natural person, guardian, corporation, professional corporation, association, limited liability company, limited company, partnership, limited partnership, joint venture, affiliate, joint-stock company, estate, legal representative, trust, proprietorship, any other type of private entity, and their respective spouses, heirs, predecessors, successors, executors, administrators, representatives, and assigns.

32. "Plaintiffs" means Raymond Cavagnaro, Diane Cavagnaro and Anthony Alimenti, on behalf of themselves and the Settlement Class.

33. "Preliminary Approval Order" means the order to be entered by the Court preliminarily approving the Settlement, and that is substantially in the form attached as **Exhibit E** to this Settlement Agreement.

34. "Release" means the release and covenant not to sue set forth in Section VII of this Settlement Agreement.

35. "Released Claims" shall have the meaning assigned to it in Section VII.A.1 of this Settlement Agreement.

36. "Released Parties" means Defendants Shieldalloy Metallurgical Corporation, AMG Critical Materials N.V., and TRC Companies, Inc. and each of their past, present, and/or future administrators, advisors, affiliated business entities, affiliates, agents, assigns, attorneys, constituent corporation or entity (including constituent of a constituent), counsel, directors, divisions, employee benefit plans, employee benefit plan participants or beneficiaries, employees, executors, heirs, insurers, managers, members, officers, owners, direct or indirect corporate parents, partners, partnerships, predecessors, principals, resulting corporation or entity, servants, shareholders, subrogees, subsidiaries, successors, trustees, trusts, joint ventures, and any other representatives, individually or in their corporate or personal capacity, and anyone acting on their behalf, including in a representative or derivative capacity.

37. "Releasing Parties" means Plaintiffs and the Settlement Class Members that/who do not otherwise timely submit a valid request for exclusion from the Settlement Class, each of their respective heirs, predecessors, successors, assigns, family members, personal representatives, attorneys, officers, stockholders, shareholders, corporate parents, subsidiaries, affiliates, directors, managers, partners, principals, owners, agents, fiduciaries, spouses, children, dependents, parents, creditors, judgment creditors, representatives, employees, employers, executors, administrators, conservators, receivers, subrogees, trusts, trustees, members, servants, independent contractors, lessors, lessees, tenants, legally authorized representatives, insurers or reinsurers, and on behalf of anyone else who or which could or might assert any claim under or through any of the foregoing. Releasing Parties does not include government entities, including,

without limitation, the United States, State of New Jersey, the NJDEP, and any other department of the State of New Jersey.

38. "Residential Property" means those properties assigned a Class 2, 3A, or 15F property classification for tax purposes, as defined in N.J. Admin. Code § 18:12-2.2, provided that the tax records for Class 3A or 15F properties indicate a single family dwelling or a dwelling designed for use and enjoyment of not more than four families is present on the property.

39. "Residual Funds" means any funds that remain in the Settlement Fund Account after payment of funds to all Eligible Claimants, all Administrative Costs, court-approved Class Counsel attorneys' fees and costs, and court-approved service awards in accordance with this Settlement Agreement, but shall not include Undeposited Settlement Payments.

40. "Settlement Administrator" means the entity or person selected to implement the Notice Plan and administer the Settlement Agreement as set forth in this Settlement Agreement. The Settlement Administrator shall be agreed to by the Parties and is subject to Court approval.

41. "Settlement Agreement" means this settlement agreement and the exhibits attached hereto, settling and resolving the Action.

42. "Settlement Amount" means the One Million, Three Hundred Twenty-Five Thousand Dollars ($1,325,000.00) to be paid by or on behalf of Defendant into the Settlement Fund Account.

43. "Settlement Class" means all Persons that/who, as of the Execution Date, own one or more Class Properties. Government entities, including, without limitation, the United States, State of New Jersey, the NJDEP, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class. Also excluded from the Settlement Class

are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

44. "Settlement Class Members" means each and every member of the Settlement Class.

45. "Settlement Class Representatives" means Raymond Cavagnaro, Diane Cavagnaro and Anthony Alimenti.

46. "Settlement Fund Account" means the escrow account established and maintained by the Settlement Administrator for purposes of receiving, holding and disbursing the Gross Settlement Fund.

47. "Settlement Payee List" shall have the meaning assigned to it in Section IV.C.3.a of this Settlement Agreement.

48. "Settlement Payment" shall have the meaning assigned to it in Section IV.C.2 of this Settlement Agreement.

49. "Settlement Website" means the Internet website established and maintained by the Settlement Administrator as part of the administration of this Settlement, at the URL www.VinelandShieldalloyLitigation.com.

50. "Settling Parties" means Plaintiffs and Defendant Shieldalloy Metallurgical Corporation, collectively.

51. "Toll-Free Number" shall have the meaning assigned to it in Section VI.C of this Settlement Agreement.

52. "Undeposited Settlement Payments" means any Settlement Payment funds remaining in the Settlement Fund Account one year after the Payment Date for checks that were

successfully delivered but not timely deposited and/or checks or electronic payments deemed undeliverable by the Settlement Administrator.

53. "Website Notice" means the notice of the terms of the proposed Settlement that shall be provided in the manner contemplated by Section VI.B herein and that shall appear on the Settlement Website. The Website Notice shall be agreed to by the Settling Parties.

54. "Well Restriction Area" means the geographical area identified by the City of Vineland Ordinance No. 86-67.

B. When a capitalized singular form of a plural defined term is used, it refers to any one of the defined terms. When a capitalized plural form of a singular defined term is used, it refers to one or more of the defined terms.

III. CERTIFICATION OF THE SETTLEMENT CLASS

A. Only for the purposes of the Settlement Agreement and the proceedings contemplated herein for effectuating the Settlement Agreement, Plaintiffs shall move for certification of a class consisting of the Settlement Class Members pursuant to New Jersey Court Rule 4:32-2, and Defendant shall not oppose the aforementioned certification.

B. Only for the purposes of the Settlement Agreement, Plaintiffs shall move for the appointment of Settlement Class Representatives and for the appointment of Class Counsel, and Defendant shall not oppose the aforementioned appointments.

C. If the Effective Date does not occur for any reason, certification of a class consisting of the Settlement Class Members shall be vacated and deemed void; this Settlement Agreement shall be vacated and deemed void; the Plaintiffs and Class Counsel shall cause the Settlement Amount paid by Defendant to be immediately returned to Defendant; nothing related to the Settlement or its negotiations shall be admissible in connection with a contested class certification

motion or otherwise in the Action or any other proceeding in any forum; and each Party shall retain all of its respective rights, claims, and defenses, as they existed prior to execution of this Settlement Agreement.

IV. SETTLEMENT RELIEF

A. Settlement Fund. In consideration for the complete and final settlement of this Action, the Release, and other promises and covenants set forth in this Settlement Agreement, and subject to the other terms and conditions herein, Defendant will pay the Settlement Amount into the Settlement Fund Account pursuant to Section IV.B.1. The Settlement Amount will be paid by or on behalf of Defendant and will be used solely for the following purposes: payment of all Settlement Payments to the Settlement Class Members as set forth in Section IV.C.2 of this Settlement Agreement; payment of Administrative Costs; payment of attorneys' fees and costs for Class Counsel awarded by the Court; and payment of service awards for Plaintiffs awarded by the Court. Under no circumstance shall Defendant be required to pay any amounts in excess of or in addition to the Settlement Amount.

B. Establishment and Funding of the Settlement Fund Account.

1. Within thirty (30) days after the date of entry of the Preliminary Approval Order, Defendant will cause the Settlement Amount to be wired into the Settlement Fund Account.

2. The Settlement Fund Account shall be established and administered by the Settlement Administrator with approval of the Court and shall meet the requirements applicable to a Qualified Settlement Fund pursuant to Treasury Regulations Section 1.468B-1 *et seq.* If the Settlement Fund Account has not been approved by the Court and established by the deadline for payment of the Settlement Amount specified herein, Defendant shall not be obligated to pay the

Settlement Amount until ten (10) business days after the Settlement Fund Account is approved by the Court and established by the Settlement Administrator.

3. Any interest earned on monies in the Settlement Fund Account shall compound within the Settlement Fund Account and shall become part of the Gross Settlement Fund. Any taxes, fees, costs or expenses associated with the Settlement Fund Account or the Gross Settlement Fund shall be paid out of the Settlement Fund Account.

4. Plaintiffs, Class Counsel, Defendant, and Defendant's Counsel shall have no liability or responsibility for any taxes, fees, costs or expenses associated with the Settlement Fund Account or the Gross Settlement Fund, provided however Class Counsel, Plaintiffs and Eligible Class Members shall be responsible for any taxes, fees, costs or expenses associated with any payment received by them under this Settlement Agreement. The Settlement Administrator shall file all informational and other tax returns necessary or advisable with respect to the Gross Settlement Fund (including the returns described in Treasury Regulations Section 1.463B-2(k)).

5. Payment of the Settlement Amount shall constitute Defendant's sole monetary obligation under the Settlement Agreement, and under no circumstance shall Defendant be required to pay anything more than the Settlement Amount related to this Settlement Agreement.

6. The Settling Parties and their counsel make no representations to Settlement Class Members or anyone else concerning any tax consequences or tax treatment of any allocation or distribution of funds from the Gross Settlement Fund or Net Settlement Fund.

7. The Settling Parties and their counsel shall have no liability to Settlement Class Members or anyone else related to the allocation or distribution of the Gross Settlement Fund or Net Settlement Fund. In no event shall the Settling Parties or their counsel have any liability for

the administration of the Gross Settlement Fund or Net Settlement Fund by the Settlement Administrator or for acts or omissions of the Settlement Administrator.

C. Distribution of Net Settlement Fund to the Eligible Claimants. Pursuant to the terms set forth in this Settlement Agreement, including the terms regarding the disbursement of Undeposited Settlement Payments, the Net Settlement Fund shall be distributed to the Eligible Claimants, and pursuant to Section IV.C.4, any Residual Funds shall be donated to a charitable or not-for-profit organization mutually agreed upon by Class Counsel and Defendant's Counsel and approved by the Court.

1. Claim Process.

a. Each Settlement Class Member is eligible to submit a Claim For Payment. A Settlement Class Member may submit a Claim For Payment by submitting a completed Claim Form on or before the Claim Deadline. The Claim Form shall require the Claimant to acknowledge and agree to comply with the obligations of New Jersey law to disclose to any purchaser of the Class Property the existence of any then-existing CEA, which disclosure Plaintiffs allege negatively impacts property values, prior to transferring the Class Property to the purchaser and to identify and list the existence of any then-existing CEA affecting such property on any property condition disclosure statement required by N.J.A.C. 13:45A-29.1. The Claim Form shall be substantially in the form attached as **Exhibit A** to this Settlement Agreement. Claim Forms may be submitted electronically via the Settlement Website or by mail. For Claim Forms submitted by mail, the Claim Form shall be considered timely if postmarked on or before the Claim Deadline. The Notice shall identify both the Claim Deadline and the webpage address through which Claim Forms may be submitted electronically, and the Notice shall include unique personal identification numbers to facilitate the submission of Claims. The Notice shall also include a

hyperlink to the webpage address on the Settlement Website, where Claim Forms may be submitted electronically.

b. The Settlement Administrator shall review and process Claims For Payment. The Settlement Administrator shall promptly process and make eligibility determinations regarding all Claim Forms as they are received.

c. Eligible Claimants shall be issued Settlement Payments as described further herein. Only one Claim For Payment may be submitted by each Settlement Class Member.

d. Class Members that/who timely and validly request exclusion from the Settlement Class may not submit a Claim For Payment and shall not be eligible for a Settlement Payment. Only Settlement Class Members shall be eligible to submit a Claim For Payment.

e. The Settlement Administrator shall conduct reasonable audit(s) to ensure the integrity of the Claim Process, including that appropriate controls are in place to prevent fraud. If any fraud is detected or reasonably suspected, the Settlement Administrator may request further information from the Claimant or deny the Claim For Payment subject to the ultimate oversight of the Settling Parties and the Court. The Settlement Administrator will immediately notify and provide all details to Class Counsel and Defendant's Counsel if it suspects any person of committing fraud or impropriety related to the Claims Process at any time, so that the Settling Parties can meet and confer and advise the Settlement Administrator, and the Court, if necessary, concerning any response to be taken.

f. Beginning no later than two (2) weeks following the Notice Date and continuing until the processing of Claims For Payment is completed, the Settlement Administrator shall provide weekly written updates to Class Counsel and Defendant's Counsel

regarding Claims For Payment submissions and regarding its review and processing of Claims For Payment.

2. Settlement Payment. Payments to Eligible Claimants ("Settlement Payments") shall be allocated and calculated as follows:

a. A payment of $300 shall be allocated from the Net Settlement Fund to each Class Property located inside the Well Restriction Area and shall be paid to each Eligible Claimant that, as of the Execution Date, owns such Class Property pursuant to Sections IV.C.2.c. below.

b. A payment equal to no more than 7% of the 2025 tax assessed value of each Class Property[2] located outside the Well Restriction Area shall be allocated from the Net Settlement Fund to such Class Property and shall be paid to each Eligible Claimant that, as of the Execution Date, owns such Class Property pursuant to Section IV.C.2.c. below.

c. The Settlement Administrator shall first allocate Settlement Payments from the Net Settlement Fund to each Class Property located inside the Well Restriction Area. The Settlement Administrator shall then allocate the remaining funds in the Net Settlement Fund pro rata to each Class Property located outside the Well Restriction Area in an amount not to exceed 7% of the 2025 tax assessed value of each such Class Property. The amount of Settlement Payment allocated to each Class Property located outside the Well Restriction Area will depend on the number of Eligible Claimants and the funds remaining in the Net Settlement Fund after

[2] As indicated for the 2025 tax year per the online tax records available at https://taxrecords-nj.com/pub/cgi/prc6.cgi?district=0801&ms_user=ctb08 (Gloucester County addresses); and https://tax1.co.monmouth.nj.us/cgi-bin/prc6.cgi?&ms_user=ctb06&passwd=&srch_type=0&adv=0&out_type=0&district=0610 (Cumberland County addresses).

Settlement Payments have been allocated to Class Properties located inside the Well Restriction Area.

d. If there is only one Eligible Claimant for a Class Property, the Eligible Claimant shall be paid the full amount of funds allocated for that Class Property. If there is more than one Eligible Claimant for a Class Property, the amount of funds allocated for that Class Property shall be equally divided and equally paid to the Eligible Claimants for that Class Property.

e. A Claim Form may only be submitted by a Class Member identified in property tax records as the owner of the Class Property for which the Claim Form is submitted, as of the Execution Date.

f. Each Eligible Claimant will be issued a Settlement Payment in accordance with Section IV.C.2. The Settlement Administrator shall determine the validity of all Claimants, Claims For Payment, and Claim Forms, and shall calculate the Settlement Payment for each Eligible Claimant pursuant to this Settlement Agreement.

3. Creation of Payment List and Distribution of Settlement Payments

a. The Settlement Payee List. By no later than seven (7) days following the Effective Date or the Claim Deadline, whichever last occurs, the Settlement Administrator—using the class data, the timely and valid requests for exclusion from the Settlement Class, and the timely and valid Claims For Payment submitted—shall provide to Class Counsel and Defendant's Counsel a list that includes, for each Eligible Claimant: a unique identifying number; the name of the Eligible Claimant; the Eligible Claimant's last known mailing address; and the Class Property (hereinafter "Settlement Payee List").

b. Determination of Net Settlement Fund. By no later than twenty-eight (28) days following the Effective Date or the Claim Deadline, whichever last occurs, the Settlement Administrator shall determine the amount of the Net Settlement Fund by deducting from the Gross Settlement Fund: (i) the amount of any Court-approved attorneys' fees and costs award for Class Counsel; (ii) the amount of any Court-approved service awards for the Settlement Class Representatives; and (iii) the Administrative Costs (including both costs already incurred and an estimate of future costs necessary to effectuate this Settlement Agreement). By the same date, the Settlement Administrator shall inform Class Counsel and Defendant's Counsel of the amount of the Net Settlement Fund.

c. The Payment List. By no later than twenty-eight (28) days following the later of the Effective Date or Claim Deadline, the Settlement Administrator shall create and provide to Class Counsel and Defendant's Counsel a "Payment List," as a supplement to the Settlement Payee List, that includes all of the information on the Settlement Payee List and adds the Settlement Payment amount and the method of payment (i.e. whether by check or electronic payment, as elected by the Eligible Claimant) for each Eligible Claimant, as calculated pursuant to Section IV.C.2 herein.

d. Payments To Eligible Claimants. By no later than seventy-five (75) days following the later of the Effective Date or Claim Deadline (the "Payment Date"), the Settlement Administrator shall mail checks via first class U.S. Mail postage pre-paid, or provide an electronic payment, at the Eligible Claimant's election, to each Eligible Claimant on the Payment List, drawn from the Net Settlement Fund in the Settlement Fund Account in the Settlement Payment amount indicated for each Eligible Claimant on the Payment List. Settlement Payment checks or electronic payments, as applicable, shall be made payable to the Eligible Claimants as

indicated on the Payment List. Settlement Payment checks shall be sent to the mailing addresses indicated in the Payment List, and Settlement Payments made electronically shall be sent to the payment account indicated in the Payment List. The mailed Settlement Payment checks to Eligible Claimants shall be valid for a period of one hundred and eighty (180) days from date of issue ("Check-Cashing Period").

e. Undeliverable Settlement Payment Checks. For any mailed Settlement Payment checks that are returned as undeliverable with forwarding address information, the Settlement Administrator shall re-mail the check to the new address indicated. For any mailed Settlement Payment checks that are returned as undeliverable without forwarding address information, the Settlement Administrator shall conduct an industry standard "skip trace" to identify updated address information and re-mail checks to the extent an updated address is identified.

4. Residual Funds. Within 60 days after the Payment Date, pursuant to the Cy Pres Doctrine, Class Counsel and Defendant's Counsel shall notify the Administrator to direct all Residual Funds to a charitable or not-for-profit organization(s) mutually agreed upon by Class Counsel and Defendant's Counsel and approved by the Court. The Administrator, within 10 days of receiving the above-described notification, shall, on behalf of the Defendant, make payment in the amount of the Residual Funds to such charitable or not-for-profit organization(s). Any tax credit, tax deduction, tax benefit, or other tax treatment available from making a charitable donation to such charitable or not-for-profit organization(s) shall inure solely to the Defendant's benefit.

5. Undeposited Settlement Amounts. Any Undeposited Settlement Payments shall be treated as unclaimed property of the corresponding Claimant(s), subject to applicable New

Jersey unclaimed property procedures. Any Administrative Costs of the Settlement Administrator in connection with the distribution of Undeposited Settlement Payments pursuant to Section IV.C.5 shall be paid from the Undeposited Settlement Payments, shall not increase Defendant's contribution to the Gross Settlement Fund, shall not reduce the Residual Funds, shall not change any obligation of Defendant under this Settlement Agreement, and shall reduce *pro rata* the respective unclaimed property amounts for the Eligible Claimants with undeposited or undeliverable Settlement Payment checks or electronic payments.

V. THE SETTLEMENT ADMINISTRATOR

A. The duties of the Settlement Administrator, in addition to any other responsibilities that are described in this Settlement Agreement, shall include:

1. Providing Notice to Class Members as set forth in this Settlement Agreement;

2. Receiving, validating and processing Claims For Payment and making payments to Eligible Claimants pursuant to the Claim Process described in this Settlement Agreement, and providing updates to Class Counsel and Defendant's Counsel regarding the Claims For Payment and Claim Process, as provided in this Settlement Agreement;

3. Establishing and maintaining the Settlement Website;

4. Establishing and maintaining the Toll-Free Number;

5. Responding to inquiries from Class Members;

6. Keeping a clear and careful record of all communications with Class Members and all administration expenses;

7. Establishing and maintaining a post office box, or other address, for requests for exclusion, objections, and other correspondence from Class Members;

8. Establishing and maintaining an email address for correspondence from Class Members;

9. Processing and determining the timeliness and validity of any requests for exclusion by Class Members;

10. Receiving any objections mailed by Class Members to the Settlement Administrator;

11. Timely providing copies to Class Counsel and Defendant's Counsel of all requests for exclusion, objections, and other correspondence received from Class Members;

12. Providing interim reports to Class Counsel and Defendant's Counsel on request from Class Counsel and Defendant's Counsel;

13. Within ten (10) days after the Exclusion Deadline (as defined in Section IX.A herein), providing a written report to Class Counsel and Defendant's Counsel summarizing the number of requests for exclusion received, the names and addresses of Class Members who submitted a request for exclusion, and any other pertinent information requested by Class Counsel or Defendant's Counsel;

14. In advance of the Final Approval Hearing, preparing an affidavit, to submit to the Court, affirming its compliance with the Notice and settlement administration provisions of this Settlement Agreement, and identifying any Class Members who submitted timely and valid requests for exclusion;

15. Preparing and providing the Settlement Payee List and Payment List as provided in this Settlement Agreement;

16. Processing and transmitting distribution of funds from the Gross Settlement Fund and Net Settlement Fund from the Settlement Fund Account as provided in this Settlement Agreement;

17. Paying any Administrative Costs, including invoices, expenses, taxes, fees, and other costs associated with administration of this Settlement Agreement as contemplated by this Settlement Agreement or required by law; and

18. To the extent not identified above, performing any other settlement administration-related functions reasonably necessary to effectuate the Settlement Agreement, with the consent of both Class Counsel and Defendant's Counsel, or as approved by the Court.

B. Appropriately Handling Personal Information. The Settlement Administrator will (1) use personal information acquired in connection with the Settlement Agreement solely for purposes of administering the Settlement Agreement and evaluating and paying Claims For Payment under this Settlement Agreement; (2) assign a manager to oversee the protection and appropriate management of personal information and review its internal system to manage the protection of personal information to ensure consistent performance and constant improvement; (3) take security measures to prevent unauthorized access to personal information and the loss, destruction, theft, falsification, and leakage of personal information; (4) if outsourcing the handling of personal information, determine that such handlers take steps to ensure appropriate management of the information to prevent leaks of personal or confidential information, and prohibit reuse of information for any other purposes; (5) respond immediately with appropriate measures when necessary to disclose, correct, stop using, or eliminate contents of information; and (6) within one hundred and twenty (120) days after the completion of its duties under this Settlement Agreement, and in compliance with applicable retention law, destroy all personal

information obtained in connection with this Settlement Agreement in a manner that prevents such information from being obtained by unauthorized persons.

VI. NOTICE PLAN

A. Mail Notice.

1. By no later than the Notice Date, the Settlement Administrator shall mail the Notice to each owner, as of the Execution Date, of the Class Properties listed in **Exhibit B** via first class U.S. mail, postage pre-paid.

B. Settlement Website. By no later than one (1) day before the Notice Date, the Settlement Administrator shall establish and maintain an Internet website, at the URL www.VinelandShieldalloyLitigation.com ("Settlement Website") where Class Members can obtain further information about the terms of the Settlement Agreement, their rights, important dates and deadlines, and related information. The Settlement Website shall include the Notice substantially in the form attached as **Exhibit D** to this Settlement Agreement. The Settlement Website shall provide, at a minimum: (i) information concerning deadlines for filing a Claim Form, objecting to the Settlement Agreement, and requesting exclusion from the Settlement Class, and the dates and locations of relevant Court proceedings, including the Final Approval Hearing; (ii) the Toll-Free Phone Number for obtaining information about the Settlement Agreement; (iii) copies of the Settlement Agreement, the Claim Form, the operative Complaint in this Action, the Preliminary Approval Order entered by the Court, Class Counsel's fee and cost application (after it is filed), and other relevant Court documents as agreed upon by the Settling Parties and/or required by the Court; and (iv) information concerning the submission of Claim Forms, including the ability to submit Claim Forms electronically on the Settlement Website. The

Settlement Website shall remain operational until at least sixty (60) days after the conclusion of the Check-Cashing Period, or such other later date as the Settling Parties may agree.

Should any Class Members contact Defendant or Defendant's Counsel regarding the Notice, Defendant or Defendant's Counsel should be prepared to direct such Class Members to the Settlement Website.

C. Toll-Free Number. The Settlement Administrator shall establish and maintain a toll-free telephone number ("Toll-Free Number") which will provide Class Members with information about the Settlement Agreement and their rights and will direct them to the Settlement Website. The Toll-Free Number shall be operational by no later than one (1) day before the Notice Date, and it shall remain operational until at least sixty (60) days after the conclusion of the Check-Cashing Period, or such other later date as the Settling Parties may agree. The Toll-Free Number will not utilize a human operator, but rather will provide automated responses containing information about the Settlement Agreement.

D. Administrative Costs Incurred Prior to Final Approval Order. Prior to entry of the Final Approval Order, a portion of the Gross Settlement Fund not to exceed $30,000.00 will be used to pay Notice costs and other reasonable fees and expenses of the Settlement Administrator, regardless of whether the Effective Date occurs. These amounts shall not be repaid to Defendant even if the Effective Date does not occur.

VII. RELEASE, COVENANT NOT TO SUE, AND OTHER COVENANTS

A. The Settling Parties agree to the following release and waiver of the Released Claims, as defined herein, and covenant not to sue, which shall take effect upon the Effective Date and be binding on all Releasing Parties.

1. In consideration of and for the good and sufficient consideration, promises and covenants described in this Settlement Agreement, including Defendant's payment of the Settlement Amount, the Releasing Parties expressly, intentionally, voluntarily, fully, finally, irrevocably, and forever release, waive and discharge the Released Parties, to the fullest extent that the law permits their release, waiver and discharge, for, of and from any and all manner of past, present, and/or future claims, causes of action, cross-claims, counter-claims, charges, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, remedies, and/or liabilities, under any legal or factual theory, whether class or individual, in law or in equity, or arising under domestic or foreign law, constitution, statute, regulation, ordinance, contract, or otherwise in nature, for any and all fees, costs, penalties, fines, debts, expenses, attorneys' fees, damages (including but not limited to compensatory damages, economic damages, property damages, diminution in value damages, stigma damages, loss of use damages, loss of enjoyment damages, consequential damages, incidental damages, ancillary damages, statutory damages, exemplary damages, punitive damages, special damages, multiple damages, treble damages, restitution damages, and/or disgorgement damages), biomonitoring or medical monitoring, declaratory or injunctive relief, equitable relief, whenever or however incurred, and liabilities of any nature or kind whatsoever (including joint and several liability and strict liability), known or unknown, suspected or unsuspected, matured or unmatured, accrued or unaccrued, asserted or unasserted, arising from, concerning, or relating in any way to: (i) any conduct, act, event, omission, fact, legal or equitable theory alleged or that could have been alleged in the Action; (ii) any release, discharge, leak, spill, emission and/or dumping of any hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) at, on, under, above, from, and/or migrating from any property, parcel, building, plant, structure, business,

action, omission, conduct and/or operation at, on, under, about, adjacent to and/or near 35 South West Boulevard, Newfield, New Jersey 08344, also known or referred to as Block 1002, Lots 1, 4, and 18 on the tax map of the Borough of Newfield, Gloucester County, New Jersey and Block 502, Lots 1 and 2 and Block 505, Lot 23 on the tax map of the City of Vineland, Cumberland County, New Jersey ("SMC Property"); (iii) any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, touching, under, above, within and/or affecting the CEAs, any future classification exception area, Settlement Class and/or the Class Properties; and (iv) the investigation, remediation, and/or cleanup (including delineation, proposal and establishment of institutional controls such as a classification exception area or a well restriction area) of, for and/or related to any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, migrating from, migrating to, touching, under, above, within and/or affecting the SMC Property, the CEAs, any future classification exception area, and/or any and all of the Class Properties (the "Released Claims"). To avoid any doubt, the only claims and/or liabilities that are not Released Claims are personal injury claims for damages by the Releasing Parties concerning or relating to alleged human exposure to contamination from the SMC Property and are expressly excluded from this Release. The Released Parties expressly reserve all rights, arguments, remedies, objections, and defenses available under, based on, or as a result of, any fact, finding, law, statute, regulation, judicial or administrative order, plan of reorganization, bankruptcy plan, and/or bankruptcy discharge, related to or against any claims, demands and/or liabilities, including for personal injury, asserted or that may be asserted by Releasing Parties.

2. The Releasing Parties covenant not to sue and shall forever refrain from instituting, maintaining, prosecuting, pursuing, seeking or continuing any claim, suit, action, demand, arbitration or other proceeding against any of the Released Parties with respect to the Released Claims.

3. The relief provided for in this Settlement Agreement shall be the sole and exclusive remedy for all Releasing Parties with respect to the Action and any of the Released Claims, and the Released Parties shall not be subject to liability, responsibility, damages, or expense of any kind with respect to any of the Released Claims other than as expressly set forth in this Settlement Agreement.

4. This Settlement Agreement is, and may be pleaded as, a full and complete defense to, and may be used as the basis for an injunction against, any claim, action, suit, demand, arbitration, or other proceeding by any of the Releasing Parties (i) that may be instituted, prosecuted, pursued, sought or attempted in breach of or contrary to this Settlement Agreement, or (ii) that asserts any of the Released Claims against any of the Released Parties. The Releasing Parties agree and acknowledge that while the Settlement Agreement is a complete defense to any action or proceeding brought by the Releasing Parties in breach of or contrary to this Settlement Agreement, it is not the exclusive defense or remedy available to the Released Parties in such an action or proceeding.

B. Waiver of Statutory Rights: To the extent the provisions apply, the Releasing Parties expressly, knowingly, and voluntarily waive the provisions of Section 1542 of the California Civil Code, which provides as follows:

> **A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.**

To the extent the provisions apply, the Releasing Parties likewise expressly, knowingly, and voluntarily waive the provisions of Section 28-1-1602 of the Montana Code, which provides:

> **A general release does not extend to claims that the creditor does not know or suspect to exist in the creditor's favor at the time of executing the release, which, if known by the creditor, must have materially affected the creditor's settlement with the debtor.**

To the extent the provisions apply, the Releasing Parties likewise expressly, knowingly, and voluntarily waive the provisions of Section 9-13-02 of the North Dakota Century Code, which provides:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in the creditor's favor at the time of executing the release, which if known by the creditor, must have materially affected the creditor's settlement with the debtor.**

To the extent the provisions apply, the Releasing Parties likewise expressly, knowingly, and voluntarily waive the provisions of Section 20-7-11 of the South Dakota Codified Laws, which provides:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.**

To the extent the laws apply, the Releasing Parties expressly waive and relinquish all rights and benefits that they may have under, or that may be conferred upon them by, Section 1542 of the California Civil Code, Section 28-1-1602 of the Montana Code, Section 9-13-02 of the North Dakota Century Code, Section 20-7-11 of the South Dakota Codified Laws, and all similar laws of other states, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the Released Claims. In connection with such waiver and relinquishment, the Releasing Parties acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those that they now know or believe to exist with respect to the Released Claims, but that it is their intention to accept and assume that risk and fully, finally, and

forever release, waive, compromise, settle, and discharge all of the Released Claims against the Released Parties. The Release in this Section VII thus shall remain in effect notwithstanding the discovery or existence of any additional or different claims or facts.

C. Until such time as the CEAs are removed, withdrawn or discharged, any Releasing Party that attempts to convey a Class Property to a third party shall disclose the existence of the CEAs (as applicable) to such third party prior to the transfer of the Class Property.

D. Nothing in this Release shall preclude any action to enforce the terms of this Settlement Agreement.

VIII. PRELIMINARY SETTLEMENT APPROVAL

A. Preliminary Approval. Within twenty-one (21) days after the execution date of this Settlement Agreement, Class Counsel shall move the Court in this Action for entry of a Preliminary Approval Order in the form of **Exhibit E** to this Settlement Agreement, for the purposes of, among other things: (1) preliminarily approving the Settlement Agreement; (2) finding that the requirements for provisional certification of the Settlement Class have been satisfied; (3) certifying the Settlement Class as defined herein for settlement purposes only; (4) setting a date for a Final Approval Hearing; (5) approving the proposed Notice program described in Section VI herein (including the proposed forms and methods of notice), and directing dissemination of Notice to the Settlement Class in accordance with the terms of this Settlement Agreement; (6) determining that the Notice program, as set forth in this Settlement Agreement, complies with all legal requirements, including but not limited to the Due Process Clause of the United States Constitution; (7) approving the Claim Process, and directing that the Claim Process be implemented pursuant to the terms of this Settlement Agreement; (8) providing that any objections by any Settlement Class Member to the entry of the Final Approval Order, or to Class

Counsel's request for attorneys' fees, costs, or service awards, shall be heard and any papers submitted in support of said objections shall be considered by the Court at the Final Approval Hearing only if, on or before the Objection Deadline specified in the Notice and Preliminary Approval Order, such objector complies with the requirements for objections set forth in Section X of this Settlement Agreement; (9) establishing dates by which Class Counsel shall file and serve all papers in support of final approval of the Settlement Agreement and in support of their application for attorneys' fees, costs, and service awards, and by which the Settling Parties shall file and serve all papers in response to any objections; (10) providing that all Settlement Class Members will be bound by the Final Approval Order; (11) approving the procedure for Class Members to request exclusion from the Settlement Class described in Section IX, and directing that requests for exclusion be submitted pursuant to the terms of this Settlement Agreement by the Exclusion Deadline; (12) directing the Settling Parties, pursuant to the terms and conditions of this Settlement Agreement, to take all necessary and appropriate steps to establish the means necessary to implement the Settlement Agreement; (13) setting deadlines consistent with this Settlement Agreement for dissemination of Notice, requesting exclusion from the Settlement Class, and objecting to the Settlement Agreement; (14) appointing the Settlement Class Representatives and Class Counsel; (15) approving the appointment of the Settlement Administrator; (16) staying further proceedings in this Action, other than proceedings necessary to carry out and enforce the terms of the Settlement Agreement and prosecute the Defendant's crossclaims against TRC; and (17) enjoining Class Members, pending a ruling on the motion for final approval, from instituting, maintaining, prosecuting, continuing, or otherwise asserting any Released Claim without regard for any pending requests for exclusion. Class Counsel shall provide to Defendant's Counsel a copy of the motion for entry of the Preliminary Approval Order

for review and consent prior to filing such motion and Defendant's Counsel shall not oppose such motion after filing.

IX. REQUESTS FOR EXCLUSION

A. Class Members may exclude themselves from the Settlement Class by mailing to the Settlement Administrator, at the address provided in the Website Notice, a request for exclusion that is postmarked no later than sixty (60) days after the Notice Date (the "Exclusion Deadline"). To be effective, the request for exclusion must include (1) the Class Member's full name, telephone number, mailing address, and email address; (2) a clear statement that the Class Member wishes to be excluded from the Settlement Class; (3) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and (4) the Class Member's original signature. Requests for exclusion must be made on an individual basis; "mass," "class," or other purported group opt outs are not effective. Any Class Member who submits a timely and valid request for exclusion cannot object to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. If a Class Member submits both a timely and valid request for exclusion and an objection, the Class Member shall be treated as if they had only submitted a request for exclusion and the objection shall be deemed moot and invalid.

B. The Settlement Administrator shall promptly after receipt provide copies of any requests for exclusion, including any related correspondence, to Class Counsel and Defendant's Counsel.

C. By no later than fourteen (14) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Defendant's Counsel and Class Counsel for Class Counsel's filing with the Court) a declaration providing a complete and final list of Class Members who submitted timely and valid requests for exclusion.

D. Any Class Member that/who does not submit a timely and valid request for exclusion as provided in this Section IX shall be a Settlement Class Member and shall be bound by the terms of this Settlement Agreement and all proceedings, orders, and judgments in this Action, including, but not limited to, the Release, regardless of whether such Class Members have any pending claims or causes of action against Defendants.

E. Any Class Member who submits a timely and valid request for exclusion as provided in this Section IX may revoke the request by submitting to the Settlement Administrator a statement of revocation prior to the date of the Final Approval Hearing.

F. Plaintiffs agree not to submit a request for exclusion from the Settlement Agreement.

X. OBJECTIONS

A. Any Settlement Class Member that/who complies with the objection provisions set forth in this Section X shall have the right to object to the proposed Settlement Agreement and/or to Class Counsel's motion for attorneys' fees, costs, and service awards. Settlement Class Members that/who object shall remain Settlement Class Members and shall be subject to the Release and all other terms of this Settlement Agreement if this Settlement Agreement is approved by the Court and the Effective Date occurs. To be considered valid, an objection must be in writing, must be filed with the Court no later than eighty (80) days after the Notice Date (the "Objection Deadline"), and must include the following: (1) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; (2) the full name, mailing address, telephone number, and email address of the objector; (3) the objector's original signature; (4) a description of the specific reasons for the objection and any supporting authority or evidence; (5) the name, address, bar number and telephone number of counsel for the objector, if the objector is

represented by an attorney; and (6) a statement as to whether the objector intends to appear at the Final Approval Hearing either in person or through counsel. Objections must be made on an individual basis; "mass," "class," or other purported group objections are not valid. Any Settlement Class Member that/who does not timely submit an objection in accordance with this section shall waive the right to object and be heard at the Final Approval Hearing and shall be forever barred from making any objection to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. Any Settlement Class Member that/who objects to the Settlement Agreement shall nevertheless be eligible for all benefits of the Settlement Agreement if it receives final approval and the Effective Date occurs.

B. By no later than twenty-one (21) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Defendant's Counsel and Class Counsel for Class Counsel's filing with the Court) copies of any objections received by the Settlement Administrator.

C. By no later than seven (7) days before the Final Approval Hearing, the Settling Parties shall file any responses to any Settlement Class Member objections, and Plaintiffs shall file any papers in further support of the motion for final approval of the Settlement Agreement and/or in support of Class Counsel's motion for attorneys' fees, costs, and service awards.

XI. FINAL SETTLEMENT APPROVAL

A. Final Approval Order. By no later than seventy (70) days following the Notice Date, Class Counsel shall file a motion for final approval of the Settlement, requesting entry of the Final Approval Order to be agreed to by the Settling Parties to this Settlement Agreement, which shall specifically include provisions: (1) stating that the Court has personal jurisdiction over all Settlement Class Members, that the Court has subject matter jurisdiction over the claims

asserted in this Action, and that venue is proper; (2) finally approving the Settlement Agreement pursuant to New Jersey Court Rule 4:32-2 for settlement purposes only, and directing the Settling Parties and Settlement Administrator to implement the Settlement Agreement pursuant to its terms, including distributing Settlement Payments to Eligible Claimants and making such other disbursements from the Settlement Fund Account as provided by the Settlement Agreement; (3) finding that the Notice as distributed was the best notice practicable and fully satisfied the requirements of due process and New Jersey Court Rule 4:32-2; (4) finally certifying the Settlement Class pursuant to New Jersey Court Rule 4:32-2; (5) memorializing that Releasing Parties have released all Released Claims against the Released Parties; (6) permanently enjoining Releasing Parties from instituting, maintaining, prosecuting, continuing, pursuing or otherwise asserting any Released Claim against the Released Parties, irrespective of whether Settlement Payments to Settlement Class Members are deposited, cashed, or otherwise accepted by any Settlement Class Member; (7) retaining jurisdiction relating to the administration, consummation, validity, enforcement, and interpretation of this Settlement Agreement, the Final Approval Order, and any separate Order regarding Class Counsel's motion for attorneys' fees, costs, and service awards, and for any other necessary purpose; and (8) entering a judgment that dismisses all claims in this Action with prejudice, without costs to any Settling Party, except as provided in this Settlement Agreement, and subject to the Court's continuing jurisdiction over the Settling Parties and the Gross Settlement Funds and Net Settlement Funds for the purpose of enforcement of the terms of this Settlement Agreement. Class Counsel shall provide to Defendant's Counsel a copy of the motion for entry of the Final Approval Order for review and consent prior to filing such motion and Defendant's Counsel shall not oppose such motion after filing.

B. Actions Following the Effective Date. To the extent not dismissed by the Final Order, by no later than three (3) business days following the Effective Date, Plaintiffs and Class Counsel shall dismiss with prejudice the Action against all Defendants, with the Settling Parties bearing their own costs in the Action except as set forth in this Settlement Agreement.

C. Effect of Agreement if Settlement Is Not Approved. This Settlement Agreement is entered into only for the purpose of settlement. If the Settlement Agreement is not approved, or is terminated, cancelled, or fails to become effective for any reason, including without limitation in the event the Final Approval Order is reversed or vacated following any appeal taken therefrom, then this Settlement Agreement shall be *void ab initio*, shall have no force or effect, and shall impose no obligations on the Settling Parties. The intent of the previous sentence is that, in the event that a necessary approval is denied, the Settling Parties will revert to their positions immediately prior to the date this Settlement Agreement was executed, and the Action will resume without prejudice to any Settling Party. In that event, the Settling Parties further agree to cooperate in asking for a reasonable schedule for the resumption of the Action. In the event of such a reversion, the Settling Parties agree that the proposed or actual certification of the Settlement Class will be deemed void and will not be urged or considered as a factor in any further proceeding.

XII. ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

A. No later than seventy (70) days following the Notice Date, Class Counsel shall file a motion with the Court requesting an award of attorneys' fees not to exceed four hundred forty one thousand, six hundred twenty two dollars and fifty cents ($441,622.50) (*i.e.*, 33.33% of the Settlement Amount), plus reimbursement of their reasonable litigation costs incurred in an amount not to exceed fifty thousand dollars ($50,000.00) (*i.e.*, litigation expenses), with any such

amounts awarded to Class Counsel payable from the Gross Settlement Fund. Such motion shall be posted on the Settlement Website promptly after it is filed with the Court.

B. Class Counsel's entitlement to attorneys' fees and costs will be determined by the Court. The Settlement Agreement is not conditioned on Court approval of an award of attorneys' fees and costs. In the event the Court declines Class Counsel's request for attorneys' fees and costs, or awards less than the amounts sought, but otherwise approves the Settlement Agreement, the remaining provisions of this Settlement Agreement will continue to be effective and enforceable by the Settling Parties, and Class Counsel shall not object to, appeal, or otherwise seek reconsideration of, the Court's determination.

C. Any attorneys' fees and costs awarded by the Court to Class Counsel shall be paid from the Gross Settlement Fund.

D. The Settlement Administrator shall make full payment of the attorneys' fees and costs awarded by the Court to Class Counsel within three (3) business days after the Effective Date.

E. No later than seventy (70) days following the Notice Date, Class Counsel shall file a motion with the Court requesting payment from the Gross Settlement Fund to the Settlement Class Representatives of service awards not to exceed forty thousand dollars ($40,000), with $20,000 being awarded to Raymond and Diane Cavagnaro (jointly) and $20,000 being awarded to Anthony Alimenti. Any motion for service awards will be based on the Settlement Class Representatives' time, effort, expense, and commitment in this Action, and will not be based or conditioned upon the Settlement Class Representatives' support for the Settlement Agreement. Such motion shall be posted on the Settlement Website promptly after it is filed with the Court.

F. The Settlement Class Representatives' entitlement to service awards, if any, will be determined by the Court. The Settlement Agreement is not conditioned on Court approval of service awards for the Settlement Class Representatives. In the event the Court declines the request for service awards, or awards less than the amount sought, but otherwise approves this Settlement Agreement, the remaining provisions of this Settlement Agreement will continue to be effective and enforceable by the Settling Parties, including the Release set forth in this Settlement Agreement, and Settlement Class Representatives shall not object to, appeal, or otherwise seek reconsideration of, the Court's determination.

G. Any service awards for the Settlement Class Representatives awarded by the Court shall be paid from the Gross Settlement Fund.

H. To the extent awarded by the Court, the Settlement Administrator shall make full payment of service awards awarded by the Court within three (3) business days after the Effective Date. Defendant shall have no liability or responsibility to the Settlement Class Representatives or other parties arising from any claim regarding payment of any service awards.

I. The Settling Parties acknowledge that they negotiated and agreed upon all consideration to the Settlement Class before negotiating Class Counsel's proposed attorneys' fees and expenses and service awards as set forth in this Section XII. Class Counsel and the Settlement Class Representatives shall provide W-9 Forms to the Settlement Administrator prior to payment of attorneys' fees and expenses and service awards awarded by the Court.

XIII. ADDITIONAL PROVISIONS

A. No Admission of Liability or Wrongdoing. By negotiating and signing this Settlement Agreement, Defendant is not admitting any liability, fault, wrongdoing, or violation of law. Defendant denies all allegations and claims asserted against it and maintains that it has

good and meritorious defenses to Plaintiffs' claims, but is settling the Action to avoid the risk, burden, uncertainty and expense of continued litigation. This Settlement Agreement, and any and all negotiations, statements, documents, and/or proceedings in connection with this Settlement Agreement, shall not be construed or deemed to be an admission, a concession, or evidence of (1) the truth of any allegation by Plaintiffs in the Action; (2) any contention that any person suffered compensable harm or is entitled to any legal, injunctive, equitable, or other relief with respect to the matters asserted in the Action or any Released Claim; (3) any liability, negligence, fault, or wrongdoing by Defendant; or (4) that the Action or any other action was or may be properly certified as a class action for litigation, non-settlement purposes.

B. No Penalty or Fine. No amounts paid pursuant to this Settlement Agreement are being paid or incurred to, or at the direction of, any government or governmental entity in relation to the violation of any civil or criminal law or the investigation or inquiry by any government or governmental entity into the potential violation of any civil or criminal law, within the meaning of Section 162(f)(1) of the Internal Revenue Code of 1986, as amended, and Section 1.162-21(a) of the Treasury Regulations thereunder (hereinafter "Governmental Violation"). No portion of any amount paid under this Settlement Agreement constitutes the payment of a fine, penalty, or punitive damages, the disgorgement of profits, reimbursement for litigation or investigation costs or attorneys' fees or costs, or an amount paid in settlement of any claim for or related to any Governmental Violation; and if a determination were made to the contrary, the amounts paid would qualify under the exceptions in paragraphs (2) and (3) of Section 162(f).

C. Termination.

1. This Settlement Agreement may be terminated by any of the Settling Parties by serving on counsel for the opposing parties and filing with the Court a written notice of

termination within ten (10) days (or such longer time as may be agreed between Class Counsel and Defendant's Counsel) after any of the following occurrences:

a. the Court denies preliminary or final approval of the Settlement Agreement;

b. the Court conditions preliminary or final approval on changes to the Settlement Amount, the Release, or other material provisions of the Settlement Agreement other than attorneys' fees awarded to Class Counsel and/or service awards eligibility or payments to the Settlement Class Representatives;

c. an appellate court reverses, vacates, or otherwise overturns the Final Approval Order, and the Settlement Agreement is not reinstated and finally approved without material change by the Court on remand;

d. any of the Settling Parties materially breaches this Settlement Agreement before the Effective Date and fails to promptly cure the breach after receiving written notice of the breach; or

e. the Effective Date does not occur.

2. This Settlement Agreement may be terminated by the Defendant by serving on Class Counsel and filing with the Court a written notice of termination within ten (10) days after the Exclusion Deadline (or such longer time as may be agreed between Class Counsel and Defendant's Counsel) if the total number of Class Members validly excluding themselves from the Settlement Class exceeds 5% of the total number of Class Members.

3. If a Settling Party exercises a right to terminate this Settlement Agreement pursuant to Section XIII.C., (i) the Settling Parties shall have thirty (30) days to resume settlement

negotiations and determine if the Settling Parties can reach an amended settlement agreement, including without limitation with the assistance of a mediator; (ii) the Settling Parties shall jointly request a stay of all Court deadlines for the duration of the negotiations; and (iii) the Settling Parties shall jointly advise the Court of the status of this Settlement Agreement or any amendment to this Settlement Agreement within seven (7) days after the conclusion of the thirty-day negotiation period.

4. In the event of a termination pursuant to Section XIII.C., this Settlement Agreement shall become null and void *ab initio*.

5. In the event of a termination pursuant to Section XIII.C., this Settlement Agreement shall have no force or effect and the Settling Parties will return to the *status quo ante* in this Action as they existed prior to the date of execution of this Settlement Agreement. The Settling Parties will also be prohibited from using this Settlement Agreement or any settlement or mediation communications in connection with discovery or as evidence in the Action or any other action. The Settling Parties further agree to cooperate in asking for a reasonable schedule for the resumption of the Action. In addition, the Settlement Amount, including interest accrued, shall be returned promptly to the Defendant.

D. Non-Disparagement. The Eligible Claimants, Plaintiffs, and Class Counsel agree not to make any negative, derogatory, disparaging, and/or untruthful statements, either written or oral, to any person or entity nor do anything that derogates the Released Parties or their counsel. The Parties agree that this Paragraph is a material term of this Settlement Agreement, without which Defendant would not enter into this Settlement Agreement. Defendant maintains all claims, rights, and/or remedies as a result of a breach of this Paragraph, whether equitable or sounding in damages.

E. Confidentiality. The Settling Parties and their respective attorneys agree that prior to the filing of a motion for preliminary approval of the Settlement Agreement, the Settlement Agreement, including the terms and Settlement Amount set forth herein, is and shall be treated as confidential and shall not be disclosed, described, or characterized to any other person, attorney, entity, publication or member of the media, except as may be required by law, judicial process, or order of a court, to enforce the terms of the Settlement Agreement, or as otherwise agreed by the Settling Parties. The Settling Parties agree not to disclose the substance of the negotiations that led to this Settlement Agreement, including the merits of any positions taken by any Settling Party, except as may be necessary to provide the Court with information necessary to consider approval of the Settlement Agreement.

F. Voluntary Agreement. This Settlement Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of the Settling Parties, or of any other person, firm or entity.

G. Binding On Successors. This Settlement Agreement shall bind and inure to the benefit of the Settling Parties, the Settlement Class Members, and their respective successors, assigns, legatees, heirs, and personal representatives.

H. Parties Represented by Counsel. The Settling Parties hereby acknowledge that they have been represented in negotiations for and in the preparation of this Settlement Agreement by independent counsel of their own choosing, that they have read this Settlement Agreement and have had it fully explained to them by such counsel, and that they are fully aware of the contents of this Settlement Agreement and of its legal effect.

I. Authorization. Each Releasing Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or

causes of action released herein and, further, that each Releasing Party is fully entitled and duly authorized to give this complete and final release and discharge as set forth in Section VII.

J. Construction and Interpretation. No Settling Party shall be deemed the drafter of this Settlement Agreement for purposes of interpreting any provision hereof in any judicial or other proceeding that may arise.

K. Headings. The various headings used in this Settlement Agreement are solely for the convenience of the Settling Parties and shall not be used to interpret this Settlement Agreement.

L. Exhibits. The exhibits to this Settlement Agreement are integral parts of the Settlement Agreement and are hereby incorporated and made a part of this Settlement Agreement.

M. Effect of Weekends and Holidays. If any date or deadline in this Settlement Agreement falls on a Saturday, Sunday, or federal holiday, the next business day following the date or deadline shall be the operative date. Unless the Court orders otherwise, the Settling Parties may agree in writing (but shall not be required to agree) to any reasonable extensions of time to carry out any of the provisions of this Settlement Agreement.

N. Merger and Integration. This Settlement Agreement, together with its exhibits, contain the entire, complete, and integrated statement of each and every term and condition agreed to by, between, and among the Settling Parties, and are not subject to any term or condition not provided for therein. In entering into this Settlement Agreement, no Settling Party has made or relied on any warranty or representation not specifically set forth in the Settlement Agreement. This Settlement Agreement supersedes all prior and contemporaneous oral and written agreements and discussions among the Settling Parties regarding the subject matter of the Settlement Agreement.

O. No Waiver. There shall be no waiver of any term or condition absent an express writing to that effect by the Settling Party to be charged with that waiver. No waiver of any term or condition in this Settlement Agreement by any Settling Party shall be construed as a waiver of a subsequent breach or failure of the same term or condition, or waiver of any other term or condition of this Settlement Agreement.

P. Modifications and Amendments. No amendment, change, or modification of this Settlement Agreement or any part thereof shall be valid unless in writing signed by the Settling Parties and, if it occurs after entry of the Final Approval Order, with approval of the Court.

Q. Governing Law. This Settlement Agreement shall be governed by and interpreted in accordance with the laws of the State of New Jersey, without regard to its choice of law or conflict of law principles.

R. Further Assurances; Dispute Resolution. Each of the Settling Parties hereto shall execute and deliver any and all additional papers, documents and other assurances and shall do any and all acts or things reasonably necessary to obtain approval of this Settlement Agreement and in connection with the performance of its obligations hereunder to carry out the express intent of the Settling Parties hereto. The Settling Parties and their counsel undertake to implement the terms of this Settlement Agreement in good faith, and to use good faith in resolving any disputes that may arise in the implementation of the terms of this Settlement Agreement. If unable to resolve any disputes regarding this Settlement Agreement among themselves, the Settling Parties will consult the mediator, and, only if mediation fails to resolve such disputes, refer the disputes to the Court for resolution.

S. Severability. The provisions of this Settlement Agreement are not severable, except as provided in the Settlement Agreement or by subsequent agreement of the Settling Parties.

T. Third-Party Beneficiaries. The Settlement Agreement does not create any third-party beneficiaries, except for the Settlement Class Members, Defendants, and the Released Parties, all of whom are intended third-party beneficiaries.

U. Force Majeure. The failure of any Settling Party to perform any of its obligations hereunder shall not subject such Settling Party to any liability or remedy for damages, or otherwise, where such failure is occasioned in whole or in part by Acts of God, fires, accidents, pandemics, other natural disasters, war, labor disputes or shortages, shortages of material or supplies, governmental laws, rules or regulations.

V. Continuing Jurisdiction. The Parties to this Settlement Agreement stipulate that the Court shall retain personal and subject matter jurisdiction over the implementation and enforcement of this Settlement Agreement, the Preliminary Approval Order, the Final Approval Order, and any separate order regarding Class Counsel attorneys' fees and expenses and/or the Settlement Class Representatives' service awards.

W. Execution Date; Counterparts. This Settlement Agreement shall be deemed executed on the date that the last of the signatories for the Settling Parties provides its signature. This Settlement Agreement may be executed in counterparts, including via electronic signature, each of which shall constitute an original, but all of which together shall constitute one and the same instrument. The several signature pages may be collected and annexed to one or more documents to form a complete counterpart. Photocopies of executed copies of this Settlement Agreement may be treated as originals.

X. Notices. Notices to counsel for the Settling Parties required under this Settlement Agreement shall be sent by email and first-class mail or a nationally-recognized courier to:

For Plaintiffs:

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

For Defendant, Shieldalloy Metallurgical Corporation

DUANE MORRIS, LLP
Phil Cha, Esq.
Dana B Klinges, Esq.
Lindsay A. Brown, Esq.
James Hearon, Esq.
40 Lake Center Drive
401 Route 73 North, Suite 200
Marlton, NJ 08053
Telephone: (856) 874-4200
Facsimile: (856) 424-4367
pcha@duanemorris.com

Agreed to on the date indicated below.

APPROVED AND AGREED TO BY DEFENDANT SHIELDALLOY METALLURGICAL CORPORATION:

Dated: 7/15/26

By: _____

Title: President
Jackson Director

APPROVED AND AGREED TO BY COUNSEL FOR SHIELDALLOY METALLURGICAL CORPORATION:

Dated: 7/15/26

_____
Phil Cha
Duane Morris, LLP

APPROVED AND AGREED TO BY CLASS COUNSEL:

Dated: 7/14/26

Stephen P. DeNittis James Barry
DeNittis Osefchen Prince, P.C.

APPROVED AND AGREED TO BY PLAINTIFFS:

Dated: 07/13/26

Raymond Cavagnaro (Jul 14, 2026 12:40:47 EDT)

Raymond Cavagnaro

Dated: _____

Diane Cavagnaro

Dated: _____

Anthony Alimenti

APPROVED AND AGREED TO BY PLAINTIFFS:

Dated: _____

Raymond Cavagnaro

Dated: 07/14/26

Diane Cavagnaro
Diane Cavagnaro (Jul 14, 2026 12:39:07 EDT)

Diane Cavagnaro

Dated: _____

Anthony Alimenti

APPROVED AND AGREED TO BY PLAINTIFFS:

Dated: _____

Raymond Cavagnaro

Dated: _____

Diane Cavagnaro

Dated: 07/14/26

Anthony Alimenti (Jul 14, 2026 11:36:32 EDT)

Anthony Alimenti

Exhibit A

SHIELDALLOY SETTLEMENT CLAIM FORM

IMPORTANT -- All Settlement Class Members who sign and submit this claim form are certifying that, as of the Execution Date, they own residential property located partially or wholly within the geographical boundary defined by (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed by and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of properties located within one or both CEAs is attached to the Settlement Agreement and available online at www.VinelandShieldalloyLitigation.com.

If your property is located within one or both of the CEAs and is also located within the Well Restriction Area ("WRA") identified by the City of Vineland Ordinance No. 86-67 and established in 1986, a payment of $300 will be allocated to your property. If your property is located within one or both CEAs and is not located within the WRA, a payment equal to no more than 7% of the 2025 tax assessed value of your property will be allocated to your property. If multiple owners of a property file claim forms, allocated payments will be split equally among the Eligible Claimants.

Upon completing and submitting this claim form by the deadline, the Settlement Administrator will review your eligibility for payment under the Settlement Agreement. If the Court grants final approval of the Settlement Agreement, and the Settlement Administrator determines you are eligible for payment, your final payment amount may depend on the funds available for distribution and the number of Eligible Claimants. The Settlement Agreement is available at www.VinelandShieldalloyLitigation.com.

All claims will be paid by check or electronic payment.

To be eligible for a settlement payment, you must complete and file this Claim Form. You can either:

(1) File Online: File online at www.VinelandShieldalloyLitigation.com; or

(2) File by Mail: Fill out, sign, and return this form to: [ADDRESS]

You must file a claim to receive a settlement payment. THE DEADLINE TO FILE A CLAIM IS [DATE].

Unless otherwise defined herein, all capitalized terms have the same meaning as given in the Settlement Agreement.

Part 1: Provide Your Contact Information

Personal ID # ☐ ☐ ☐ ☐ ☐ ☐ ☐

(You can find this number on the front or top of the settlement notice you received.

If you no longer have the notice, and need your Personal ID #, email the Settlement Administrator at: [EMAIL ADDRESS]).

Your Name_____

Street Address_____

City_____ State _____ ZIP _____

Phone Number:_____ Email Address: _____

*If you submit a Claim Form without a unique personal identification number you must submit documentary proof of identification, proof of your ownership of the Class Property, and proof of the date you became the owner of the Class Property.

Part 2: Confirm Class Property

If the property you own in one or both of the CEAs is not the same as the address provided in Step 1, provide:

Street Address of
Class Property_____

City_____ State _____ ZIP _____

Part 3: Non-disparagement

I acknowledge and agree that I shall not make any negative, derogatory, disparaging, and/or untruthful statements, either written or oral, to any person or entity, about the Released Parties.

Part 4: CEA Disclosure to Purchasers

I acknowledge and agree to comply with the obligations of New Jersey law to disclose to any purchaser or transferee of my property the existence of any then-existing CEA prior to transferring the property. I further acknowledge and agree to identify and list the existence of any then-existing CEA affecting my property on any property condition disclosure statement required by N.J.A.C. 13:45A-29.1.

Part 5: Sign the Form

I hereby certify, under penalty of perjury, that the information stated herein is true and correct to the best of my knowledge. I also agree and acknowledge that I will comply with the non-disparagement requirement in Part 3 and that I will comply with the CEA Disclosure requirement in Part 4.

_____

Your Signature Date

_____ / [Toll-Free Number]

Exhibit B

Municipality	Block	Lot	Address	Inside or Outside WRA
614	401	18	799 W WEYMOUTH RD	OUTSIDE
614	401	24	619 W WEYMOUTH RD	INSIDE
614	401	25	581 W WEYMOUTH RD	INSIDE
614	401	26	573 W WEYMOUTH RD	INSIDE
614	401	27	557 W WEYMOUTH RD	INSIDE
614	401	28	3576 N WEST AVE	INSIDE
614	401	29	3564 N WEST AVE	INSIDE
614	401	30	3544 N WEST AVE	INSIDE
614	401	31	3468 N WEST AVE	INSIDE
614	401	32	3454 N WEST AVE	INSIDE
614	401	33	3430 N WEST AVE	INSIDE
614	401	34	3390 N WEST AVE	INSIDE
614	401	35	3350 N WEST AVE	INSIDE
614	401	36	588 W ARBOR AVE	INSIDE
614	401	37	608 W ARBOR AVE	INSIDE
614	401	38	632 W ARBOR AVE	INSIDE
614	401	39	650 W ARBOR AVE	INSIDE
614	401	40	670 W ARBOR AVE	INSIDE
614	401	41	714 W ARBOR AVE	INSIDE
614	401	42	738 W ARBOR AVE	INSIDE
614	401	43	756 W ARBOR AVE	INSIDE
614	401	44	778 W ARBOR AVE	INSIDE
614	401	45	3339 BRUUN AVE	INSIDE
614	401	46	3369 BRUUN AVE	INSIDE
614	401	46.01	824 ELTY AVE	INSIDE
614	401	47	828 ELTY AVE	INSIDE
614	401	48	830 ELTY AVE	INSIDE
614	401	49	850 ELTY AVE	INSIDE
614	401	50	868 ELTY AVE	INSIDE
614	401	51	888 ELTY AVE	INSIDE
614	401	53	926 ELTY AVE	INSIDE
614	401	54	950 ELTY AVE	INSIDE
614	401	55	GEROW AVE	INSIDE
614	401	58	3360 GEROW AVE	INSIDE
614	401	59	3324 GEROW AVE	INSIDE
614	401	60	3292 GEROW AVE	INSIDE
614	401	61	1032 W ARBOR AVE	INSIDE
614	401	62	1132 W ARBOR AVE	INSIDE
614	402	1	3361 GEROW AVE	INSIDE
614	402	2	947 ELTY AVE	INSIDE
614	402	3	931 ELTY AVE	INSIDE
614	402	4	913 ELTY AVE	INSIDE
614	402	5	893 ELTY AVE	INSIDE
614	402	6	873 ELTY AVE	INSIDE
614	402	7	853 ELTY AVE	INSIDE
614	402	8	829 ELTY AVE	INSIDE

614	402	9	820 W ARBOR AVE	INSIDE
614	402	10	848 W ARBOR AVE	INSIDE
614	402	11	874 W ARBOR AVE	INSIDE
614	402	12	900 W ARBOR AVE	INSIDE
614	402	17	3311 GEROW AVE	INSIDE
614	402	18	3339 GEROW AVE	INSIDE
614	403	18	1170 W ARBOR AVE	INSIDE
614	501	7	601 SALEM AVE	INSIDE
614	501	26	3826 N WEST BLVD	INSIDE
614	501	27	3814 N WEST BLVD	INSIDE
614	501	28	3788 N WEST BLVD	INSIDE
614	501	35	242 W WEYMOUTH RD	INSIDE
614	501	36	306 W WEYMOUTH RD	INSIDE
614	501	37	380 W WEYMOUTH RD	INSIDE
614	501	38	420 W WEYMOUTH RD	INSIDE
614	501	39	442 W WEYMOUTH RD	INSIDE
614	501	40	460 W WEYMOUTH RD	INSIDE
614	501	41	478 W WEYMOUTH RD	INSIDE
614	501	42	496 W WEYMOUTH RD	INSIDE
614	501	43	510 W WEYMOUTH RD	INSIDE
614	501	44	520 W WEYMOUTH RD	INSIDE
614	501	45	552 W WEYMOUTH RD	INSIDE
614	501	46	568 W WEYMOUTH RD	INSIDE
614	501	47	628 W WEYMOUTH RD	INSIDE
614	502	4	102 E WEYMOUTH RD	OUTSIDE
614	502	5	42 E WEYMOUTH RD	OUTSIDE
614	503	1	3595 N EAST BLVD	OUTSIDE
614	503	1.01	45 E WEYMOUTH RD	OUTSIDE
614	503	1.02	71 E WEYMOUTH RD	OUTSIDE
614	503	1.03	93 E WEYMOUTH RD	OUTSIDE
614	503	3	167 E WEYMOUTH RD	OUTSIDE
614	503	5	3558 PROSPECT AVE	OUTSIDE
614	503	6	3410 PROSPECT AVE	OUTSIDE
614	503	7	3431 N EAST BLVD	OUTSIDE
614	503	8	3451 N EAST BLVD	OUTSIDE
614	503	9	3471 N EAST BLVD	OUTSIDE
614	503	10	3487 N EAST BLVD	OUTSIDE
614	503	11	3509 N EAST BLVD	OUTSIDE
614	503	12	3527 N EAST BLVD	OUTSIDE
614	503	13	3541 N EAST BLVD	OUTSIDE
614	504	2	59 DIVISION ST	OUTSIDE
614	504	5	144 E ARBOR AVE	OUTSIDE
614	504	6	166 E ARBOR AVE	OUTSIDE
614	504	7	3406 PROSPECT AVE	OUTSIDE
614	504	8	218 E ARBOR AVE	OUTSIDE
614	504	10	120 E ARBOR AVE	OUTSIDE
614	504	12	74 E ARBOR AVE	OUTSIDE

614	504	15	3379 N EAST BLVD	OUTSIDE
614	504	16	3401 N EAST BLVD	OUTSIDE
614	505	1	3625 N WEST AVE	INSIDE
614	505	3	397 W WEYMOUTH RD	INSIDE
614	505	4	319 W WEYMOUTH RD	INSIDE
614	505	6	3492 N WEST BLVD	INSIDE
614	505	11	3526 N WEST BLVD	INSIDE
614	505	12	3454 N WEST BLVD	INSIDE
614	505	13	100 W ARBOR AVE	INSIDE
614	505	14	110 W ARBOR AVE	INSIDE
614	505	15	120 W ARBOR AVE	INSIDE
614	505	16	130 W ARBOR AVE	INSIDE
614	505	17	168 W ARBOR AVE	INSIDE
614	505	18	188 W ARBOR AVE	INSIDE
614	505	19	236 W ARBOR AVE	INSIDE
614	505	20	278 W ARBOR AVE	INSIDE
614	505	21	296 W ARBOR AVE	INSIDE
614	505	24	3457 N WEST AVE	INSIDE
614	505	25	3477 N WEST AVE	INSIDE
614	505	26	3539 N WEST AVE	INSIDE
614	505	27	3541 N WEST AVE	INSIDE
614	505	28	3595 N WEST AVE	INSIDE
614	603	4	1350 W FOREST GROVE RD	OUTSIDE
614	603	7	2808 N DELSEA DR	INSIDE
614	603	9	1452 W FOREST GROVE RD	INSIDE
614	603	11	1522 W FOREST GROVE RD	OUTSIDE
614	603	12	1550 W FOREST GROVE RD	OUTSIDE
614	603	13	1628 W FOREST GROVE RD	OUTSIDE
614	604	11	2672 N DELSEA DR	OUTSIDE
614	604	13	2608 N DELSEA DR	OUTSIDE
614	604	21	1200 W GARDEN RD	OUTSIDE
614	604	22	1242 W GARDEN RD	OUTSIDE
614	604	24	1360 W GARDEN RD	OUTSIDE
614	604	25	1414 W GARDEN RD	OUTSIDE
614	604	27	1528 W GARDEN RD	OUTSIDE
614	604	28	1590 W GARDEN RD	OUTSIDE
614	604	29	1632 W GARDEN RD	OUTSIDE
614	604	32	1726 W GARDEN RD	OUTSIDE
614	604	34	1814 W GARDEN RD	OUTSIDE
614	701	4	1089 W ARBOR AVE	INSIDE
614	701	8	940 ARBOR CT WEST	INSIDE
614	701	9	970 ARBOR CT WEST	INSIDE
614	701	10	996 ARBOR CT WEST	INSIDE
614	701	11	995 ARBOR CT WEST	INSIDE
614	701	13	929 ARBOR CT WEST	INSIDE
614	701	15	875 ARBOR CT EAST	INSIDE
614	701	16	876 ARBOR CT EAST	INSIDE

614	701	17	896 ARBOR CT EAST	INSIDE
614	701	19	871 W ARBOR AVE	INSIDE
614	701	20	839 W ARBOR AVE	INSIDE
614	701	21	813 W ARBOR AVE	INSIDE
614	701	22	3274 EGLANTINE DR	INSIDE
614	701	23	3240 EGLANTINE DR	INSIDE
614	701	24	800 DAMASK ROSE CT	INSIDE
614	701	26.01	825 DAMASK ROSE CT	INSIDE
614	701	27	795 DAMASK ROSE CT	INSIDE
614	701	28	3190 EGLANTINE DR	INSIDE
614	701	29	3160 EGLANTINE DR	INSIDE
614	701	31	3100 EGLANTINE DR	INSIDE
614	701	32	3135 EGLANTINE DR	INSIDE
614	701	33	3155 EGLANTINE DR	INSIDE
614	701	34	3185 EGLANTINE DR	INSIDE
614	701	35	3215 EGLANTINE DR	INSIDE
614	701	36	3245 EGLANTINE DR	INSIDE
614	701	37	3275 EGLANTINE DR	INSIDE
614	701	38	687 W ARBOR AVE	INSIDE
614	701	39	641 W ARBOR AVE	INSIDE
614	701	40	605 W ARBOR AVE	INSIDE
614	701	41	579 W ARBOR AVE	INSIDE
614	701	42	551 W ARBOR AVE	INSIDE
614	701	43	515 W ARBOR AVE	INSIDE
614	701	45	3178 N WEST AVE	INSIDE
614	701	46	3048 N WEST AVE	INSIDE
614	701	47	2968 N WEST AVE	INSIDE
614	701	48	2956 N WEST AVE	INSIDE
614	701	49	2936 N WEST AVE	INSIDE
614	701	50	2910 N WEST AVE	INSIDE
614	701	51	2884 N WEST AVE	INSIDE
614	701	52	2858 N WEST AVE	INSIDE
614	701	53	546 W FOREST GROVE RD	INSIDE
614	701	56	634 W FOREST GROVE RD	INSIDE
614	701	57	668 W FOREST GROVE RD	INSIDE
614	701	58	684 W FOREST GROVE RD	INSIDE
614	701	59	688 W FOREST GROVE RD	INSIDE
614	701	60	722 W FOREST GROVE RD	INSIDE
614	701	61	738 W FOREST GROVE RD	INSIDE
614	701	62	764 W FOREST GROVE RD	INSIDE
614	701	64	874 W FOREST GROVE RD	INSIDE
614	701	65	2821 NICOLETTE CT	INSIDE
614	701	67	2881 NICOLETTE CT	INSIDE
614	701	68	2929 NICOLETTE CT	INSIDE
614	701	70	2965 NICOLETTE CT	INSIDE
614	701	71	3001 NICOLETTE CT	INSIDE
614	701	72	2990 NICOLETTE CT	INSIDE

614	701	73	2956 NICOLETTE CT	INSIDE
614	701	74	2926 NICOLETTE CT	INSIDE
614	701	75	2880 NICOLETTE CT	INSIDE
614	701	76	2850 NICOLETTE CT	INSIDE
614	701	77	2810 NICOLETTE CT	INSIDE
614	701	78	990 W FOREST GROVE RD	INSIDE
614	701	79	1010 W FOREST GROVE RD	INSIDE
614	701	83	2911 N DELSEA DR	INSIDE
614	701	84	2935 N DELSEA DR	INSIDE
614	701	85	2955 N DELSEA DR	INSIDE
614	701	87	3011 N DELSEA DR	INSIDE
614	701	89	3131 N DELSEA DR	INSIDE
614	701	90	3161 N DELSEA DR	INSIDE
614	702	1	435 W ARBOR AVE	INSIDE
614	702	2	185 W ARBOR AVE	INSIDE
614	702	3	179 W ARBOR AVE	INSIDE
614	702	4	173 W ARBOR AVE	INSIDE
614	702	5	167 W ARBOR AVE	INSIDE
614	702	6	161 W ARBOR AVE	INSIDE
614	702	7	155 W ARBOR AVE	INSIDE
614	702	8	149 W ARBOR AVE	INSIDE
614	702	9	3360 N WEST BLVD	INSIDE
614	702	10	3346 N WEST BLVD	INSIDE
614	702	11	3326 N WEST BLVD	INSIDE
614	702	12	3306 N WEST BLVD	INSIDE
614	702	13	3266 N WEST BLVD	INSIDE
614	702	15	46 OLD FOREST RD	INSIDE
614	702	16	68 OLD FOREST RD	INSIDE
614	702	17	78 OLD FOREST RD	INSIDE
614	702	18	96 OLD FOREST RD	INSIDE
614	702	19	124 OLD FOREST RD	INSIDE
614	702	20	160 OLD FOREST RD	INSIDE
614	702	21	198 OLD FOREST RD	INSIDE
614	702	22	282 OLD FOREST RD	INSIDE
614	702	23	326 OLD FOREST RD	INSIDE
614	702	24	360 OLD FOREST RD	INSIDE
614	703	1	327 OLD FOREST RD	INSIDE
614	703	4	3120 N WEST BLVD	INSIDE
614	703	5	3082 N WEST BLVD	INSIDE
614	703	6.01	3070 N WEST BLVD	INSIDE
614	703	8	3030 N WEST BLVD	INSIDE
614	703	9	3014 N WEST BLVD	INSIDE
614	703	10	2984 N WEST BLVD	INSIDE
614	703	11	2954 N WEST BLVD	INSIDE
614	703	12	2930 N WEST BLVD	INSIDE
614	703	24	406 W FOREST GROVE RD	INSIDE
614	703	25	432 W FOREST GROVE RD	INSIDE

614	703	26	450 W FOREST GROVE RD	INSIDE
614	703	27	478 W FOREST GROVE RD	INSIDE
614	703	28	3023 N WEST AVE	INSIDE
614	703	29	3039 N WEST AVE	INSIDE
614	801	2	895 W FOREST GROVE RD	INSIDE
614	801	3	873 W FOREST GROVE RD	INSIDE
614	801	4	843 W FOREST GROVE RD	INSIDE
614	801	5	833 W FOREST GROVE RD	INSIDE
614	801	6	813 W FOREST GROVE RD	INSIDE
614	801	7	775 W FOREST GROVE RD	INSIDE
614	801	8	733 W FOREST GROVE RD	INSIDE
614	801	9	695 W FOREST GROVE RD	INSIDE
614	801	10	659 W FOREST GROVE RD	INSIDE
614	801	11	595 W FOREST GROVE RD	INSIDE
614	801	12	521 W FOREST GROVE RD	INSIDE
614	801	13	2740 N WEST AVE	OUTSIDE
614	801	14	2700 N WEST AVE	OUTSIDE
614	801	40	2511 N DELSEA DR	OUTSIDE
614	801	46	2639 N DELSEA DR	OUTSIDE
614	802	1	483 W FOREST GROVE RD	INSIDE
614	901	1	3351 N EAST BLVD	OUTSIDE
614	901	2	85 E ARBOR AVE	OUTSIDE
614	901	3	103 E ARBOR AVE	OUTSIDE
614	901	4	125 E ARBOR AVE	OUTSIDE
614	901	5	135 E ARBOR AVE	OUTSIDE
614	901	6	169 E ARBOR AVE	OUTSIDE
614	901	7.06	3320 PROSPECT AVE	OUTSIDE
614	901	7.08	3260 PROSPECT AVE	OUTSIDE
614	901	8	122 STRAWBERRY AVE	OUTSIDE
614	901	9	112 STRAWBERRY AVE	OUTSIDE
614	901	10	102 STRAWBERRY AVE	OUTSIDE
614	901	11	92 STRAWBERRY AVE	OUTSIDE
614	901	12	82 STRAWBERRY AVE	OUTSIDE
614	901	13	72 STRAWBERRY AVE	OUTSIDE
614	901	14	62 STRAWBERRY AVE	OUTSIDE
614	901	15	3255 N EAST BLVD	OUTSIDE
614	901	16	3297 N EAST BLVD	OUTSIDE
614	901	17	3311 N EAST BLVD	OUTSIDE
614	901	18	3327 N EAST BLVD	OUTSIDE
614	902	2	3501 PROSPECT AVE	OUTSIDE
614	902	11	3319 PROSPECT AVE	OUTSIDE
614	902	12	3391 PROSPECT AVE	OUTSIDE
614	902	13	3437 PROSPECT AVE	OUTSIDE
614	902	14	3451 PROSPECT AVE	OUTSIDE
614	914	1	3219 N EAST BLVD	OUTSIDE
614	914	2	61 STRAWBERRY AVE	OUTSIDE
614	914	3	85 STRAWBERRY AVE	OUTSIDE

614	914	4	101 STRAWBERRY AVE	OUTSIDE
614	914	5	121 STRAWBERRY AVE	OUTSIDE
614	914	7	149 STRAWBERRY AVE	OUTSIDE
614	914	8	165 STRAWBERRY AVE	OUTSIDE
614	914	9	181 STRAWBERRY AVE	OUTSIDE
614	914	10	197 STRAWBERRY AVE	OUTSIDE
614	914	50	3095 N EAST BLVD	OUTSIDE
614	914	51	3127 N EAST BLVD	OUTSIDE
614	914	52	3153 N EAST BLVD	OUTSIDE
614	914	53	3183 N EAST BLVD	OUTSIDE
614	1101	13	1803 W GARDEN RD	OUTSIDE
614	1101	14	1739 W GARDEN RD	OUTSIDE
805	7004.01	2	3651 PROSPECT AVE	OUTSIDE
805	7004.01	3	512 WEYMOUTH RD	OUTSIDE
805	7004.01	4	530 WEYMOUTH RD	OUTSIDE
813	106	18	36 SOUTHWEST BLVD	OUTSIDE
813	106	19	40 SOUTHWEST BLVD	OUTSIDE
813	106	23	54 SOUTHWEST BLVD	INSIDE
813	1002	19	313 WEYMOUTH RD	OUTSIDE
813	1002	19.01	309 WEYMOUTH RD	OUTSIDE

Exhibit C

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action **[PROPOSED] ORDER GRANTING FINAL APPROVAL OF CLASS SETTLEMENT AGREEMENT AND DISMISSAL OF ACTION WITH PREJUDICE**

The Court preliminarily approved the Settlement Agreement in this case on ___, 2026. Since that time, Plaintiffs and Shieldalloy Metallurgical Corporation (the "Settling Parties") have completed the Notice process and now seek final approval of the Settlement Agreement ("Settlement Agreement"). Through a Motion For Final Approval of Class Settlement Agreement and Motion for Fees and Costs (the "Motions"), the Settling Parties seek, among other things, from the Court: (1) a granting of final certification of the Settlement Class; (2) approval of the Settlement Agreement as fair, reasonable, and adequate; (3) a ruling that the Notice process was reasonable and the best practicable under the circumstances; and (4) a granting of Plaintiffs' unopposed request for attorneys' fees and costs and Settlement Class Representative awards. A hearing was held on the Motions on ____, 2026. For the reasons stated below, the Motions are granted.

On ____, 2026, the matter of the Court's final approval of the Settlement Agreement came before the Court for consideration by way of the unopposed Motions filed by Class Counsel. Appearing on behalf of Settlement Class Representatives, Raymond and Diane Cavagnaro and Anthony Alimenti, and the Settlement Class were Stephen P. DeNittis and James A. Barry of DeNittis Osefchen & Prince, P.C., 5 Greentree Centre, 525 Route 73 North, Suite 410, Marlton,

NJ 08053; appearing on behalf of Defendant, Shieldalloy Metallurgical Corporation were Phil Cha, Esq., Lindsay A. Brown, Esq. and James Hearon, Esq. of Duane Morris, LLP 40 Lake Center Drive 401 Route 73 North, Suite 200 Marlton, NJ 08053.

WHEREAS, the Settlement Class Representatives, Raymond and Diane Cavagnaro and Anthony Alimenti, on behalf of themselves and the proposed Settlement Class, and Defendant, Shieldalloy Metallurgical Corporation ("Defendant," as defined in the Settlement Agreement), have executed and filed the Settlement Agreement with the Court on ___, 2026; and

WHEREAS, unless otherwise defined herein, all capitalized terms used herein shall have the same meaning as set forth in the Settlement Agreement and are hereby incorporated by reference; and

WHEREAS, the Court, on ___, 2026, entered the Order Granting Preliminary Approval of Class Settlement and Directing Dissemination of Class Notice ("Preliminary Approval Order"), preliminarily approving the proposed Settlement Agreement and conditionally certifying this Action, for settlement purposes only, as a class action; and

WHEREAS, Raymond and Diane Cavagnaro and Anthony Alimenti were approved in the Preliminary Approval Order as the Settlement Class Representatives; and

WHEREAS, the Court, as part of its Preliminary Approval Order, directed that a plan for disseminating notice of the settlement ("Notice Plan") be implemented, and scheduled a hearing to determine whether the proposed settlement should be finally approved as fair, reasonable and adequate; and

WHEREAS, Class Counsel have satisfactorily demonstrated to the Court that the Notice Plan was followed; and

WHEREAS, all interested persons were given an opportunity to be heard, and all objections to the proposed Settlement Agreement, if any, were duly considered;

NOW, THEREFORE, the Court, having read and considered all submissions and having heard all arguments made in connection with the proposed Settlement Agreement, including the Motions, and having reviewed and considered the files and records herein, finds and concludes as follows:

1. The Complaint filed in this Action alleges generally that defendants diminished the value of Class Properties due to the establishment of groundwater Classification Exception Areas covering the Class Properties. As part of the Preliminary Approval Order, the Court certified the Settlement Class, for settlement purposes only, consisting of:

> All Persons that/who, as of the Execution Date, owns a Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as Exhibit B (the "Class Properties") to the Settlement Agreement.
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

2. The Court hereby affirms the Settlement Class for purposes of this Order Granting Final Approval of Class Settlement Agreement and Dismissal of Action With Prejudice ("Final Order").

3. For purposes of settlement, the Plaintiffs possess standing and the Settlement Class is adequately defined. The Settlement Class is adequately defined because the class definition is clear and precise, is based on objective criteria, and is not overbroad.

4. For purposes of settlement, the Settlement Class is sufficiently numerous, there are questions of law and fact common to the Settlement Class and Settlement Class Representatives' claims are typical of the Settlement Class. In addition, both Settlement Class Representatives and Class Counsel are adequate representatives of the Settlement Class and have fairly and adequately protected and will continue to protect the interests of the Settlement Class. Thus, the requirements to certify a class prescribed by the New Jersey Rules of Civil Procedure are satisfied as to the Settlement Class for purposes of settlement.

5. For purposes of settlement, the Settlement Class is certifiable under the New Jersey Rules because common issues predominate over individual issues and class treatment is superior to other alternatives for adjudicating the claims at issue.

6. The Settlement Class Representatives and Defendant have entered into the Settlement Agreement which has been filed with the Court. The Settlement Agreement provides for the settlement and dismissal of this Action with Defendant on behalf of the Settlement Class Representatives and the Settlement Class Members, subject to approval by the Court of its terms. The Court scheduled a hearing to consider the approval of the Settlement Agreement and directed that the Class Notice be disseminated in accordance with the terms of the Preliminary Approval Order.

7. In accordance with the terms of the Settlement Agreement and the Preliminary Approval Order, the Settling Parties implemented the Notice Plan approved by the Court. Class Counsel have confirmed to the Court that the Settling Parties complied with the Notice Plan.

8. The Court hereby finds that the Notice Plan and the Class Notice constituted the best notice practicable under the circumstances, and constituted valid, due and sufficient notice to the Settlement Class Members.

9. The Settlement Class Representatives have applied to the Court for final approval of the terms of the Settlement Agreement and for the entry of this Final Order and dismissal of Plaintiffs' claims in the Action on the merits with prejudice and without leave to amend.

10. The Court hereby finds that approval of the Settlement Agreement will result in substantial savings of time and money to the Court and the litigants and will further the interests of justice.

11. The Court hereby finds that the Settlement Agreement is the result of good faith arm's length negotiations by the Settling Parties thereto, and is fair, reasonable, and adequate.

NOW, THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED, ADJUDGED AND DECREED THAT:

12. The Court possesses jurisdiction over the subject matter of this Action, the Plaintiffs, the Settlement Class Members, Defendant, the Releasing Parties and the Released Parties.

13. [##] Class Members have filed requests for exclusion. All remaining Settlement Class Members are therefore bound by this Final Order and by the Settlement Agreement, including the Releases.

14. All provisions and terms of the Settlement Agreement are hereby found to be fair, reasonable and adequate as to the Settlement Class Members and the Settlement Class Representatives, are in compliance with due process and New Jersey law, and all provisions and terms of the Settlement Agreement are hereby finally approved in all respects.

15. The Settling Parties are hereby directed to consummate the Settlement Agreement in accordance with all its terms.

16. The Plaintiffs' Claims in this Action, individually and on behalf of the Settlement Class, as well as the Action itself, are dismissed in their entirety on the merits with prejudice and without leave to amend, and all members of the Settlement Class and all Releasing Parties shall be forever barred and permanently enjoined from asserting, either directly or indirectly, individually or in a representative capacity or on behalf of or as part of a class, whether under State or Federal statutory or common law, any Released Claim against any of the Released Parties.

17. As of the Effective Date, by operation of the entry of the Final Order, the Releasing Parties shall be deemed to have fully released, waived, relinquished and discharged, to the fullest extent permitted by law, all Released Claims that the Releasing Parties may have against all the Released Parties.

18. "Released Claims" means:

> to the fullest extent that the law permits their release, waiver and discharge, for, of and from any and all manner of past, present, and/or future claims, causes of action, cross-claims, counter-claims, charges, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, remedies, and/or liabilities, under any legal or factual theory, whether class or individual, in law or in equity, or arising under domestic or foreign law, constitution, statute, regulation, ordinance, contract, or otherwise in nature, for any and all fees, costs, penalties, fines, debts, expenses, attorneys' fees, damages (including but not limited to compensatory damages, economic damages, property damages, diminution in value damages, stigma damages, loss of use damages, loss of enjoyment damages, consequential damages, incidental damages, ancillary damages, statutory damages, exemplary damages, punitive damages, special damages, multiple damages, treble damages, restitution

damages, and/or disgorgement damages), biomonitoring or medical monitoring, declaratory or injunctive relief, equitable relief, whenever or however incurred, and liabilities of any nature or kind whatsoever (including joint and several liability and strict liability), known or unknown, suspected or unsuspected, matured or unmatured, accrued or unaccrued, asserted or unasserted, arising from, concerning, or relating in any way to: (i) any conduct, act, event, omission, fact, legal or equitable theory alleged or that could have been alleged in the Action; (ii) any release, discharge, leak, spill, emission and/or dumping of any hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) at, on, under, above, from, and/or migrating from any property, parcel, building, plant, structure, business, action, omission, conduct and/or operation at, on, under, about, adjacent to and/or near 35 South West Boulevard, Newfield, New Jersey 08344, also known or referred to as Block 1002, Lots 1, 4, and 18 on the tax map of the Borough of Newfield, Gloucester County, New Jersey and Block 502, Lots 1 and 2 and Block 505, Lot 23 on the tax map of the City of Vineland, Cumberland County, New Jersey ("SMC Property"); (iii) any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, touching, under, above, within and/or affecting the CEAs, any future classification exception area, Settlement Class and/or the Class Properties; and (iv) the investigation, remediation, and/or cleanup (including delineation, proposal and establishment of institutional controls such as a classification exception area or a well restriction area) of, for and/or related to any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, migrating from, migrating to, touching, under, above, within and/or affecting the SMC Property, the CEAs, any future classification exception area, and/or any and all of the Class Properties (the "Released Claims"). To avoid any doubt, the only claims and/or liabilities that are not Released Claims are personal injury claims for damages by the Releasing Parties concerning or relating to alleged human exposure to contamination from the SMC Property and are expressly excluded from this Release. The Released Parties expressly reserve all rights, arguments, remedies, objections, and defenses available under, based on, or as a result of, any fact, finding, law, statute, regulation, judicial or administrative order, plan of reorganization, bankruptcy plan, and/or bankruptcy discharge, related to or against any claims, demands and/or liabilities, including for personal injury, asserted by Releasing Parties.

19. "Released Parties" means:

Defendants Shieldalloy Metallurgical Corporation, AMG Critical Materials N.V., and TRC Companies, Inc. and each of their past, present, and/or future administrators, advisors, affiliated business entities, affiliates, agents, assigns, attorneys, constituent corporation or entity (including constituent of a constituent), counsel, directors, divisions, employee benefit plans, employee benefit plan participants or beneficiaries, employees, executors, heirs, insurers, managers, members, officers, owners, direct or indirect corporate parents, partners,

partnerships, predecessors, principals, resulting corporation or entity, servants, shareholders, subrogees, subsidiaries, successors, trustees, trusts, joint ventures, and any other representatives, individually or in their corporate or personal capacity, and anyone acting on their behalf, including in a representative or derivative capacity.

20. "Releasing Parties" means:

Plaintiffs and the Settlement Class Members that/who do not otherwise timely submit a valid request for exclusion from the Settlement Class, each of their respective heirs, predecessors, successors, assigns, family members, personal representatives, attorneys, officers, stockholders, shareholders, corporate parents, subsidiaries, affiliates, directors, managers, partners, principals, owners, agents, fiduciaries, spouses, children, dependents, parents, creditors, judgment creditors, representatives, employees, employers, executors, administrators, conservators, receivers, subrogees, trusts, trustees, members, servants, independent contractors, lessors, lessees, tenants, legally authorized representatives, insurers or reinsurers, and on behalf of anyone else who or which could or might assert any claim under or through any of the foregoing. Releasing Parties does not include government entities, including, without limitation, the United States, State of New Jersey, the NJDEP, and any other department of the State of New Jersey.

21. It is hereby determined that the Notice and method of distribution thereof constituted the best notice practicable under the circumstances to the Settlement Class Members and is therefore finally approved as reasonable. Due and adequate notice of the pendency of this Action and of the Settlement Agreement has been provided to all the Settlement Class Members, and this Court hereby finds that the Notice complied fully with the requirements of due process, the New Jersey Rules and all other applicable laws.

22. Within 30 days after all of Defendant's obligations under this Settlement Agreement are effectuated, Class Counsel and any Settlement Class Member or their counsel shall destroy all confidential information provided by Defendant to Class Counsel or anyone they employed or retained in this Action, either in discovery, during mediation, or in connection with this Settlement Agreement. Class Counsel shall deliver a letter to Defendant's Counsel certifying their compliance with this paragraph. Further, neither Class Counsel, nor anyone employed with, retained by, or otherwise associated with Class Counsel, nor any other attorney or Person who

shall have access to such confidential information, shall use any of such confidential information in any other litigation or proceeding, current or future, or for any other purpose whatsoever.

23. The Settlement Agreement and this Final Order are not to be deemed admissions of liability or fault by Defendant, or a finding of the validity of any claims in the Action or of any wrongdoing or violation of law by Defendant. The Settlement Agreement is not a concession by the Defendant and, to the extent permitted by law, neither this Final Order nor the Settlement Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be utilized or offered as evidence or received in evidence in any pending or future civil, criminal, or administrative action or proceeding, for any purpose including to establish any liability or admission by Defendant, except in any proceedings by Plaintiffs to enforce the Settlement Agreement or the Final Order or otherwise with the written consent of Defendant at its sole discretion; however, the Released Parties may use the Settlement Agreement and/or the Exhibits thereto, and/or any related document, in any action that may be brought by any of the Releasing Parties against any of the Released Parties in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion relating to the Released Claims set forth in the Settlement Agreement.

24. Only to the extent that it is otherwise not violative of any applicable rules governing the practice of law, Class Counsel agree that any representation, encouragement, solicitation or other assistance, including, but not limited to, referral to other counsel, of any Class Member that submitted a valid and timely request for exclusion, or any other person seeking to litigate with any of the Released Parties over any of the Released Claims or to represent any form of class of Persons that excluded themselves from the Settlement Agreement, could place Class Counsel in an

untenable conflict of interest with the Settlement Class Members. Accordingly, Class Counsel and their respective firms shall not (only to the extent that it is otherwise not violative of any applicable rules governing the practice of law) represent, encourage, solicit or otherwise assist, in any way whatsoever (including, but not limited to referrals to other counsel) any Class Member that submitted a valid and timely request for exclusion or any form of opt-out class, except that referring such person to the Notice or suggesting to any such person the option of obtaining separate counsel, without specifically identifying options for such counsel, shall be permitted.

25. The Court has considered the request for Settlement Class Representative service awards, and hereby approves and awards Raymond and Diane Cavagnaro an amount of $_____ and Anthony Alimenti an amount of $_____, to be paid out of the Gross Settlement Fund.

26. The Court has considered Class Counsel's request for an attorneys' fees award for the prosecution of this action and hereby makes an attorneys' fees award in the amount of $_____, to be paid out of the Gross Settlement Fund. Class Counsel shall also be reimbursed reasonable out-of-pocket costs in the amount of $_____, to be paid out of the Gross Settlement Fund.

27. This Final Order is a final order and judgment in the Action within the meaning and for the purposes of the New Jersey Rules of Civil Procedure as to all claims between Defendant on the one hand, and the Plaintiffs/Settlement Class Representatives and all Settlement Class Members, on the other hand, and there is no just reason to delay enforcement or appeal. This Final Order does not apply to the defendants' respective cross-claims, which shall continue and over which the Court shall retain jurisdiction.

28. The Clerk of this Court is directed to enter a judgment of dismissal with prejudice and without leave to amend and to close Plaintiffs' Action against the defendants.

29. Without in any way affecting the finality of this Final Order, this Court shall retain continuing jurisdiction over this Action for purposes of:

a. Enforcing this Final Order and the Settlement Agreement;

b. Hearing and determining any application by any Settling Party for a settlement bar order;

c. Presiding over the defendants' respective cross-claims; and

d. Any other matters related or ancillary to any of the foregoing.

IT IS SO ORDERED.

DATED: _____, 2026

_____

Exhibit D

Superior Court of the State of New Jersey

If you are an owner of a residential property contained within Shieldalloy Metallurgical Corp. Classification Exception Areas ("CEAS") for groundwater contamination approved in September 2020

YOU MAY BE ENTITLED TO A PAYMENT

from a class action settlement.

A court authorized this notice. It is not a solicitation from a lawyer. You are not being sued. Please do not contact the Court. Your legal rights are affected whether you act or don't act. ***Read this notice carefully****.*

OVERVIEW

- Certain residential property owners were notified in or about August 2018 that one or more Classification Exception Areas ("CEAs") were to be established for certain existing and projected groundwater contamination above groundwater quality standards. The CEAs were established by TRC Companies, Inc. ("TRC") and approved by the New Jersey Department of Environmental Protection ("NJDEP") in September 2020. Plaintiffs filed a class action lawsuit against Shieldalloy Metallurgical Corporation ("SMC" or "Defendant"), TRC and other defendants seeking damages for diminution of property value allegedly caused by the CEAs and the requirement to disclose the CEAs upon the sale of Plaintiffs' property. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit. Plaintiffs and Defendant have reached a proposed settlement to resolve the lawsuit on a class action basis against all defendants, as described below.
- If, as of [EXECUTION DATE], you own a residential property located within one or both of the CEAs, you are in the Settlement Class and are eligible to file a claim for a settlement payment.
- **IMPORTANT: You must file a claim by [DATE] to be eligible for payment from the settlement. Click here to file a claim.** (Read below or see Questions 6-7 for details)
- Your legal rights **are affected**, and you have a choice to make. Your options are explained here.

YOUR LEGAL RIGHTS AND OPTIONS	
FILE A CLAIM	File a claim by **[DATE]** to be eligible to receive a payment. See Questions 6-7.
DO NOTHING	Receive no payment and give up the right to sue defendants about the issues in the lawsuit.
OPT OUT	Receive no payment from the settlement and retain any right you may have to sue defendants about the issues in the lawsuit. To opt out, you must mail a signed request for exclusion by **[DATE]**. See Question 11 for details.
OBJECT OR COMMENT	Object or comment on the proposed settlement by **[DATE]**. See Question 12 for details. If you object or comment, you can still file a claim and be eligible to receive a payment.

- Questions? Read below or visit www.VinelandShieldalloyLitigation.com or call [TOLL-FREE NUMBER] for more information.

INFORMATION ABOUT THE LAWSUIT AND CLASS

1. What is this lawsuit about?

A class action lawsuit was filed in New Jersey State Court, seeking relief under New Jersey law on behalf of a class of residential property owners who own property located within one or more Classification Exception Areas ("CEAs") that were established as an institutional control for certain existing and projected groundwater contamination. The lawsuit sought to recover damages incurred by class members for the diminution of their property value as a result of the CEAs. The complaint is available at www.VinelandShieldalloyLitigation.com.

Plaintiffs and Defendant have now agreed to a Settlement Agreement to resolve the lawsuit on a class basis against all defendants, as described below. The Court has not decided whether Plaintiffs' claims and/or defendants' defenses are valid. By agreeing to the Settlement Agreement, neither Defendant nor Plaintiffs make any admissions regarding any liability by Defendant or the merits of the allegations, claims, or defenses in this case. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit.

The Superior Court of the State of New Jersey is overseeing the lawsuit. The lawsuit is known as Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al., GLO-L-816-24 (N.J. Super. Ct. Gloucester County)

2. Why is this a class action?

In a class action, one or more people sue on behalf of themselves and other people with similar claims. All of these people together make up the class and are class members. One court resolves the issues for all class members, except for those who exclude themselves from the class.

3. Who is in the Settlement Class?

The "Settlement Class" in this case includes:

> All Persons that/who, as of Execution Date, own Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** (the "Class Properties") to the Settlement Agreement and is available for review at www.VinelandShieldalloyLitigation.com.
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

If you received this notice of settlement by mail, you were identified as being a Settlement Class Member. People in the Settlement Class are called "Settlement Class Members."

Information about the Settlement and About Filing a Claim for a Payment

4. What are the terms of the proposed settlement?

The complete terms of the proposed Settlement Agreement are available at www.VinelandShieldalloyLitigation.com This notice provides only a summary of the terms and benefits of the Settlement Agreement, which is set forth below.

5. What are the benefits of the proposed Settlement?

If the Settlement Agreement is approved and becomes final, Defendant will pay **$1,325,000.00** into a Settlement Fund Account. This money will be used to: (1) make settlement payments to Settlement Class Members, as described at Questions 6-9 below; (2) pay the costs of distributing notice and settlement checks and electronic payments to Settlement Class Members and other costs of administering the settlement; and (3) pay court-awarded attorneys' fees and expenses of the attorneys appointed by the Court to represent the Class ("Class Counsel") and any service awards granted to the Settlement Class Representatives. As explained below, if you file a claim by the deadline and are eligible for a payment, the amount of payment is dependent on your property's location and how many Settlement Class Members file valid claims.

6. How do I get a payment?

You must file a claim by [DATE] to be eligible for a settlement payment.

7. How do I file a claim for a payment?

File Online: To file a claim online, click here or visit www.VinelandShieldalloyLitigation.com

File By Mail: If you prefer, you can also print a paper claim form, available at www.VinelandShieldalloyLitigation.com, fill it out, and mail it to the address listed on the form. Or, if you received notice of this Settlement Agreement by mail you can fill out the claim form that is attached to that notice and mail it to the address listed on the form.

The deadline to file a claim online or by mail is [DATE]. The Settlement Administrator will review all claim forms and determine your eligibility and final payment.

8. How much will the payments be?

An Eligible Claimant that, as of [EXECUTION DATE], owns Class Property located within the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment of $300. An Eligible Claimant that, as of [EXECUTION DATE], owns a Class Property located outside of the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment equal to no more than 7% of the 2025 tax assessed value of the Eligible Claimant's Class Property[1]. Depending on the number of Claims For Payment filed, the amount of this payment may be pro-rata adjusted downward.

Claim Forms may only be submitted by Class Members identified in property tax records as owning the Class Property for which the Claim Form is submitted, as of [EXECUTION DATE]. If multiple Claim Forms are submitted by Eligible Claimants for the same Residential Property, then any payment shall be divided equally between the Eligible Claimants.

You must submit a claim by the deadline [DATE] to be eligible to receive a payment.

[1] As indicated for the 2025 tax year per the online tax records available at https://taxrecords-nj.com/pub/cgi/prc6.cgi?district=0801&ms_user=ctb08 (Gloucester County addresses); and https://tax1.co.monmouth.nj.us/cgi-bin/prc6.cgi?&ms_user=ctb06&passwd=&srch_type=0&adv=0&out_type=0&district=0610 (Cumberland County addresses).

9. How and when will payments be sent?

Settlement payments will be issued to Eligible Claimants by check or electronic payment after the Settlement Agreement is approved and becomes final.

For any settlement payments that are uncashed or deemed undeliverable by the Settlement Administrator, those amounts will be treated as unclaimed property of the corresponding Eligible Claimant, subject to applicable state unclaimed property procedures (the additional administrative costs of such unclaimed property process will be deducted from the unclaimed property amounts on a *pro rata* basis).

Your other rights and options

10. What happens if I do nothing?

If you do nothing, you will not receive any settlement payment. **You must file a claim by [DATE] to be eligible to receive a payment.**

If you do nothing, you will release and give up any right you may have to sue defendants about the issues in this lawsuit as set forth in the Settlement Agreement. You will also be legally bound by all of the orders that the Court issues and judgments the Court makes in this class action lawsuit.

11. How do I exclude myself (opt out) from the Settlement Class?

To exclude yourself from the Settlement Class, you must mail a signed request for exclusion to: [SETTLEMENT ADMINISTRATOR ADDRESS].

To be effective, your request for exclusion must be postmarked no later than **[DATE]**, and must include the following information:

(a) your full name, telephone number, mailing address, and email address;

(b) a clear statement that you wish to be excluded from the Settlement Class;

(c) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and

(d) your original signature.

12. How do I object or comment?

If you have not excluded yourself from the Settlement Class, you can comment on or object to the settlement, Class Counsel's request for attorneys' fees and litigation expenses, and/or the request for service awards for the Settlement Class Representatives. To object or comment, you must file with the Court a signed, written objection/comment including the following:

(a) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al.";

(b) your full name, mailing address, telephone number, and email address;

(c) your original signature;

(d) a description of the specific reasons for the objection;

(e) the name, address, bar number and telephone number of your attorney if you are represented by an attorney; and

(f) a statement about whether or not you intend to appear at the Final Approval Hearing either in person or through an attorney.

To be considered by the Court, your comment or objection must be in writing and electronically filed with the Court no later than **[DATE],** or mailed to the Clerk of Court at the below address, so that it may be

received by the Clerk of Court and filed on your behalf by **[DATE]**.

THE COURT
Superior Court of New Jersey Gloucester County Clerk of Court 70 Hunter Street Woodbury, New Jersey 08096

Note that you can ask the Court to deny approval of the Settlement by filing an objection, but you cannot ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval of the settlement, no settlement payments will be sent out and the lawsuit will continue. If you would like to request that the Court deny approval, you must object. You have the right to consult with your own attorney, at your own expense, before deciding how best to proceed.

13. What claims will be released by this Settlement?

If you are in the Settlement Class and do not exclude yourself from the Settlement Class, and the settlement is approved and becomes final, the settlement will be legally binding on you and you will be bound by all judgments entered in the case. In exchange for the settlement benefits, you will release all claims against defendants and the "Released Parties" listed in the Settlement Agreement about the issues in the lawsuit, except for personal injury claims. The Settlement Agreement, available at www.VinelandShieldalloyLitigation.com, describes the claims you are releasing (giving up) by staying in the Settlement Class (called "Released Claims").

14. Do I have a lawyer in this class action?

Yes. The Court has appointed the following attorneys and law firms to represent the Settlement Class Members. These lawyers are called "Class Counsel":

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

You do not have to pay Class Counsel for their time or expenses incurred in this case out of your pocket. Instead, Class Counsel will petition the Court for an award of their fees and expenses; any amount awarded to Class Counsel will be paid from the Gross Settlement Fund.

The Court has also appointed Raymond Cavagnaro, Diane Cavagnaro, and Anthony Alimenti as Settlement Class Representatives to represent the Settlement Class.

15. How will the lawyers be paid?

Class Counsel (see Question 14) will file a motion on or before [DATE] asking the Court to award them attorneys' fees of up to $441,622.50 (which is 33.33% of the $1,325,000.00 Settlement Amount) plus reimbursement of their reasonable litigation expenses. The attorneys' fees and expenses awarded by the Court will be the only payment to Class Counsel for their efforts in achieving the settlement and for their risk in undertaking this representation on a wholly contingent basis. In addition, Class Counsel will ask the Court on or before [DATE] to award the Settlement Class Representatives representing the Settlement Class a service award

of up to $40,000.00 total to be shared by the Settlement Class Representatives to compensate them for their efforts and commitment on behalf of the Settlement Class in this lawsuit.

The Court will determine the amount of attorneys' fees, expenses, and service awards to award. Class Counsel's application for attorneys' fees, expenses, and service awards will be available at www.VinelandShieldalloyLitigation.com when it is filed.

16. Should I hire my own lawyer for this case?

You do not need to hire your own lawyer because Class Counsel represents you and the other members of the Settlement Class already. However, you have the right to hire your own lawyer. If you want your own lawyer, you will have to pay that lawyer.

The Court's Final Approval Hearing

17. When and where will the Court decide whether to approve the settlement?

The Court will hold a Final Approval Hearing, currently scheduled for [__:__] a.m. on [DATE], in the New Jersey Superior Court, located at 70 Hunter Street, Woodbury, New Jersey 08096. The hearing may be moved to a different date or time without additional notice and/or may be held remotely or telephonically. Please check www.VinelandShieldalloyLitigation.com for updates or changes.

At the Final Approval Hearing, the Court will consider whether the settlement should be approved as fair, reasonable and adequate. The Court will also consider Class Counsel's application for attorneys' fees, expenses, and service awards. If there are timely objections, the Court will consider them. After the hearing, the Court will decide whether to approve the settlement. We do not know how long these decisions will take.

18. Do I have to come to the hearing?

No. Class Counsel will answer questions the Court may have. But you are welcome to come at your own expense. If you submit an objection, you do not have to come to the Court to talk about it. So long as you submitted your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

19. May I speak at the hearing?

You may ask the Court for permission to speak at the Final Approval Hearing. You cannot speak at the hearing if you exclude yourself from the Settlement Class.

Getting more information

20. Where can I get more information?

More information can be found at www.VinelandShieldalloyLitigation.com. That website includes important case deadlines, links to case documents including the full Settlement Agreement, the complaint in this lawsuit, and other information about the lawsuit and the settlement. You can also get more information by calling [TOLL-FREE NUMBER].

PLEASE DO NOT CONTACT THE COURT ABOUT THE SETTLEMENT

Exhibit E

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action **[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS SETTLEMENT AGREEMENT AND DIRECTING DISSEMINATION OF CLASS NOTICE**

Before the Court is the Motion for Preliminary Approval of Class Settlement Agreement and for Direction of Class Notice Pursuant to N.J. Ct. R. 4:32-2 ("Motion"), filed by Plaintiffs. Plaintiffs and Defendant Shieldalloy Metallurgical Corporation (the "Settling Parties") have entered into a Class Action Settlement Agreement, dated [DATE] ("Settlement Agreement"). Having thoroughly reviewed the Settlement Agreement, including the proposed forms of class notice and other exhibits thereto, the Motion, and the papers and arguments in connection therewith, and good cause appearing, the Court hereby ORDERS as follows:

1. Capitalized terms not otherwise defined herein have the meanings set forth in the Settlement Agreement.

2. This Court has subject matter jurisdiction over this matter and has personal jurisdiction over the Settling Parties and the Settlement Class Members for purposes of this settlement. Venue is proper in this Court.

PRELIMINARY APPROVAL

3. The Motion is GRANTED.

4. The Court hereby preliminarily approves the Settlement Agreement and the terms

embodied therein pursuant to N.J. Ct. R. 4:32-2.

5. The Court finds that it will likely be able to approve the Settlement Agreement under N.J. Ct. R. 4:32-2 and to certify the Settlement Class for purposes of judgment on the Settlement Agreement.

6. The Court preliminarily finds that the Settlement Agreement is fair, reasonable, and adequate as to the Settlement Class Members under the relevant considerations. The Court finds that Plaintiffs and Class Counsel have adequately represented, and will continue to adequately represent, the Settlement Class. The Court further finds that the Settlement Agreement is the product of arms' length negotiations by the Settling Parties with the assistance of an experienced mediator, Hon. Peter E. Doyne, A.J.S.C. (Ret.), and comes after significant litigation and investigation. The Court preliminarily finds that the relief provided—a non-reversionary common settlement fund of $1,325,000.—is adequate taking into account, *inter alia*, the costs, risks, and delay of trial and appeal for the Settling Parties, the legal issues presented in this Action, the interests of the Settlement Class, and the method of distributing payments to the Settlement Class (*i.e.*, direct payments by checks or electronic payments). The Court preliminarily finds that the Settlement Agreement treats the Settlement Class Members equitably relative to each other, and that the allocation of settlement funds to Settlement Class Members is reasonable and equitable. Under the terms of the Settlement Agreement, all Settlement Class Members are eligible to submit claims for settlement payments via a simple claim form. The Court will fully assess any request for attorneys' fees and litigation expenses after receiving a motion from Class Counsel supporting such request. At this stage, the Court finds that the plan to request fees and litigation expenses to be paid from the common settlement fund creates no reason not to direct notice to the Settlement Class; should this Court find any aspect of the requested attorneys' fees or expenses unsupported

or unwarranted, such funds will not revert to Defendant.

7. The Court hereby provisionally certifies, for settlement purposes only, the following Settlement Class, pursuant to N.J. Ct. R. 4:32-1(b)(3) and 4:32-2, consisting of:

> All Persons that/who, as of the Execution Date, own Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** to the Settlement Agreement (the "Class Properties").
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection ("NJDEP"), and any other department of the State of New Jersey or municipal entity are not Class Members.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

8. The Court finds that, for settlement purposes only, the Settlement Class, as defined above, meets the requirements for class certification under N.J. Ct. R. 4:32-1—namely, that (1) the Settlement Class Members are sufficiently numerous such that joinder is impracticable; (2) there are common questions of law and fact; (3) Plaintiffs' claims are typical of those of the Settlement Class Members; (4) Plaintiffs and Class Counsel have adequately represented, and will continue to adequately represent the interests of the Settlement Class Members; and (5) for purposes of settlement only, the Settlement Class meets the predominance and superiority requirements of N.J. Ct. R. 4:32-1(b)(3).

9. Certification of the Settlement Class and appointment of the Settlement Class Representatives and Class Counsel shall be solely for settlement purposes and without prejudice to the Settling Parties in the event the Settlement Agreement is not finally approved by this Court or otherwise does not take effect. If the Settlement Agreement is not finally approved by this Court or otherwise does not take effect for any reason, certification of the Settlement Class and any Settlement Class Representative or Class Counsel appointments, and all findings in support thereof, shall be deemed void and vacated. The Settling Parties reserve all rights and defenses as they existed prior to the execution of the Settlement Agreement and this Order in the event the Settlement Agreement is not finally approved by this Court or otherwise does not take effect.

10. The Court hereby appoints Raymond Cavagnaro, Diane Cavagnaro, and Anthony Alimenti as Settlement Class Representatives to represent the Settlement Class.

11. The Court hereby appoints the following attorneys as Class Counsel for the Settlement Class:

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

12. The Court hereby appoints [INSERT] as Settlement Administrator and directs [INSERT] to carry out all duties and responsibilities of the Settlement Administrator as specified in the Settlement Agreement and herein.

NOTICE PROGRAM

13. Pursuant to N.J. Ct. R. 4:32-2(b), the Court approves the Notice Plan set forth at Section VI of the Settlement Agreement. The Court finds that the Notice Plan meets the

requirements of Due Process under the U.S. Constitution and N.J. Ct. R. 4:32-2; and that such Notice Plan, which includes individual direct notice to Settlement Class Members via mail, and the establishment of a Settlement Website and Toll-Free Number is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

14. The Court further finds that the form and content of the Notice (including Exhibit D to the Settlement Agreement) are adequate and will give the Settlement Class Members sufficient information to enable them to make informed decisions as to the Settlement Class, the right to object or exclude themselves from the Settlement Class (i.e., opt out), and the Settlement Agreement. The Court finds that the Notice clearly and concisely states in plain, easily understood language, inter alia: (i) the nature of the Action; (ii) the definition of the Settlement Class; (iii) the class claims and issues; (iv) that a Settlement Class Member may enter an appearance through an attorney if the member so desires; (v) that the Court will exclude from the Settlement Class any member who timely and validly requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on Settlement Class Members under N.J. Ct. R. 4:32-1 and 4:32-2.

15. The Court directs the Settlement Administrator and the Settling Parties to implement the Notice Plan as set forth in the Settlement Agreement.

CLAIM PROCEDURE

16. The Court approves the form and content of the Claim Form attached as Exhibit A to the Settlement Agreement, approves the Claim Process set forth in the Settlement Agreement for Settlement Class Members to submit a Claim For Payment, and directs the Settling Parties and the Settlement Administrator to implement the Claim Process.

PROCEDURES FOR REQUESTING EXCLUSION OR OBJECTING TO THE SETTLEMENT

17. Settlement Class Members may exclude themselves from the Settlement Class by mailing to the Settlement Administrator, at the address provided in the Website Notice, a request for exclusion that is postmarked no later than sixty (60) days after the Notice Date (the "Exclusion Deadline").

18. To be effective, the request for exclusion must include (1) the Settlement Class Member's full name, telephone number, mailing address, and email address; (2) a clear statement that the Settlement Class Member wishes to be excluded from the Settlement Class; (3) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and (4) the Settlement Class Member's original signature. Requests for exclusion furthermore must be made on an individual basis; "mass," "class," or other purported group opt-outs are not effective.

19. Any Settlement Class Member who submits a timely and valid request for exclusion is foreclosed from objecting to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. If a Settlement Class Member submits both a timely and valid request for exclusion and an objection, the request shall be treated as a request for exclusion.

20. Any Settlement Class Member who does not submit a timely and valid request for exclusion as set forth in the Settlement Agreement shall be bound by all subsequent proceedings, orders, and judgments in this Action, including, but not limited to, the Release as defined in the Settlement Agreement, regardless of whether the Settlement Class Member has any pending claims or causes of action against Defendant.

21. Any Settlement Class Member who does not submit a timely and valid request for exclusion shall have the right to object to the Settlement Agreement and/or to Class Counsel's motion for attorneys' fees, costs, or service awards, only by complying with the objection

provisions set forth herein and in the Settlement Agreement.

22. Settlement Class Members who object shall remain Settlement Class Members and shall be subject to the Release set forth in this Settlement Agreement if this settlement is approved by the Court and becomes effective. To be considered valid, an objection must be in writing, must be filed with the Court or mailed to the Court at the address listed in the Website Notice, postmarked/filed no later than eighty (80) days after the Notice Date (the "Objection Deadline"), and must include the following: (1) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; (2) the full name, mailing address, telephone number, and email address of the objector; (3) the objector's original signature; (4) a description of the specific reasons for the objection; (5) the name, address, bar number and telephone number of counsel for the objector, if the objector is represented by an attorney; and (6) statement on whether the objector intends to appear at the Final Approval Hearing either in person or through counsel. Any Settlement Class Member who does not timely submit an objection in accordance with this section shall waive the right to object or to be heard at the Final Approval Hearing and shall be forever barred from making any objection to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. Any Settlement Class Member who objects to the Settlement Agreement shall nevertheless be eligible for all benefits of the Settlement Agreement if it is approved and becomes final.

FINAL APPROVAL HEARING

23. The Court will hold a Final Approval Hearing on [DATE] at the Superior Court of New Jersey, Gloucester County located at 70 Hunter Street Woodbury, New Jersey.

24. The purposes of the Final Approval Hearing will be to: (i) determine whether the Settlement Agreement should be finally approved by the Court as fair, reasonable, adequate, and

in the best interests of the Settlement Class; (ii) determine whether judgment should be entered pursuant to the Settlement Agreement, dismissing the Action with prejudice and releasing all Released Claims; (iii) determine whether the Settlement Class should be finally certified; (iv) rule on Class Counsel's motion for attorneys' fees, costs, and service awards; (v) consider any properly filed objections; and (vi) consider any other matters necessary in connection with the final approval of the Settlement Agreement.

25. By no later than seventy (70) days after the Notice Date, Plaintiffs and Class Counsel shall file their: (a) motion for final approval of the Settlement Agreement, requesting entry of the Final Approval Order and Judgment; and (b) motion for attorneys' fees, costs, and service awards. Promptly after they are filed, these document(s) shall be posted on the Settlement Website.

26. By no later than twenty-one (21) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Class Counsel for filing with the Court) copies of any objections received by the Settlement Administrator.

27. By no later than seven (7) days before the Final Approval Hearing, the Parties shall file any responses to any Settlement Class Member objections, and any reply papers in support of the motion for final approval of the Settlement Agreement and/or in support of Class Counsel's motion for attorneys' fees, costs, and service awards.

28. By no later than fourteen (14) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Class Counsel for filing with the Court) a declaration providing a complete and final list of Class Members who submitted timely and valid requests for exclusion.

29. The Court may, in its discretion, modify the date and/or time of the Final Approval Hearing, and may order that this hearing be held remotely or telephonically. In the event the Court

changes the date, time, and/or the format of the Final Approval Hearing, Class Counsel shall ensure that the updated information is posted on the Settlement Website.

30. Only Settlement Class Members who have submitted timely and valid objections, in accordance with the requirements of this Preliminary Approval Order, may be heard at the Final Approval Hearing.

OTHER PROVISIONS

31. If the Settlement Agreement, including any amendment made in accordance therewith, is not approved by the Court or shall not become effective for any reason whatsoever, the Settlement Agreement and any actions taken or to be taken in connection therewith (including this Preliminary Approval Order and any judgment entered herein), shall be terminated and shall become null and void and of no further force and effect except for (i) any obligations to pay for any expense incurred in connection with Notice and administration as set forth in the Settlement Agreement, and (ii) any other obligations or provisions that are expressly designated in the Settlement Agreement to survive the termination of the Settlement Agreement, including the Settling Parties' agreement to cooperate in asking the Court to set a reasonable schedule for the resumption of this Action.

32. Other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement Agreement, all proceedings in this Action are hereby stayed and suspended until further order of this Court.

33. Pending final determination of whether the Settlement Agreement should be finally approved, Plaintiffs and all members of the Settlement Class are barred and enjoined from instituting, maintaining, prosecuting, continuing, or otherwise asserting any Released Claim against the Released Parties, excluding any efforts in furtherance of the Settlement Agreement.

This bar and injunction are necessary to protect and effectuate the Settlement Agreement and this Preliminary Approval Order, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction.

34. The Court retains jurisdiction over this Action to consider all further matters arising out of or connected with the Settlement Agreement, including enforcement of the Release provided for in the Settlement Agreement.

35. The Settling Parties are directed to use all reasonable efforts to implement and accomplish the terms and conditions of the Settlement Agreement should it be finally approved.

36. The Court may, for good cause, extend any of the deadlines set forth in this Preliminary Approval Order without further notice to Settlement Class Members. Without further order of the Court, the Settling Parties may agree to make non-material modifications in implementing the Settlement Agreement that are not inconsistent with this Preliminary Approval Order.

IT IS SO ORDERED.

Date: _____

_____

Exhibit 2

RAYMOND CAVAGNARO AND DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, vs. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-00816-24 **DECLARATION OF NAVID ZIVARI OF ANGEION GROUP, LLC REGARDING SETTLEMENT ADMINISTRATION**

I, Navid Zivari declare and state as follows:

1. I am a Project Manager at the class action notice and settlement administration firm Angeion Group, LLC ("Angeion"), located at 1650 Arch Street, Suite 2210, Philadelphia, PA 19103. I am fully familiar with the facts contained herein based upon my personal knowledge, as well as information that has been provided to me by my colleagues in the ordinary course of business at Angeion.

2. Angeion was appointed by the Court to serve as the Settlement Administrator pursuant to the *Order Granting Preliminary Approval of Class Settlement Agreement and Directing Dissemination of Class Notice* ("Preliminary Approval Order").

3. The purpose of this declaration is to provide the Court and the Parties with a summary of the work performed by Angeion to disseminate notice and to administer the Settlement in accordance with the *Class Action Settlement Agreement* ("Settlement Agreement"), Preliminary Approval Order and the *Order Amending Preliminary Approval of Class Settlement Agreement and Directing Dissemination of Class Notice* ("Amended Preliminary Approval Order").

SETTLEMENT CLASS MEMBER LIST

4. On or about August 12, 2026, Angeion received from Plaintiffs, an electronic spreadsheet containing a total of 301 Settlement Class Member records. Each record contained the Settlement Class Members' names, last known address, property address, assessed property value, and whether the property was inside or outside the Well Restricted Area. Angeion reviewed the 301 records that were provided to compile the Settlement Class Member database ("Class List").

DIRECT MAIL NOTICE

5. Angeion processed the 301 mailing addresses through the United States Postal Service ("USPS") National Change of Address ("NCOA") database to identify updated addresses for individuals who have moved in the last four years and filed a change of address card with the USPS. The NCOA process did not result in any updated addresses for the Class Members.

6. On August 31, 2026, Angeion caused the Notice of Class Action and Proposed Settlement ("Mailed Notice") to be mailed to all 301 Class Members via United States Postal Service ("USPS") first class mail, postage prepaid. A true and accurate copy of the Mailed Notice is attached hereto as **Exhibit A**.

7. As of November 5, 2026, the USPS has not returned any of the initial Notices with a forwarding address.

8. As of November 5, 2026, the USPS has not returned any of the initial Notices without a forwarding address.

SETTLEMENT WEBSITE

9. On August 31, 2026, Angeion established the following website dedicated to this Settlement: www.vinelandshieldalloylitigation.com. The Settlement Website contains a secure online portal where class members may submit a claim. Additionally, the Long-Form Notice, Claim Form, Settlement Agreement, Preliminary Approval Order, Order Amending the Preliminary Approval Order and other settlement related documents are available for download. The Settlement Website also has a "Frequently Asked Questions" page which provides Class Members with answers to common inquiries about the Settlement, and a "Contact Us" page which provides Class Members with the mailing address, phone number and email address to contact the Settlement Administrator. True and accurate copies of the Long-Form Notice and Claim Form are attached hereto as **Exhibit B** and **Exhibit C** respectively.

10. As of November 5, 2026, the Settlement Website has had 119 unique visitors and 716 page views.

TOLL-FREE TELEPHONE SUPPORT

11. On August 31, 2026, Angeion established the following toll-free telephone support line dedicated to this Settlement: 1-855-945-4350. The toll-free support line utilizes an interactive voice response ("IVR") system to provide Settlement Class Members with information about the Settlement, including a summary of Settlement Class Member rights and options under the Settlement, responses to frequently asked questions and essential information regarding the Settlement, including important dates and deadlines. The toll-free support line is accessible 24 hours a day, 7 days a week. As of November 5, 2026, the toll-free hotline has received 18 incoming calls for a total of 75 minutes.

CLAIM FORM SUBMISSIONS

12. The deadline for Settlement Class Members to submit a Claim Form is December 29, 2026. As of November 5, 2026, Angeion has received 62 Claim Forms (40 via the online portal and 22 via mail).

13. These Claim Form submissions remain subject to final audits, including the full assessment of each claim's validity and a review for duplicate submissions. Angeion will continue to report to the Parties the number of Claim Form submissions it receives and processes.

EXCLUSION REQUESTS AND OBJECTIONS

14. The deadline for Settlement Class Members to exclude themselves from the Settlement was October 30, 2026. As of November 5, 2026, Angeion has received four (4) requests for exclusion from Alfred Tubertini, Patricia Tubertini, Salvatore Ruocco and Geraldine Ruocco.[1]

15. The deadline for Settlement Class Members to object to the Settlement is November 19, 2026. As of November 5, 2026, Angeion has not received any objections to the Settlement.

NOTICE AND ADMINISTRATION EXPENSES

16. Angeion has agreed to provide the Notice and Administration services described herein for the fixed amount of $30,000.00.

[1] This represents two (2) Settlement Class Member records for the properties located at 3558 Prospect Ave and 267 E. Weymouth Rd., respectively.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: November 6, 2026

Navid Zivari

Navid Zivari

Exhibit A

Superior Court of the State of New Jersey

If you are an owner of a residential property contained within Shieldalloy Metallurgical Corp. Classification Exception Areas ("CEAS") for groundwater contamination approved in September 2020

YOU MAY BE ENTITLED TO A PAYMENT

from a class action settlement.

A court authorized this notice. It is not a solicitation from a lawyer. You are not being sued. Please do not contact the Court. Your legal rights are affected whether you act or don't act. ***Read this notice carefully.***

OVERVIEW

- Certain residential property owners were notified in or about August 2018 that one or more Classification Exception Areas ("CEAs") were to be established for certain existing and projected groundwater contamination above groundwater quality standards. The CEAs were established by TRC Companies, Inc. ("TRC") and approved by the New Jersey Department of Environmental Protection ("NJDEP") in September 2020. Plaintiffs filed a class action lawsuit against Shieldalloy Metallurgical Corporation ("SMC" or "Defendant"), TRC and other defendants seeking damages for diminution of property value allegedly caused by the CEAs and the requirement to disclose the CEAs upon the sale of Plaintiffs' property. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit. Plaintiffs and Defendant have reached a proposed settlement to resolve the lawsuit on a class action basis against all defendants, as described below.
- If, as of July 15, 2026, you own a residential property located within one or both of the CEAs, you are in the Settlement Class and are eligible to file a claim for a settlement payment.
- **IMPORTANT: You must file a claim by December 29, 2026, to be eligible for payment from the settlement. Click here to file a claim.** (Read below or see Questions 6-7 for details)
- Your legal rights **are affected**, and you have a choice to make. Your options are explained here.

YOUR LEGAL RIGHTS AND OPTIONS	
FILE A CLAIM	File a claim by **December 29, 2026,** to be eligible to receive a payment. See Questions 6-7.
DO NOTHING	Receive no payment and give up the right to sue defendants about the issues in the lawsuit.
OPT OUT	Receive no payment from the settlement and retain any right you may have to sue defendants about the issues in the lawsuit. To opt out, you must mail a signed request for exclusion by **October 30, 2026**. See Question 11 for details.
OBJECT OR COMMENT	Object or comment on the proposed settlement by **October 30, 2026**. See Question 12 for details. If you object or comment, you can still file a claim and be eligible to receive a payment.

- Questions? Read below or visit www.VinelandShieldalloyLitigation.com or call 1-855-945-4350 for more information.

INFORMATION ABOUT THE LAWSUIT AND CLASS

1. What is this lawsuit about?

A class action lawsuit was filed in New Jersey State Court, seeking relief under New Jersey law on behalf of a class of residential property owners who own property located within one or more Classification Exception Areas ("CEAs") that were established as an institutional control for certain existing and projected groundwater contamination. The lawsuit sought to recover damages incurred by class members for the diminution of their property value as a result of the CEAs. The complaint is available at www.VinelandShieldalloyLitigation.com.

Plaintiffs and Defendant have now agreed to a Settlement Agreement to resolve the lawsuit on a class basis against all defendants, as described below. The Court has not decided whether Plaintiffs' claims and/or defendants' defenses are valid. By agreeing to the Settlement Agreement, neither Defendant nor Plaintiffs make any admissions regarding any liability by Defendant or the merits of the allegations, claims, or defenses in this case. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit.

The Superior Court of the State of New Jersey is overseeing the lawsuit. The lawsuit is known as Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al., GLO-L-816-24 (N.J. Super. Ct. Gloucester County)

2. Why is this a class action?

In a class action, one or more people sue on behalf of themselves and other people with similar claims. All of these people together make up the class and are class members. One court resolves the issues for all class members, except for those who exclude themselves from the class.

3. Who is in the Settlement Class?

The "Settlement Class" in this case includes:

> All Persons that/who, as of Execution Date, own Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** (the "Class Properties") to the Settlement Agreement and is available for review at www.VinelandShieldalloyLitigation.com.
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

If you received this notice of settlement by mail, you were identified as being a Settlement Class Member. People in the Settlement Class are called "Settlement Class Members."

Information about the Settlement and About Filing a Claim for a Payment

4. What are the terms of the proposed settlement?

The complete terms of the proposed Settlement Agreement are available at www.VinelandShieldalloyLitigation.com. This notice provides only a summary of the terms and benefits of the Settlement Agreement, which is set forth below.

5. What are the benefits of the proposed Settlement?

If the Settlement Agreement is approved and becomes final, Defendant will pay **$1,325,000.00** into a Settlement Fund Account. This money will be used to: (1) make settlement payments to Settlement Class Members, as described at Questions 6-9 below; (2) pay the costs of distributing notice and settlement checks and electronic payments to Settlement Class Members and other costs of administering the settlement; and (3) pay court-awarded attorneys' fees and expenses of the attorneys appointed by the Court to represent the Class ("Class Counsel") and any service awards granted to the Settlement Class Representatives. As explained below, if you file a claim by the deadline and are eligible for a payment, the amount of payment is dependent on your property's location and how many Settlement Class Members file valid claims.

6. How do I get a payment?

You must file a claim by December 29, 2026, to be eligible for a settlement payment.

7. How do I file a claim for a payment?

File Online: To file a claim online, visit www.VinelandShieldalloyLitigation.com

File By Mail: If you prefer, you can also print a paper claim form, available at www.VinelandShieldalloyLitigation.com, fill it out, and mail it to the address listed on the form. Or, if you received notice of this Settlement Agreement by mail you can fill out the claim form that is attached to that notice and mail it to the address listed on the form.

The deadline to file a claim online or by mail is December 29, 2026. The Settlement Administrator will review all claim forms and determine your eligibility and final payment.

8. How much will the payments be?

An Eligible Claimant that, as of July 15, 2026, owns Class Property located within the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment of $300. An Eligible Claimant that, as of July 15, 2026, owns a Class Property located outside of the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment equal to no more than 7% of the 2025 tax assessed value of the Eligible Claimant's Class Property[1]. Depending on the number of Claims For Payment filed, the amount of this payment may be pro-rata adjusted downward.

Claim Forms may only be submitted by Class Members identified in property tax records as owning the Class Property for which the Claim Form is submitted, as of July 15, 2026. If multiple Claim Forms are submitted by Eligible Claimants for the same Residential Property, then any payment shall be divided equally between the Eligible Claimants.

You must submit a claim by the deadline December 29, 2026, to be eligible to receive a payment.

[1] As indicated for the 2025 tax year per the online tax records available at https://taxrecords-nj.com/pub/cgi/prc6.cgi?district=0801&ms_user=ctb08 (Gloucester County addresses); and https://tax1.co.monmouth.nj.us/cgi-bin/prc6.cgi?&ms_user=ctb06&passwd=&srch_type=0&adv=0&out_type=0&district=0610 (Cumberland County addresses).

9. How and when will payments be sent?

Settlement payments will be issued to Eligible Claimants by check or electronic payment after the Settlement Agreement is approved and becomes final.

For any settlement payments that are uncashed or deemed undeliverable by the Settlement Administrator, those amounts will be treated as unclaimed property of the corresponding Eligible Claimant, subject to applicable state unclaimed property procedures (the additional administrative costs of such unclaimed property process will be deducted from the unclaimed property amounts on a *pro rata* basis).

Your other rights and options

10. What happens if I do nothing?

If you do nothing, you will not receive any settlement payment. **You must file a claim by December 29, 2026, to be eligible to receive a payment.**

If you do nothing, you will release and give up any right you may have to sue defendants about the issues in this lawsuit as set forth in the Settlement Agreement. You will also be legally bound by all of the orders that the Court issues and judgments the Court makes in this class action lawsuit.

11. How do I exclude myself (opt out) from the Settlement Class?

To exclude yourself from the Settlement Class, you must mail a signed request for exclusion to: Shieldalloy Settlement Administrator, Attn: Exclusions, 1650 Arch Street, Suite 2210, Philadelphia, PA, 19103.

To be effective, your request for exclusion must be postmarked no later than **October 30, 2026,** and must include the following information:

(a) your full name, telephone number, mailing address, and email address;

(b) a clear statement that you wish to be excluded from the Settlement Class;

(c) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and

(d) your original signature.

12. How do I object or comment?

If you have not excluded yourself from the Settlement Class, you can comment on or object to the settlement, Class Counsel's request for attorneys' fees and litigation expenses, and/or the request for service awards for the Settlement Class Representatives. To object or comment, you must file with the Court a signed, written objection/comment including the following:

(a) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al.";

(b) your full name, mailing address, telephone number, and email address;

(c) your original signature;

(d) a description of the specific reasons for the objection;

(e) the name, address, bar number and telephone number of your attorney if you are represented by an attorney; and

(f) a statement about whether or not you intend to appear at the Final Approval Hearing either in person or through an attorney.

To be considered by the Court, your comment or objection must be in writing and electronically filed with the Court no later than **October 30, 2026,** or mailed to the Clerk of Court at the below address, so that it

may be received by the Clerk of Court and filed on your behalf by **October 30, 2026.**

THE COURT
Superior Court of New Jersey Gloucester County Clerk of Court 70 Hunter Street Woodbury, New Jersey 08096

Note that you can ask the Court to deny approval of the Settlement by filing an objection, but you cannot ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval of the settlement, no settlement payments will be sent out and the lawsuit will continue. If you would like to request that the Court deny approval, you must object. You have the right to consult with your own attorney, at your own expense, before deciding how best to proceed.

13. What claims will be released by this Settlement?

If you are in the Settlement Class and do not exclude yourself from the Settlement Class, and the settlement is approved and becomes final, the settlement will be legally binding on you and you will be bound by all judgments entered in the case. In exchange for the settlement benefits, you will release all claims against defendants and the "Released Parties" listed in the Settlement Agreement about the issues in the lawsuit, except for personal injury claims. The Settlement Agreement, available at www.VinelandShieldalloyLitigation.com, describes the claims you are releasing (giving up) by staying in the Settlement Class (called "Released Claims").

14. Do I have a lawyer in this class action?

Yes. The Court has appointed the following attorneys and law firms to represent the Settlement Class Members. These lawyers are called "Class Counsel":

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

You do not have to pay Class Counsel for their time or expenses incurred in this case out of your pocket. Instead, Class Counsel will petition the Court for an award of their fees and expenses; any amount awarded to Class Counsel will be paid from the Gross Settlement Fund.

The Court has also appointed Raymond Cavagnaro, Diane Cavagnaro, and Anthony Alimenti as Settlement Class Representatives to represent the Settlement Class.

15. How will the lawyers be paid?

Class Counsel (see Question 14) will file a motion on or before November 9, 2026, asking the Court to award them attorneys' fees of up to $441,622.50 (which is 33.33% of the $1,325,000.00 Settlement Amount) plus reimbursement of their reasonable litigation expenses. The attorneys' fees and expenses awarded by the Court will be the only payment to Class Counsel for their efforts in achieving the settlement and for their risk in undertaking this representation on a wholly contingent basis. In addition, Class Counsel will ask the Court on or before November 9, 2026 to award the Settlement Class Representatives representing the Settlement Class a

service award of up to $40,000.00 total to be shared by the Settlement Class Representatives to compensate them for their efforts and commitment on behalf of the Settlement Class in this lawsuit.

The Court will determine the amount of attorneys' fees, expenses, and service awards to award. Class Counsel's application for attorneys' fees, expenses, and service awards will be available at www.VinelandShieldalloyLitigation.com when it is filed.

16. Should I hire my own lawyer for this case?

You do not need to hire your own lawyer because Class Counsel represents you and the other members of the Settlement Class already. However, you have the right to hire your own lawyer. If you want your own lawyer, you will have to pay that lawyer.

The Court's Final Approval Hearing

17. When and where will the Court decide whether to approve the settlement?

The Court will hold a Final Approval Hearing, currently scheduled for **November 30, 2026**, in the New Jersey Superior Court, located at 70 Hunter Street, Woodbury, New Jersey 08096. The hearing may be moved to a different date or time without additional notice and/or may be held remotely or telephonically. Please check www.VinelandShieldalloyLitigation.com for updates or changes.

At the Final Approval Hearing, the Court will consider whether the settlement should be approved as fair, reasonable and adequate. The Court will also consider Class Counsel's application for attorneys' fees, expenses, and service awards. If there are timely objections, the Court will consider them. After the hearing, the Court will decide whether to approve the settlement. We do not know how long these decisions will take.

18. Do I have to come to the hearing?

No. Class Counsel will answer questions the Court may have. But you are welcome to come at your own expense. If you submit an objection, you do not have to come to the Court to talk about it. So long as you submitted your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

19. May I speak at the hearing?

You may ask the Court for permission to speak at the Final Approval Hearing. You cannot speak at the hearing if you exclude yourself from the Settlement Class.

Getting more information

20. Where can I get more information?

More information can be found at www.VinelandShieldalloyLitigation.com. That website includes important case deadlines, links to case documents including the full Settlement Agreement, the complaint in this lawsuit, and other information about the lawsuit and the settlement. You can also get more information by calling 1-855-945-4350.

PLEASE DO NOT CONTACT THE COURT ABOUT THE SETTLEMENT

Your claim must be submitted online or postmarked by: December 29, 2026	*Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al.*, GLO-L-816-24 New Jersey Superior Court Gloucester County **CLAIM FORM**	**CSA CLAIM**

SHIELDALLOY SETTLEMENT CLAIM FORM

IMPORTANT -- All Settlement Class Members who sign and submit this claim form are certifying that, as of the Execution Date, they own residential property located partially or wholly within the geographical boundary defined by (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed by and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of properties located within one or both CEAs is attached to the Settlement Agreement and available online at .

If your property is located within one or both of the CEAs and is also located within the Well Restriction Area ("WRA") identified by the City of Vineland Ordinance No. 86-67 and established in 1986, a payment of $300 will be allocated to your property. If your property is located within one or both CEAs and is not located within the WRA, a payment equal to no more than 7% of the 2025 tax assessed value of your property will be allocated to your property. If multiple owners of a property file claim forms, allocated payments will be split equally among the Eligible Claimants.

Upon completing and submitting this claim form by the deadline, the Settlement Administrator will review your eligibility for payment under the Settlement Agreement. If the Court grants final approval of the Settlement Agreement, and the Settlement Administrator determines you are eligible for payment, your final payment amount may depend on the funds available for distribution and the number of Eligible Claimants. The Settlement Agreement is available at www.VinelandShieldalloyLitigation.com.

All claims will be paid by check or electronic payment.

To be eligible for a settlement payment, you must complete and file this Claim Form. You can either:

(1) File Online: File online at ; or

(2) File by Mail: Fill out, sign, and return this form to: Shieldalloy Settlement Administrator, Attn: Claim Forms, 1650 Arch Street, Suite 2210, Philadelphia, PA, 19103.

You must file a claim to receive a settlement payment. THE DEADLINE TO FILE A CLAIM IS **DECEMBER 29, 2026.**

Unless otherwise defined herein, all capitalized terms have the same meaning as given in the Settlement Agreement.

Your claim must be submitted online or postmarked by: December 29, 2026	*Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al.*, GLO-L-816-24 New Jersey Superior Court Gloucester County **CLAIM FORM**	**CSA CLAIM**

Part 1: Provide Your Contact Information

Notice ID: CSA100001

(You can find this number on the front or top of the settlement notice you received. If you no longer have the notice, and need your Personal ID #, email the Settlement Administrator at: info@VinelandShieldalloyLitigation.com.).

Your Name_____

Street Address_____

City_____ State _____ ZIP _____

Phone Number:_____ Email Address: _____

*If you submit a Claim Form without a unique personal identification number you must submit documentary proof of identification, proof of your ownership of the Class Property, and proof of the date you became the owner of the Class Property.

Part 2: Confirm Class Property

If the property you own in one or both of the CEAs is not the same as the address provided in Step 1, provide:

Street Address of Class Property_____

City_____ State _____ ZIP _____

Part 3: Non-disparagement

I acknowledge and agree that I shall not make any negative, derogatory, disparaging, and/or untruthful statements, either written or oral, to any person or entity, about the Released Parties.

Your claim must be submitted online or postmarked by: December 29, 2026	*Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al.*, GLO-L-816-24 New Jersey Superior Court Gloucester County **CLAIM FORM**	**CSA CLAIM**

Part 4: CEA Disclosure to Purchasers

I acknowledge and agree to comply with the obligations of New Jersey law to disclose to any purchaser or transferee of my property the existence of any then-existing CEA prior to transferring the property. I further acknowledge and agree to identify and list the existence of any then-existing CEA affecting my property on any property condition disclosure statement required by N.J.A.C. 13:45A-29.1.

Part 5: Sign the Form

I hereby certify, under penalty of perjury, that the information stated herein is true and correct to the best of my knowledge. I also agree and acknowledge that I will comply with the non-disparagement requirement in Part 3 and that I will comply with the CEA Disclosure requirement in Part 4.

Your Signature Date

www.VinelandShieldalloyLitigation.com / **1-855-945-4350**

Your claim must be submitted online or postmarked by: December 29, 2026	***Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al.,*** GLO-L-816-24 New Jersey Superior Court Gloucester County **CLAIM FORM**	**CSA CLAIM**

[redacted]

Confirmation Code: [redacted]

[redacted]

Exhibit B

Superior Court of the State of New Jersey

If you are an owner of a residential property contained within Shieldalloy Metallurgical Corp. Classification Exception Areas ("CEAS") for groundwater contamination approved in September 2020

YOU MAY BE ENTITLED TO A PAYMENT

from a class action settlement.

A court authorized this notice. It is not a solicitation from a lawyer. You are not being sued. Please do not contact the Court. Your legal rights are affected whether you act or don't act. ***Read this notice carefully****.*

OVERVIEW

- Certain residential property owners were notified in or about August 2018 that one or more Classification Exception Areas ("CEAs") were to be established for certain existing and projected groundwater contamination above groundwater quality standards. The CEAs were established by TRC Companies, Inc. ("TRC") and approved by the New Jersey Department of Environmental Protection ("NJDEP") in September 2020. Plaintiffs filed a class action lawsuit against Shieldalloy Metallurgical Corporation ("SMC" or "Defendant"), TRC and other defendants seeking damages for diminution of property value allegedly caused by the CEAs and the requirement to disclose the CEAs upon the sale of Plaintiffs' property. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit. Plaintiffs and Defendant have reached a proposed settlement to resolve the lawsuit on a class action basis against all defendants, as described below.
- If, as of July 15, 2026, you own a residential property located within one or both of the CEAs, you are in the Settlement Class and are eligible to file a claim for a settlement payment.
- **IMPORTANT: You must file a claim by December 29, 2026, to be eligible for payment from the settlement. Click here to file a claim.** (Read below or see Questions 6-7 for details)
- Your legal rights **are affected**, and you have a choice to make. Your options are explained here.

YOUR LEGAL RIGHTS AND OPTIONS	
FILE A CLAIM	File a claim by **December 29, 2026,** to be eligible to receive a payment. See Questions 6-7.
DO NOTHING	Receive no payment and give up the right to sue defendants about the issues in the lawsuit.
OPT OUT	Receive no payment from the settlement and retain any right you may have to sue defendants about the issues in the lawsuit. To opt out, you must mail a signed request for exclusion by **October 30, 2026**. See Question 11 for details.
OBJECT OR COMMENT	Object or comment on the proposed settlement by **November 19**. See Question 12 for details. If you object or comment, you can still file a claim and be eligible to receive a payment.

- Questions? Read below or visit www.VinelandShieldalloyLitigation.coobjem or call 1-855-945-4350 for more information.

INFORMATION ABOUT THE LAWSUIT AND CLASS

1. What is this lawsuit about?

A class action lawsuit was filed in New Jersey State Court, seeking relief under New Jersey law on behalf of a class of residential property owners who own property located within one or more Classification Exception Areas ("CEAs") that were established as an institutional control for certain existing and projected groundwater contamination. The lawsuit sought to recover damages incurred by class members for the diminution of their property value as a result of the CEAs. The complaint is available at www.VinelandShieldalloyLitigation.com.

Plaintiffs and Defendant have now agreed to a Settlement Agreement to resolve the lawsuit on a class basis against all defendants, as described below. The Court has not decided whether Plaintiffs' claims and/or defendants' defenses are valid. By agreeing to the Settlement Agreement, neither Defendant nor Plaintiffs make any admissions regarding any liability by Defendant or the merits of the allegations, claims, or defenses in this case. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit.

The Superior Court of the State of New Jersey is overseeing the lawsuit. The lawsuit is known as Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al., GLO-L-816-24 (N.J. Super. Ct. Gloucester County)

2. Why is this a class action?

In a class action, one or more people sue on behalf of themselves and other people with similar claims. All of these people together make up the class and are class members. One court resolves the issues for all class members, except for those who exclude themselves from the class.

3. Who is in the Settlement Class?

The "Settlement Class" in this case includes:

> All Persons that/who, as of Execution Date, own Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** (the "Class Properties") to the Settlement Agreement and is available for review at www.VinelandShieldalloyLitigation.com.
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

If you received this notice of settlement by mail, you were identified as being a Settlement Class Member. People in the Settlement Class are called "Settlement Class Members."

Information about the Settlement and About Filing a Claim for a Payment

4. What are the terms of the proposed settlement?

The complete terms of the proposed Settlement Agreement are available at www.VinelandShieldalloyLitigation.com. This notice provides only a summary of the terms and benefits of the Settlement Agreement, which is set forth below.

5. What are the benefits of the proposed Settlement?

If the Settlement Agreement is approved and becomes final, Defendant will pay **$1,325,000.00** into a Settlement Fund Account. This money will be used to: (1) make settlement payments to Settlement Class Members, as described at Questions 6-9 below; (2) pay the costs of distributing notice and settlement checks and electronic payments to Settlement Class Members and other costs of administering the settlement; and (3) pay court-awarded attorneys' fees and expenses of the attorneys appointed by the Court to represent the Class ("Class Counsel") and any service awards granted to the Settlement Class Representatives. As explained below, if you file a claim by the deadline and are eligible for a payment, the amount of payment is dependent on your property's location and how many Settlement Class Members file valid claims.

6. How do I get a payment?

You must file a claim by December 29, 2026, to be eligible for a settlement payment.

7. How do I file a claim for a payment?

File Online: To file a claim online, visit www.VinelandShieldalloyLitigation.com

File By Mail: If you prefer, you can also print a paper claim form, available at www.VinelandShieldalloyLitigation.com, fill it out, and mail it to the address listed on the form. Or, if you received notice of this Settlement Agreement by mail you can fill out the claim form that is attached to that notice and mail it to the address listed on the form.

The deadline to file a claim online or by mail is December 29, 2026. The Settlement Administrator will review all claim forms and determine your eligibility and final payment.

8. How much will the payments be?

An Eligible Claimant that, as of July 15, 2026, owns Class Property located within the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment of $300. An Eligible Claimant that, as of July 15, 2026, owns a Class Property located outside of the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment equal to no more than 7% of the 2025 tax assessed value of the Eligible Claimant's Class Property[1]. Depending on the number of Claims For Payment filed, the amount of this payment may be pro-rata adjusted downward.

Claim Forms may only be submitted by Class Members identified in property tax records as owning the Class Property for which the Claim Form is submitted, as of July 15, 2026. If multiple Claim Forms are submitted by Eligible Claimants for the same Residential Property, then any payment shall be divided equally between the Eligible Claimants.

You must submit a claim by the deadline December 29, 2026, to be eligible to receive a payment.

[1] As indicated for the 2025 tax year per the online tax records available at https://taxrecords-nj.com/pub/cgi/prc6.cgi?district=0801&ms_user=ctb08 (Gloucester County addresses); and https://tax1.co.monmouth.nj.us/cgi-bin/prc6.cgi?&ms_user=ctb06&passwd=&srch_type=0&adv=0&out_type=0&district=0610 (Cumberland County addresses).

9. How and when will payments be sent?

Settlement payments will be issued to Eligible Claimants by check or electronic payment after the Settlement Agreement is approved and becomes final.

For any settlement payments that are uncashed or deemed undeliverable by the Settlement Administrator, those amounts will be treated as unclaimed property of the corresponding Eligible Claimant, subject to applicable state unclaimed property procedures (the additional administrative costs of such unclaimed property process will be deducted from the unclaimed property amounts on a *pro rata* basis).

Your other rights and options

10. What happens if I do nothing?

If you do nothing, you will not receive any settlement payment. **You must file a claim by December 29, 2026, to be eligible to receive a payment.**

If you do nothing, you will release and give up any right you may have to sue defendants about the issues in this lawsuit as set forth in the Settlement Agreement. You will also be legally bound by all of the orders that the Court issues and judgments the Court makes in this class action lawsuit.

11. How do I exclude myself (opt out) from the Settlement Class?

To exclude yourself from the Settlement Class, you must mail a signed request for exclusion to: Shieldalloy Settlement Administrator, Attn: Exclusions, 1650 Arch Street, Suite 2210, Philadelphia, PA, 19103.

To be effective, your request for exclusion must be postmarked no later than **October 30, 2026,** and must include the following information:

(a) your full name, telephone number, mailing address, and email address;

(b) a clear statement that you wish to be excluded from the Settlement Class;

(c) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and

(d) your original signature.

12. How do I object or comment?

If you have not excluded yourself from the Settlement Class, you can comment on or object to the settlement, Class Counsel's request for attorneys' fees and litigation expenses, and/or the request for service awards for the Settlement Class Representatives. To object or comment, you must file with the Court a signed, written objection/comment including the following:

(a) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al.";

(b) your full name, mailing address, telephone number, and email address;

(c) your original signature;

(d) a description of the specific reasons for the objection;

(e) the name, address, bar number and telephone number of your attorney if you are represented by an attorney; and

(f) a statement about whether or not you intend to appear at the Final Approval Hearing either in person or through an attorney.

To be considered by the Court, your comment or objection must be in writing and electronically filed with the Court no later than **November 19, 2026,** or mailed to the Clerk of Court at the below address, so that

it may be received by the Clerk of Court and filed on your behalf by **November 19, 2026.**

THE COURT
Superior Court of New Jersey Gloucester County Clerk of Court 70 Hunter Street Woodbury, New Jersey 08096

Note that you can ask the Court to deny approval of the Settlement by filing an objection, but you cannot ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval of the settlement, no settlement payments will be sent out and the lawsuit will continue. If you would like to request that the Court deny approval, you must object. You have the right to consult with your own attorney, at your own expense, before deciding how best to proceed.

13. What claims will be released by this Settlement?

If you are in the Settlement Class and do not exclude yourself from the Settlement Class, and the settlement is approved and becomes final, the settlement will be legally binding on you and you will be bound by all judgments entered in the case. In exchange for the settlement benefits, you will release all claims against defendants and the "Released Parties" listed in the Settlement Agreement about the issues in the lawsuit, except for personal injury claims. The Settlement Agreement, available at www.VinelandShieldalloyLitigation.com, describes the claims you are releasing (giving up) by staying in the Settlement Class (called "Released Claims").

14. Do I have a lawyer in this class action?

Yes. The Court has appointed the following attorneys and law firms to represent the Settlement Class Members. These lawyers are called "Class Counsel":

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

You do not have to pay Class Counsel for their time or expenses incurred in this case out of your pocket. Instead, Class Counsel will petition the Court for an award of their fees and expenses; any amount awarded to Class Counsel will be paid from the Gross Settlement Fund.

The Court has also appointed Raymond Cavagnaro, Diane Cavagnaro, and Anthony Alimenti as Settlement Class Representatives to represent the Settlement Class.

15. How will the lawyers be paid?

Class Counsel (see Question 14) will file a motion on or before November 9, 2026, asking the Court to award them attorneys' fees of up to $441,622.50 (which is 33.33% of the $1,325,000.00 Settlement Amount) plus reimbursement of their reasonable litigation expenses. The attorneys' fees and expenses awarded by the Court will be the only payment to Class Counsel for their efforts in achieving the settlement and for their risk in undertaking this representation on a wholly contingent basis. In addition, Class Counsel will ask the Court on or before November 9, 2026 to award the Settlement Class Representatives representing the Settlement Class a

service award of up to $40,000.00 total to be shared by the Settlement Class Representatives to compensate them for their efforts and commitment on behalf of the Settlement Class in this lawsuit.

The Court will determine the amount of attorneys' fees, expenses, and service awards to award. Class Counsel's application for attorneys' fees, expenses, and service awards will be available at www.VinelandShieldalloyLitigation.com when it is filed.

16. Should I hire my own lawyer for this case?

You do not need to hire your own lawyer because Class Counsel represents you and the other members of the Settlement Class already. However, you have the right to hire your own lawyer. If you want your own lawyer, you will have to pay that lawyer.

The Court's Final Approval Hearing

17. When and where will the Court decide whether to approve the settlement?

The Court will hold a Final Approval Hearing, currently scheduled for **November 30, 2026**, in the New Jersey Superior Court, located at 70 Hunter Street, Woodbury, New Jersey 08096. The hearing may be moved to a different date or time without additional notice and/or may be held remotely or telephonically. Please check www.VinelandShieldalloyLitigation.com for updates or changes.

At the Final Approval Hearing, the Court will consider whether the settlement should be approved as fair, reasonable and adequate. The Court will also consider Class Counsel's application for attorneys' fees, expenses, and service awards. If there are timely objections, the Court will consider them. After the hearing, the Court will decide whether to approve the settlement. We do not know how long these decisions will take.

18. Do I have to come to the hearing?

No. Class Counsel will answer questions the Court may have. But you are welcome to come at your own expense. If you submit an objection, you do not have to come to the Court to talk about it. So long as you submitted your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

19. May I speak at the hearing?

You may ask the Court for permission to speak at the Final Approval Hearing. You cannot speak at the hearing if you exclude yourself from the Settlement Class.

Getting more information

20. Where can I get more information?

More information can be found at www.VinelandShieldalloyLitigation.com. That website includes important case deadlines, links to case documents including the full Settlement Agreement, the complaint in this lawsuit, and other information about the lawsuit and the settlement. You can also get more information by calling 1-855-945-4350.

PLEASE DO NOT CONTACT THE COURT ABOUT THE SETTLEMENT

Exhibit C

Your claim must be submitted online or postmarked by: December 29, 2026	*Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al.*, GLO-L-816-24 New Jersey Superior Court Gloucester County **CLAIM FORM**	**CSA CLAIM**

SHIELDALLOY SETTLEMENT CLAIM FORM

IMPORTANT -- All Settlement Class Members who sign and submit this claim form are certifying that, as of the Execution Date, they own residential property located partially or wholly within the geographical boundary defined by (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed by and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of properties located within one or both CEAs is attached to the Settlement Agreement and available online at www.VinelandShieldalloyLitigation.com.

If your property is located within one or both of the CEAs and is also located within the Well Restriction Area ("WRA") identified by the City of Vineland Ordinance No. 86-67 and established in 1986, a payment of $300 will be allocated to your property. If your property is located within one or both CEAs and is not located within the WRA, a payment equal to no more than 7% of the 2025 tax assessed value of your property will be allocated to your property. If multiple owners of a property file claim forms, allocated payments will be split equally among the Eligible Claimants.

Upon completing and submitting this claim form by the deadline, the Settlement Administrator will review your eligibility for payment under the Settlement Agreement. If the Court grants final approval of the Settlement Agreement, and the Settlement Administrator determines you are eligible for payment, your final payment amount may depend on the funds available for distribution and the number of Eligible Claimants. The Settlement Agreement is available at www.VinelandShieldalloyLitigation.com.

All claims will be paid by check or electronic payment.

To be eligible for a settlement payment, you must complete and file this Claim Form. You can either:

(1) File Online: File online at www.VinelandShieldalloyLitigation.com; or

(2) File by Mail: Fill out, sign, and return this form to: Shieldalloy Settlement Administrator, Attn: Claim Forms, 1650 Arch Street, Suite 2210, Philadelphia, PA, 19103.

You must file a claim to receive a settlement payment. THE DEADLINE TO FILE A CLAIM IS **DECEMBER 29, 2026.**

Unless otherwise defined herein, all capitalized terms have the same meaning as given in the Settlement Agreement.

Your claim must be submitted online or postmarked by: December 29, 2026	***Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al.,*** GLO-L-816-24 New Jersey Superior Court Gloucester County **CLAIM FORM**	**CSA CLAIM**

Part 1: Provide Your Contact Information

Notice ID: ☐☐☐☐☐☐☐☐

(You can find this number on the front or top of the settlement notice you received. If you no longer have the notice, and need your Personal ID #, email the Settlement Administrator at: info@VinelandShieldalloyLitigation.com.).

Your Name_____

Street Address_____

City_____ State _____ ZIP _____

Phone Number:_____ Email Address: _____

*If you submit a Claim Form without a unique personal identification number you must submit documentary proof of identification, proof of your ownership of the Class Property, and proof of the date you became the owner of the Class Property.

Part 2: Confirm Class Property

If the property you own in one or both of the CEAs is not the same as the address provided in Step 1, provide:

Street Address of
Class Property_____

City_____ State _____ ZIP _____

Part 3: Non-disparagement

☐ I acknowledge and agree that I shall not make any negative, derogatory, disparaging, and/or untruthful statements, either written or oral, to any person or entity, about the Released Parties.

Your claim must be submitted online or **postmarked by**: December 29, 2026	***Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al.***, GLO-L-816-24 New Jersey Superior Court Gloucester County **CLAIM FORM**	**CSA CLAIM**

Part 4: CEA Disclosure to Purchasers

☐ I acknowledge and agree to comply with the obligations of New Jersey law to disclose to any purchaser or transferee of my property the existence of any then-existing CEA prior to transferring the property. I further acknowledge and agree to identify and list the existence of any then-existing CEA affecting my property on any property condition disclosure statement required by N.J.A.C. 13:45A-29.1.

Part 5: Sign the Form

I hereby certify, under penalty of perjury, that the information stated herein is true and correct to the best of my knowledge. I also agree and acknowledge that I will comply with the non-disparagement requirement in Part 3 and that I will comply with the CEA Disclosure requirement in Part 4.

_____

Your Signature Date

www.VinelandShieldalloyLitigation.com / **1-855-945-4350**

Exhibit 3

Texas v. Organon USA Inc. (In re Remeron End-Payor Antitrust Litig.)

United States District Court for the District of New Jersey

September 13, 2005, Decided ; September 13, 2005, Filed

Civil No. 02-2007 (FSH), Civil No. 04-5126 (FSH)

Reporter

2005 U.S. Dist. LEXIS 27011 *; 2005-2 Trade Cas. (CCH) P74,966

IN RE: REMERON END-PAYOR ANTITRUST LITIGATION; STATES AND COMMONWEALTHS OF TEXAS, et al., Plaintiffs, v. ORGANON USA INC. AND AKZO NOBEL N.V., Defendants.

Prior History: *In re Remeron Direct Purchaser Antitrust Litig., 367 F. Supp. 2d 675, 2005 U.S. Dist. LEXIS 7193 (D.N.J., 2005)*
Walgreen Co. v. Organon, Inc. (In re Remeron Antitrust Litig.), 335 F. Supp. 2d 522, 2004 U.S. Dist. LEXIS 18364 (D.N.J., 2004)

Counsel: [*1] For EON LABS, INC., Movant: FRANKLYN C. STEINBERG, III, STEINBERG LAW OFFICES, SOMERVILLE, NJ.

For GAYLE TAYLOR, Individually, and on behalf of herself and all others similarly situated, Plaintiff: LISA J. RODRIGUEZ, TRUJILLO RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For CVS MERIDIAN, INC., RITE AID CORPORATION, Plaintiffs: MICHAEL LIEBERMAN, HANGLEY ARONCHICK SEGAL & PUDLIN, PHILADELPHIA, PA; LISA J. RODRIGUEZ, TRUJILLO RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For ROBERT KAPELLA, Individually and o/b/o himself and all others similarly situated, Consol Plaintiff: LISA J. RODRIGUEZ, TRUJILLO RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ.

For ORGANON INC., AKZO NOBEL N.V., Defendants: KEVIN J. MCKENNA, JENNIFER A. HRADIL, GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, PC, NEWARK, NJ.

Judges: Honorable Faith S. Hochberg, United States District Judge.

Opinion by: Faith S. Hochberg

Opinion

OPINION

This matter is before the Court upon a settlement agreement between the manufacturers of the anti-depressant drug Remeron, Organon USA Inc. and Akzo Nobel N.V. (Defendants or Organon), and the end-payor purchasers of Remeron along with all Attorney Generals of the United States of America and territories. The settling parties seek (1) final approval of their class action settlement agreement and plan of distribution, (2) final certification of an end-payor settlement class pursuant to *Fed. R. Civ. P. 23*, and (3) award of attorneys' fees to Plaintiffs' Counsel, reimbursement of litigation expenses, and incentive awards to named Plaintiffs. The Court preliminarily approved the settlement on January 25, 2005 after a preliminary fairness hearing on December 1, 2004. The final Fairness Hearing was conducted on June 28, 2005.

I. BACKGROUND

[*2] A. The Litigation

1. The Complaint

In 2002, end-payor purchasers of Remeron filed class action complaints against Defendants. Complaints were filed by United Food and Commercial Workers Local 56 Health & Welfare Fund, Board of Trustees of United Food and Commercial Workers Local 56 Health & Welfare Fund, Vista Healthplan, Inc., Gayle Taylor, Dianne Mason and Robert Kapella (End-Payor Plaintiffs or Plaintiffs). These complaints were followed by a Consolidated Class Action Complaint on September 11, 2002, and thereafter by an Amended Consolidated Class Action Complaint (Complaint) in *In re Remeron End-Payor Antitrust Litigation*, Master Docket No. 02-CV-2007 (D.N.J.), filed January 5, 2004.

The Complaint alleges violations of the Sherman Act, *15 U.S.C. § 2*, and violations of state antitrust and/or unfair competition statutes. It alleges that Defendants (a) obtained United States Patent No. 5,977,099 ('099 patent) through fraud on the United States Patent and Trademark Office (PTO), (b) improperly listed the 099 patent in the United States Food and Drug Administration's (FDA's) "Approved Therapeutic Equivalence Evaluations" (Orange Book) to preserve **[*3]** their monopoly, (c) improperly delayed the listing of that patent in the Orange Book to prolong their monopoly, and (d) thereafter improperly commenced lawsuits asserting sham claims of patent infringement under the Hatch-Waxman Act, *21 U.S.C. § 355*, and the United States patent laws against generic drug companies (Generic Manufacturers), which sought permission to market generic versions of Organon's antidepressant drug, Remeron.

The Complaint alleges that Defendants took these several actions in order to forestall the market entry of FDA-approved generic versions of Remeron (i.e. generic mirtazapine). As a result, end-payor purchasers -- composed of Third-Party Payors (such as health benefit funds, HMOs, health insurers and hospitals), governmental entities, and individual consumers -- were allegedly required to purchase brand-name Remeron at monopoly prices instead of being able to purchase generic mirtazapine at a fraction of the price. Absent Defendants' illegal activities, it is alleged that patients would have been able to purchase lower-priced generic mirtazapine earlier, resulting in a savings of millions of dollars.

2. Extensive Discovery and Litigation Prior to Settlement **[*4]**

This litigation was complex and hotly contested from the outset, beginning with Defendants' initial unsuccessful efforts to obtain a stay from the Magistrate Judge. On December 18, 2002, this Court granted summary judgment in favor of certain Generic Manufacturers with respect to Organon's patent claims against them. Following that decision, class action complaints and individual complaints were filed by various direct purchasers of Remeron (Direct Purchasers), who are not a part of this litigation or settlement.

The Court then entered a case management Order on June 18, 2003, coordinating discovery in the End-Payor class actions, the Direct Purchaser cases, and the antitrust counterclaims filed by the Generic Manufacturers. Additional coordination and case management Orders were issued on July 16, 2003; August 11, 2003; and December 11, 2003, and several Orders regarding discovery were issued September 26, 2003; December 23, 2003; January 15, 2004; January 16, 2004; February 3, 2004; February 10, 2004; and February 13, 2004.

On December 3, 2003, the Court granted Defendants' motion to dismiss several antitrust

counterclaims by Generic Manufacturers including **[*5]** the (a) allegation that the 099 patent had been improperly listed by Defendants in the FDA's Orange Book for anticompetitive reasons, and (b) allegation that the Defendants' patent litigation against the Generic Manufacturers was baseless and brought for anticompetitive purposes to prolong Defendants' monopoly.

Overall, discovery was extensive. Approximately 800,000 pages of documents and data were produced by Defendants and third parties. Documents produced included hundreds of thousands of pages relating to Defendants' various anti-generic strategies for Remeron; Defendants' internal patent planning and life cycle management strategy; Defendants' regulatory and Orange Book listing strategies; Defendants' clinical development files, which contained additional documentation regarding other regulatory exclusivity strategies for Remeron; Defendants' patent files, including file wrapper and patent prosecution history documentation; and numerous scientific and medical articles and other publications which impacted upon the issues of non-infringement and invalidity of the 099 patent. End-Payor Plaintiffs' briefs revealed extensive research into the various legal and regulatory issues **[*6]** in this case, including an analysis of various FDA regulations and the case law interpreting those regulations.

End-Payor Plaintiffs' counsel pressed Defendants on the adequacy of their document production at a hearing on December 19, 2003, through a Notice of Deposition of Corporate Defendants Pursuant to *Fed. R. Civ. P. 30(b)(6)*, and through a letter brief on February 2, 2004. They took depositions of numerous current or former employees of the Defendants. These included many high-level executives and employees, who were deposed on complicated and highly technical issues relating to Defendants' various legal, regulatory, marketing and other anti-generic strategies for Remeron. Plaintiffs also consulted heavily with counsel for the Direct Purchasers, counsel for the Generic Manufacturers, and the State Attorneys General. In all, over 50 depositions were taken.

The End-Payor Plaintiffs also provided extensive discovery, including *Rule 26* Initial Disclosures on October 15, 2002, answers to interrogatories on September 8, 2003, supplemental voluminous document production, and deposition testimony by the two institutional End-Payor Plaintiff Class **[*7]** Representatives (Vista Healthplan, Inc. and United Food & Commercial Workers Local 56 Health & Welfare Fund). End-Payor Plaintiffs also engaged and met extensively with economic and other experts to develop support for theories of liability and to measure the monetary harm suffered by End-Payors of Remeron.

Defendants moved to dismiss or stay the End-Payor Plaintiffs' Consolidated Amended Complaint on November 14, 2002. End-Payor Plaintiffs filed a comprehensive Memorandum in Opposition to Defendants' Motion to Dismiss or Stay on January 17, 2003, and a Notice of Supplemental Authority in opposition on February 6, 2003, as well as a letter brief regarding subsequent authority on April 25, 2003, and a letter brief on further supplemental authority on June 3, 2003. Defendants filed their Reply Memorandum in Support of Motion to Dismiss or Stay on February 21, 2003, and filed a response to End-Payor Plaintiffs' April 25 letter brief on May 8, 2003, and a response to End-Payor Plaintiffs' June 3 letter brief on June 5, 2003.

Defendants opposed End-Payor Plaintiffs' motion for leave to file the End-Payor Plaintiffs' Consolidated Amended Complaint. End-Payor

Plaintiffs filed an extensive **[*8]** Memorandum of Law in Support of Plaintiffs' Motion for Leave to Amend on November 18, 2003. After briefing and oral argument, the Court granted End-Payor Plaintiffs' motion for leave to amend on December 31, 2003. Following oral argument, Defendants' initial motion to dismiss was denied as moot in light of End-Payor Plaintiffs' Amended Consolidated Complaint, by Order dated January 15, 2004.

Defendants thereafter moved to dismiss End-Payor Plaintiffs' Amended Consolidated Class Action Complaint on January 20, 2004. End-Payor Plaintiffs moved to certify a nationwide class of End Payors, including consumers as well as public (non-federal) and private institutional End Payors, on October 27, 2003. End-Payor Plaintiffs filed a comprehensive Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, together with a detailed and extensive Declaration from Harvard University health economist Professor Richard G. Frank in support of class certification. The Court had not issued a ruling on these two motions at the time of the proposed settlement.

As the End-Payor Plaintiffs were developing their case, the working group of State Attorneys General were conducting their own **[*9]** economic and factual investigation relating to the claims, underlying events, and conduct alleged by the End-Payor Plaintiffs and others. Beginning in March 2003, the Office of the Attorney General of Texas issued Civil Investigative Demands (CIDs) for documents and answers to written interrogatories to the Defendants and to third parties, including the Generic Manufacturers. A multi-state working group of State Attorneys General that was formed during the summer of 2003 conducted a targeted review of the 200 CD-ROMs of document images produced in response to the CIDs. The working group also reviewed transcripts of depositions and hearings from the patent litigation and the End-Payor and Direct Purchaser litigation. The State Attorneys General also researched and analyzed may legal and regulatory issues involving patents, the FDA and the Hatch-Waxman process. In addition, the State Attorneys General gathered data relating to purchases of Remeron from their state agencies, including their state Medicaid programs, as well as sales and pricing data from the Defendants and the Generic Manufacturers, and retained economists to analyze the data and create damages estimates. The State Attorneys **[*10]** General undertook extensive legal research and analysis and consulted with economic and intellectual property law experts regarding the theories of liability at issue in this case.

B. Mediation and Settlement

In December 2003, the parties began to explore the possibility of settlement with the working group of State Attorneys General. The settlement negotiations included a multi-day global settlement mediation before Judge Politan in January 2004. This was followed by a series of settlement discussions between Defendants' and End-Payor Plaintiffs' counsel in coordination with the working group of State Attorneys General. These discussions laid the groundwork, but settlement was not achieved until the end of a two-day settlement conference before this Court. The broad outlines of this agreement were discussed with the Court in chambers on February 18, 2004.

For the next half year, the End-Payor Plaintiffs and the States together engaged in further negotiations with Defendants to craft and finalize the detailed written settlement agreement. Other negotiations included crafting and finalizing the escrow agreement, the proposed preliminary approval order, the proposed final judgment, **[*11]** and the class

notice of the proposed settlement. The working group of State Attorneys General, in conjunction with the Federal Trade Commission, engaged in many further negotiations with Defendants to draft and finalize the Stipulated Injunction. State Attorneys General who were not involved in the working group were later invited to join the settlement.

C. Preliminary Approval of the Settlement and Execution of the Notice Plan

On October 20, 2004, End-Payor Plaintiffs and the Plaintiff States filed their Memorandum in Support of End-Payor Plaintiffs' and States' Motion for Preliminary Approval of Proposed Settlement. Contemporaneous with the filing of that M emorandum, a Complaint including all of the 50 States, the District of Columbia, and all U.S. territories was filed with the Court, along with the fully executed settlement agreement. [1]

[*12] On November 17, 2004, the Court issued an Order requesting End-Payor Plaintiffs and Plaintiff States submit a brief addressing in further detail their proposed Notice Plan. On November 24, 2004, End-Payor Plaintiffs and Plaintiff States submitted a Supplemental Memorandum in Further Support of Plaintiffs' Motion for Preliminary Approval that addressed the issues raised. On December 1, 2004, the Court held a hearing on the proposed preliminary approval of the settlement. At that hearing, the Court requested that the parties develop a proposed Plan of Distribution and include details regarding that plan in the notices, which the parties did. On January 14, 2005, the End-Payor Plaintiffs and Plaintiff States submitted a Second Supplemental Memorandum in Further Support of Plaintiffs' Motion for Preliminary Approval, setting forth the proposed Plan of Distribution and revised notices. On January 24, 2005, the Court followed up with an e-mail to the parties seeking additional information regarding certain language in the proposed order and the notice. End-Payor Plaintiffs and Plaintiff States responded to the Court's questions by return e-mail and revised the long-form and summary notices **[*13]** in response to the Court's inquiries.

On January 25, 2005, the Court entered an Order Conditionally Certifying Settlement Class, Preliminarily Approving Proposed Settlement, and Preliminarily Approving Representation of Attorneys General. In compliance with the settlement agreement and the Court's January 25, 2005 Order, Defendants paid $ 35 million into escrow on February 1, 2005.

Then the Notice Plan was carried out. The claims administrator, Complete Claim Solutions (CCS), mailed 13,431 notice packages to Third-Party Payor (TPP) class members. As of May 25, 2005, with the cooperation of the pharmacies, CCS had caused to be mailed 854,046 notice packets to potential consumer class members. The media consultant retained by CCS published the summary notice in national publications, such as *Reader's Digest, Parade, USA Today* and *USA Weekend.* To provide adequate coverage for class members residing in one of the United States Territories, the media consultant published summary notice in El Nuevo Dia, the Pacific Daily News and the Virgin Islands Daily News. The media consultant also published the summary notice in an industry periodical, National Underwriter, to reach TPP class **[*14]** members. Additionally, CCS contacted 22,643 physicians, and numerous mental health, senior and women's organizations soliciting their assistance in notifying their members of

---

[1] *States and Commonwealths of Texas, Florida, Oregon, et al. v. Organon USA Inc. and Akzo Nobel N. V.*, Civil Action No. 04-5126 (FSH) (Complaint filed Oct. 20, 2004).

the settlement. CCS distributed Public Service Announcements (PSAs) to 1,000 radio stations. As of May 25, 2005, 60 radio stations reported airing the PSAs a total of 11,179 times. CCS designed and developed a website for potential class members to obtain information and for consumer class members to file a claim online; and CCS set up and operates a toll-free 800 telephone number to answer class members' questions. As of May 25, 2005, over 40,000 visits have been made to the website and nearly 30,000 calls have been made to the toll-free telephone number.

D. The Settlement Terms

A copy of the settlement agreement and its exhibits were filed with the Court on October 20, 2004 with the motion by End-Payor Plaintiffs and States for preliminary settlement approval.

1. Monetary Payments And Distributions

The settlement provides for settlement payments by Defendants in a total amount of up to Thirty-Six Million Dollars ($ 36,000,000.00) (Settlement Consideration) consisting of: (1) Thirty-Three Million **[*15]** Dollars ($ 33,000,000.00) that Defendants paid into an escrow account on February 1, 2005, plus any interest, dividends and other distributions and payments earned on that sum while in escrow (Settlement Fund); (2) Two Million Dollars ($ 2,000,000.00) that Defendants paid on February 1, 2005 into a separate escrow account to pay for costs and expenses of settlement class notice and future costs of settlement administration, plus any interest, dividends and other distributions and payments earned on that sum while in escrow (Notice Fund); and (3) up to One Million Dollars ($ 1,000,000.00) that the Defendants will pay to the States following the effective date of the settlement agreement for their reasonable attorneys' fees and expenses incurred in their investigations of Defendants relating to this matter and in connection with the approval and administration of this settlement.

a. The Settlement Fund

On February 1, 2005, Defendants deposited into escrow the sum of Thirty-Three Million Dollars ($ 33,000,000.00). This Settlement Fund may be used for purposes of distribution to the members of the settlement class and the Plaintiff States, payment of further notice or administrative **[*16]** costs in excess of the amount of the Notice Fund up to $ 500,000.00, and payment of End-Payor Plaintiffs' attorneys' fees and costs, and incentive awards for the class representatives.

Under the Plan of Distribution, the net settlement amount (the settlement fund less notice and claims administration costs, attorneys' fees, expenses, and incentive awards) will be allocated as follows: 32.8% to consumers, 16.5% to state governmental purchasers, and 50.7% to TPPs. End-Payor Plaintiffs' Co-Lead Counsel have applied to the Court for an attorneys' fees award from the Settlement Fund equal to $ 7.8 million (23.6% of the Settlement Fund) plus 23.6% of interest that has accrued on the Settlement Fund, as well as reimbursement of almost $ 500,000.00 in expenses (including expert fees and costs). Attorneys' fees and expenses will be distributed by End-Payor Plaintiffs' Co-Lead Counsel among the ten law firms that initiated and litigated these End Payor cases. In addition, End-Payor Plaintiffs seek an award of incentive awards to the Class Representatives in the amount of Seventy-Five Thousand Dollars ($ 75,000.00).

b. The Notice Fund

Defendants deposited into escrow a separate amount of Two **[*17]** Million Dollars ($ 2,000,000.00) used exclusively for the

payment of notice and administrative fees and costs reasonably incurred for the purpose of providing notice of settlement to members of the settlement class, processing claims and administering the settlement, paying any taxes and tax expenses with respect to the escrow accounts, and paying reasonable fees and costs to the escrow agent.

c. Payment to State Attorneys General

After the effective date of the settlement agreement, Defendants will reimburse the Plaintiff States for their reasonable attorneys' fees and expenses incurred in connection with their investigations of Defendants relating to this matter, as well as their future reasonable attorneys' fees and expenses to be incurred in connection with settlement approval and administration. The aggregate amount of all such fees and expenses of all Plaintiff States that shall be reimbursable shall not exceed One Million Dollars ($ 1,000,000.00).

d. Any Unclaimed Money

Any amount in the Settlement Fund that remains after payment of all claims, Court-approved fees, costs, expenses, and incentive awards, and any supplemental distribution to settlement class members and Court-approved **[*18]** supplemental fees and costs, will be distributed to charitable organizations or state agencies that provide health or legal services to settlement class members, as recommended by End-Payor Plaintiffs' Co-Lead Counsel and/or State Liaison Counsel and approved by the Court.

2. Injunctive Relief

Defendants have agreed to an injunction prohibiting certain future conduct (Injunction), which will become effective when the settlement agreement becomes effective. The Injunction, which was negotiated by the Plaintiff States in conjunction with the Federal Trade Commission states, *inter alia*, that Defendants (a) "shall not seek, maintain, certify to, or take any other action in furtherance of, the listing or continued listing of any Patent in the Orange Book where the listing of such Patent in the Orange Book violates Applicable Law" and (b) "shall not" provide to the FDA "Listing Information that [is] false or misleading."

3. Release of Claims

Members of the settlement class (who have not made valid and timely elections to exclude themselves from the settlement class) release and discharge forever the Defendants from all claims which could have been asserted from the facts **[*19]** and circumstances giving rise to this case, from the beginning of time through January 25, 2005 (the date this Court preliminarily approved the Settlement Agreement).

II. ANALYSIS

A. Class Certification for Purposes of Settlement

In its Order preliminarily approving the settlement agreement, the Court conditionally certified the Settlement Class, defined in the settlement agreement as:

> All End Payors (including any assignees of such End Payors) who purchased and/or paid all or part of the purchase price of Mirtazapine Products in the United States during the period beginning June 15, 2001 through January 25, 2005 (the date of the Preliminary Approval Order). Excluded from the Settlement Class are (i) Defendants and any of their subsidiaries and affiliates, (ii) all federal governmental entities, agencies and instrumentalities, and (iii) all wholesalers and retailers and all persons or entities that purchased

> Mirtazapine Products primarily for purposes of resale.

The Court also preliminarily approved the following as Class Representatives:

> United Food and Commercial Workers Local 56 Health & Welfare Fund, and Board of Trustees of United Food and **[*20]** Commercial Workers Local 56 Health & Welfare Fund, a health benefit fund operated for the benefit of present and retired members of the union local and their families;
>
> Vista Healthplan, Inc., a health maintenance organization that provides comprehensive healthcare benefits to its members; and
>
> Gayle Taylor, Dianne Mason, and Robert Kapella, all of whom are consumers who purchased Remeron during the Class Period.

Under *Rule 23 of the Federal Rules of Civil Procedure*, the Court must engage in a two-step analysis in order to determine whether it should certify a class action for settlement purposes. First, the Court must determine whether the End-Payor Plaintiffs and Plaintiff States have satisfied the prerequisites for maintaining a class action as set forth in *Fed. R. Civ. P. 23(a)*. If the End-Payor Plaintiffs and Plaintiff States can satisfy these prerequisites, the Court must then determine whether the alternative requirements of *Rule 23(b)(2)* or *23(b)(3)* are met. *See* *Fed. R. Civ. P. 23(a)* advisory committee's note. "Confronted with a request for **[*21]** settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* *Fed. Rule Civ. Proc. 23(b)(3)(D)*, for the proposal is that there be no trial." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

1. The Requirements of *Rule 23(a)*

Rule 23(a) provides that class members may maintain a class action as representatives of a class if they show the court that:

> (a) the class members are so numerous that joinder of all members is impracticable;
>
> (b) the action addresses questions of law or fact common to the class;
>
> (c) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and
>
> (d) the class representative parties will fairly and adequately protect the interests of the class.

a. Numerosity

Courts will ordinarily discharge the prerequisite of numerosity if the class is so large that "joinder of all members is impracticable." *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998)*. "The plaintiff need not precisely enumerate the potential size of the proposed **[*22]** class, nor is the plaintiff required to demonstrate that joinder would be impossible." *Cannon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540, 543 (D.N.J. 1999)*; *accord* *Wachtel v. Guardian Life Ins. Co., 223 F.R.D. 196, 211 (D.N.J. 2004)*. Moreover, "it is proper for the court to accept common sense assumptions in order to support a finding of numerosity." *Cumberland Farms, Inc. v. Browning-Ferris Indus., 120 F.R.D. 642, 646 (E.D. Pa. 1988)* (citation omitted); *accord* *In re Nasdaq Market-Makers Antitrust Litig., 169 F.R.D. 493, 509 (S.D.N.Y. 1996)*.

Here, the plaintiff class consists of End Payors, including consumers, who paid all or part of the price of Remeron in the United States during the class period. "There can be no serious question that joinder of all these

parties, geographically dispersed throughout the United States, would be impracticable." *In re Corrugated Container Antitrust Litig., 80 F.R.D. 244, 247 (S.D. Tex. 1978)*. Hundreds of thousands of class members have received notice and tens of thousands have filed proofs of claim across. The class thus easily fulfills the numerosity requirement. **[*23]** "Numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the [numerosity] requirement." *Weiss v. York Hosp., 745 F.2d 786, 808 n.35 (3d Cir. 1984)*.

b. Commonality

The threshold commonality inquiry is whether there are any questions of fact or law that are common to the class. *Fed. R. Civ. P. 23(a)(2)*. "Commonality does not require an identity of claims or facts among class members." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001)*. Rather, "the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." "Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 57 (3d Cir. 1994)*. *Id. at 57*. "The threshold of commonality is not high." *In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)*.

In this case, many common questions exist. They include, *inter alia*, (1) what is the relevant **[*24]** product market?; (2) did Defendants have market power in that market?; and (3) did Defendants unlawfully monopolize that market? Antitrust actions often present common questions of law and fact, and are, therefore, frequently certified as class actions. *See, e.g., Transamerican Ref. Corp. v. Dravo Corp., 130 F.R.D. 70, 73 (S.D. Tex. 1990)* (antitrust price-fixing claims and common law fraud); *Cusick v. NVNederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022, 1024 (E.D. Pa. 1970)* (consumer class action charging monopolization). The commonality requirement is satisfied here.

c. Typicality

The Third Circuit has "set a low threshold for satisfying" the typicality requirement holding that "if the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001)*; *accord Baby Neal v. Casey, 43 F.3d 48, 58 (3d Cir. 1994)* (stating "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality **[*25]** requirement").

The typicality requirement "does not mandate that all putative class members share identical claims." *Newton, 259 F.3d at 184*; *see also Hassine v. Jeffes, 846 F.2d 169, 176-77 (3d Cir. 1988)*. Plainly, "there is nothing in *Rule 23(a)(3)* which requires named plaintiffs to be clones of each other or clones of other class members." *Advocate Health Care v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 202 F.R.D. 12, 27 (D.D.C. 2001)*; *accord In re Catfish Antitrust Litig., 826 F.Supp. 1019, 1036 (N.D. Miss. 1993)*.

In this case, the Class Representatives' and the class members' claims are identically predicated upon Defendants' alleged actions of improper listing and late listing of the 099 Patent in the Orange Book, fraud on the PTO, and filing of allegedly baseless patent infringement lawsuits against Generic Manufacturers. Thus, "there are no differences as to the type of relief sought or the theories of liability upon which plaintiffs will proceed." *In re Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D. Tex. 1978)*. The Class

Representatives' claims and those of the class members arise from the same **[*26]** course of conduct. "Since the various claims alleged appear to stem from a single course of conduct . . . we cannot conclude that the district court abused its discretion in holding that the typicality requirement was met." *Grasty v. Amalgamated Clothing and Textile Workers Union, 828 F.2d 123, 130 (3d Cir. 1987)*. Accordingly, the Class Representatives' claims are typical of those of the class members.

d. Adequacy of Representation

The 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)*. The Third Circuit has held that "adequate representation depends on two factors: (i) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (ii) the plaintiff must not have interests antagonistic to those of the class." *Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992)*; *accord In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 532 (3d Cir. 2004)*; *Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975).* **[*27]**

As to the first factor, End-Payor Plaintiffs' counsel have successfully prosecuted numerous antitrust class actions. Plaintiffs' Co-Lead Counsel, Arthur M. Kaplan, is a graduate of the Harvard Law School (J.D., *cum laude*, 1970) and has been active in antitrust and other complex litigation. Mr. Kaplan was Co-Lead Counsel for plaintiffs in the *In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)*, in which plaintiffs achieved settlements totaling $ 1.027 billion. [2] End-Payor Plaintiffs' Co-Lead Counsel Joseph H. Meltzer likewise is experienced. Mr. Meltzer is a graduate of the Temple University School of Law (J.D., *cum laude)* and has focused his practice exclusively on antitrust and complex class action litigation. In addition to prominent roles in prosecuting several major antitrust class actions to successful conclusions, including *In re Sorbates Direct Purchaser Antitrust Litig.*, C98-4886 (N.D. Cal. 2001) (settlements exceeding $ 92 million), Mr. Meltzer was appointed Co-Lead Counsel in *Ryan-House v. GlaxoSmithKline plc*, C.A. 2:02cv442 (E.D. Va.), a pharmaceutical antitrust class action brought on behalf of end payors of the **[*28]** prescription medication Augmentin which recently settled for $ 29 million. End-Payor Plaintiffs' Acting Co-Lead Counsel Jeffrey S. Istvan is a 1992 graduate of the University of Virginia School of Law, where he was a Hardy Cross Dillard Scholar. Following a federal judicial clerkship, he has been active in antitrust and consumer class actions. Mr. Istvan was sole lead counsel in *Parsky v. Wachovia Bank, N.A.*, 2001 WL 535786 (C.C.P. Phila. May 8, 2001), a consumer class action that recently settled for approximately than $ 23 million and worked on several large antitrust class actions, including *In re Copper Antitrust Litig.*, M.D.L. No. 1303 (7th Cir. 2004) (appeal pending); *In re Polypropylene Carpet Antitrust Litig., 93 F. Supp. 2d 1348 (N.D. Ga. 2000)* (settlements totaling $ 50 million); *and In re Commercial Explosives Antitrust Litig., 945 F. Supp. 1489 (D. Utah 1996)* (settlements totaling $ 77 million).

[*29] The State Attorneys General, as

---

[2] In *In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. at 474*, the court in approving that settlement stated, "it is difficult to conceive of better representation than the parties to this action achieved." Likewise, in *Advocate Health Care v. Mylan Labs. Inc. (In re Lorazepam & Clorazepate Anittrust Litig.), 2003 U.S. Dist. LEXIS 12344, 2003 WL 22037741, at *6 (D.D.C. June 16, 2003)*, in which Mr. Kaplan was co-counsel for the class of direct purchasers, the Court in approving settlement characterized counsel as "among the best and most experienced antitrust litigators in the country."

counsel for the Plaintiff States, have considerable expertise in complex antitrust *parens patriae* and class action litigation. State Liaison Counsel Patricia A. Conners, Director of the Antitrust Division of the Florida Attorney General's Office and past Chair of the National Association of Attorneys General ("NAAG") Multistate Antitrust Task Force. She was an Assistant Attorney General in the Antitrust Division, working on such notable cases as *Florida v. Borden, Inc.*, the 1989 school milk bid-rigging cases that resulted in a $ 36 million recovery for Florida school boards and *Florida v. Abbott Laboratories, Inc.*, the first of the so-called Infant Formula cases, and the *Disposable Contact Lens Litigation*, which settled in 2002 for $ 80 million. She has practiced antitrust law exclusively since 1987. State Liaison Counsel Kim Van Winkle is an Assistant Attorney General in the Office of the Attorney General of Texas, where she has practiced antitrust law exclusively since 1998. Ms. Van Winkle graduated in 1997 with honors from the University of Texas School of Law, with a joint Master of Public Affairs degree from the Lyndon B. Johnson **[*30]** School of Public Affairs. She has participated in the investigation and litigation of numerous complex, multistate antitrust cases, including *In re Buspirone Antitrust Litigation*, No. 01-CV-1 1401, MDL 1413 (S.D.N.Y. Mar. 7, 2003) (final approval granted for $ 100 million settlement of end-payor action alleging monopolization of drug markets through patent abuse). These attorneys are qualified, experienced, and have skillfully worked on this litigation.

The Class Representatives' interests are not antagonistic to those of the absent class members. The central issues in this case are critical to the claims of both groups. In proving these common issues, the Class Representatives further the absent class members' claims no less than their own. *Cf.* *In re Cardizem CD Antitrust Litig., 218 F.R.D. 508, 518 (E.D. Mich. 2003)* ("Each Class member . . . has a common interest in establishing that he, she, or it was financially injured by Defendants' conduct and in an aggregate damages computation"); *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 251 (D. Del. 2002)*, *aff'd*, *391 F.3d 516 (3d Cir. 2004)* ("The named plaintiffs share **[*31]** a strong interest in establishing liability of defendant, seeking the same type of damages (compensation for overpayment) for the same type of injury (overpayment for warfarin sodium)"). Further, "it is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general." *In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971)*; *accord* *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 387 (D.D.C. 2002)* (stating the plaintiff states "have evidenced a genuine interest in this litigation, and are qualified and experienced."). States, acting through their attorneys general, have frequently been held to be the "best representatives of the consumers residing within their jurisdictions." *In re Ampicillin Antitrust Litig., 55 F.R.D. 269, 274 (D.D.C. 1972)*; *see also* *West Virginia v. Chas Pfizer & Co., Inc., 440 F.2d 1079, 1089-91 (2d Cir. 1971)*. Thus, the adequacy requirement has been met.

2. The Requirements of *Rule 23(b)(3)*

Once the requirements of *Rule 23(a)* are met, *Rule 23(b)(3)* permits the maintenance of a class action if "the court **[*32]** finds [a] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [b] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

"The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently

cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. As the Supreme Court has observed, "predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem, 521 U.S. at 625*. In particular, "antitrust actions involving common questions of liability for monopolization . . . have frequently been held to predominate for the preliminary stage of class certification." *Lorazepam & Clorazepate, 202 F.R.D. at 29*. "The presence of individual questions . . . does not mean that the common questions of law and fact do not predominate." *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)*.

a. Questions of Law and Fact Common to the Class Predominate

"As is true in many **[*33]** antitrust cases, the alleged violations of the antitrust laws at issue here respecting . . . monopolization relate solely to Defendants' conduct, and as such proof for these issues will not vary among class members." *Lorazepam & Clorazepate, 202 F.R.D. at 29* (internal quotation marks and citation omitted). As the Third Circuit held in *In re Linerboard Antitrust Litig., 305 F.3d 145 (3d Cir. 2002)*, *cert. denied*, *538 U.S. 977, 123 S. Ct. 1786, 155 L. Ed. 2d 666 (2003)* that "common issues . . . predominate here because the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *Id. at 163* (citation omitted); *see also Warfarin Sodium, 391 F.3d at 528*. "The common questions of law, the elements of the monopolization claim fully enumerated, . . . dwarf, rather than merely predominate over, any individual questions." *Sollenbarger v. Mountain States Tel. and Tel. Co., 121 F.R.D. 417, 427 (D.N.M. 1988)*; *see also Davis v. Southern Bell Tel. Co., 1993 U.S. Dist. LEXIS 20033, 1993 WL 593999, *7 (S.D. Fla. Dec. 23, 1993)* ("The issues of antitrust violation, injury, and damages all turn **[*34]** on class-wide proof").

In this case, the claims of all class members arise from the same facts giving rise to the same legal claims, as discussed in the above sections on commonality and typicality. Accordingly, the predominance requirement is satisfied.

b. A Class Action is Superior to Other Available Methods

"In the case of consumers, the class members here have little interest in individually controlling the prosecution or defense of separate actions,' *Fed. R. Civ. P. 23(b)(3)(A)*, because each consumer has a very small claim in relation to the cost of prosecuting a lawsuit." *Warfarin Sodium, 212 F.R.D. at 251*. Indeed, "where it is not economically feasible to obtain relief . . . aggrieved persons may be without any effective redress unless they employ the class action device." *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)*.

In contrast to the inefficiency of duplicative individual lawsuits, "the efficacy of resolving all plaintiffs' claims in a single proceeding is beyond discussion." *Sollenbarger v. Mountain States Tel. and Tel. Co., 121 F.R.D. 417, 436 (D.N.M. 1988)*. "The **[*35]** class action mechanism offers substantial economies of time, effort and expense for the litigants as well as the Court." *In re Terazosin Hydrochloride, 220 F.R.D. 672, 700 (S.D. Fl. 2004)*.

In this very expensive litigation involving hundreds of thousands documents, it would not have been economically feasible for many plaintiffs to seek individual redress. Judicial economy as well as fairness to Defendants makes the litigation of such claims in one action far more desirable than numerous separate actions litigating the same issues.

Because the End-Payor Plaintiffs and Plaintiff States have satisfied all of the requirements under *Fed. R. Civ. P. 23(a)* and the requirements of *Fed. R. Civ. P. 23(b)(3)*, this Court certifies the proposed class for purposes of this settlement.

B. The Notice of Settlement

The settlement class members are entitled to notice of the proposed settlement and an opportunity to be heard. *See Fed. R. Civ. P. 23(e)*; *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*. The notice period in this case **[*36]** began on March 14, 2005, and continued for forty-five (45) calendar days until April 27, 2005. Under the settlement agreement and Preliminary Approval Order, settlement class members had that Notice Period of 45 days to submit any requests to opt-out of the class and until May 28, 2005 to submit objections.

1. Notice Plan

The Notice Plan consisted of multiple components designed to reach consumers through paid print and broadcast media through Public Service Announcements, earned media, and direct mailed notice (to the extent that information could be obtained) to purchasers of Remeron. The media plan provided an estimated reach of more than 90 percent, and frequency realized may have been as much as 2.5 times. [3]

[*37] a. Published Notice

Syndicated data, audited data and proprietary research from the National Mental Health Association and the National Foundation for Depressive Illness were reviewed to identify the media vehicles that would most effectively deliver the message to potential class members in the U.S. and its territories (specifically, Guam, U.S. Virgin Islands, and Puerto Rico). The resulting plan was that the summary notice (about 1 page) be placed in a combination of national Sunday Supplements, *USA Today*, and *Reader's Digest* to reach consumers, plus an insertion in *National Underwriter* to reach Third-Party Payors. The Notice Plan's consumer published media schedule was based upon techniques specifically designed for legal notification.

The long-form notice (several pages) provides detailed information about the proposed settlement, including a summary of the monetary and injunctive terms, the allocation percentages, the requested attorneys' fees, litigation costs and incentive awards, and detailed information on the terms of the releases. In addition, the long-form notice provides information about the fairness hearing date, and Settlement Class members' rights to **[*38]** object or opt out (and deadlines and procedures). Finally, the long-form notice included a Claim Form to be completed and returned by Class members. The Claim Form also is available on a dedicated website, *www.RemeronSettlement.com*, or by calling a toll-free 800 telephone number provided in the long-form notice and the summary notice.

b. Mailed Notice

Direct mail notices consisted of mailing the settlement notice packet (including the long-form notice and a Claim Form) to inform potential class members of their rights and how they could participate in the class action. This direct mail settlement notice packet was sent to all potential TPP class members included in CCS' proprietary TPP mailing database, which includes 13,431 TPPs (e.g.,

---

[3] Measurement of the notice program is provided in terms *of reach and frequency. Reach* is the estimated percentage of a target audience reached through a specific media vehicle or combination of media vehicles. *Frequency* is the estimated average number of times an audience is exposed to advertising vehicles carrying the message.

insurance companies, healthcare and welfare funds, self-insureds, etc.) and record keepers (e.g., third-party administrators and pharmacy benefit managers).

In addition, potential consumer class members were contacted by direct mail with the assistance of pharmacies and psychiatrists. Many potential class members were mailed a settlement notice packet by their pharmacy and/or psychiatrist. Twenty-six large national pharmacies participated in mailing **[*39]** settlement notice packets to their customers who purchased Remeron and mirtazapine during the claim period, including 14 of the top 25 drug chains, 6 of the top 7 mass merchant pharmacies, and 3 of the top 6 supermarket pharmacies. In all, more than 850,000 settlement notice packets were mailed to potential class members through this program. This direct mail program provided an opportunity to reach those class members who may have missed the summary notice in their newspapers.

c. News Media

CCS implemented a campaign to expand notice through free or "earned" media which included contacting consumer groups such as AARP, mental health groups such as the National Alliance for the Mentally Ill, National Federation for Depressive Illnesses, National Mental Health Association, National Community Pharmacists Association, and issuing a press release over Businesswire. The State Attorneys General have undertaken further efforts to expand notice through the news media. A number of Attorneys General issued press releases about the settlement, notice and claims process, including the toll-free telephone numbers and website address. These press releases were run in newspapers and broadcast on **[*40]** the radio.

d. Toll-Free Telephone Number

Complete Claims Solutions has obtained a toll-free telephone number that allows callers to request the notice of settlement and obtain a Claim Form. It also allows them to find out other information about the settlement. This number was included in the summary notice, the notice of settlement, and on the website, *www.RemeronSettlement.com*.

e. Internet Website

In addition to the media outlets described above, Complete Claims Solutions developed and maintains a website at *www.RemeronSettlement.com*, which can be accessed by the settlement class members. This website includes the summary notice and long-form notice and a Claim Form.

f. Results of Notice Effort

CCS received nearly 65,000 individual consumer claims and 1,156 TPP claims. In addition, over 40,000 visits have been made to the settlement website, and approximately 30,000 telephone calls have been made to the toll-free number.

2. The Notice Plan Meets the Requirements of Due Process

"In order to satisfy due process, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an **[*41]** opportunity to present their objections." *In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 119 (D.N.J. 2002)* (internal quotations and citation omitted). In *Rule 23(b)(3)* actions, "class members must receive the best notice practicable under the circumstances." *Id. at 119-20* (quoting *Fed. R. Civ. P. 23(c)(2)(B)*); *see also Varacallo v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 207, 225 (D.N.J. 2005)*.

The notice forms are similar to those successfully used in numerous other class

settlements. *See, e.g.,* *In re Toys "R" Us Antitrust Litig., 191 F.R.D. 347 (E.D.N.Y. 2000)*; *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004)*. This Court reviewed the summary notice and the long-form notice in detail and suggested several changes, which were made, prior to the preliminary approval of the settlement. The final product is clear and comprehensive, and is written in simple terminology. The notices "fairly, accurately, and neutrally describe the claims and parties in the litigation, the terms of the proposed settlement and the identity of persons **[*42]** entitled to participate in it," and apprise affected class members of their options with regard to the proposed settlement. *Foe v. Cuomo, 700 F. Supp. 107, 113 (E.D.N.Y. 1988)*.

For those whose names and addresses cannot be determined by reasonable efforts, notice by publication suffices under both *Rule 23(c)(2)* and under the *Due Process Clause*. *Carlough v. Amchem Products, Inc., 158 F.R.D. 314, 325 (E.D. Pa. 1993)* (citing *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*). Under the circumstances of this case, where End-Payor Plaintiffs, Plaintiff States and Defendants have limited and/or incomplete access to the names or addresses of End-Payors who purchased Remeron during the Class Period, [4] the law requires reasonably feasible notice by publication coupled with such mailed notice. The plan is allocated $ 2 million for this task and for processing returned Claims Forms, spending over $ 750,000 on publication notice alone. The Notice Plan meets the requirements of due process.

[*43] C. Final Approval of Class Action Settlement

1. State Attorneys' General Authority to Settle All Consumer Claims

Plaintiff States, by their Attorneys General, have the authority to settle and release indirect purchaser claims in a *parens patriae* or other representative capacity. "A State has a quasi-sovereign interest in the health and well being -- both physical and economic -- of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*. That federal authority is supplemented by state statutory provisions and case law. All Attorneys' General have authority to represent consumers, depending on the state, in at least one of the following four ways: (1) *parens patriae* authority expressly conferred by the state legislature, (2) authority expressly conferred by the state legislature that is the functional equivalent of parens patriae authority, (3) judicially recognized authority to represent consumers, or (4) authority to proceed as a class representative of consumers pursuant to *Fed. R. Civ. P. 23*. *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.* ("Lorazepam"), *205 F.R.D. at 386-87.* **[*44]**

2. Settlements That Meet Certain Conditions Are Presumed Fair

The Third Circuit affords an initial presumption of fairness for a settlement "if the court finds that: (1) the negotiations occurred at arm's

[4] The privacy of consumers who purchase prescription medication is protected under the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-91. *42 U.S.C. § 1320d-2*. HIPAA protects "protected health information" from disclosure. "Protected health information" means individually identifiable health information that is maintained and/or transmitted in any form or medium. *45 C.F.R. § 160.103 (2004)*. Pharmacists are health care providers covered by the act. Patient authorization is required for disclosure of "protected health information." Improper disclosure may subject the provider to civil and/or criminal penalties. *42 U.S.C. § 1320d-5* and *6*. Thus, End-Payor Plaintiffs and Plaintiff States were unable to obtain a list of potential class members for a direct mail campaign and instead had to rely on pharmacies and psychiatrists to forward notices to their customers and patients.

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 Cendant Corp. Litig., 264 F.3d 201, 233 n.18 (3d Cir. 2001)*. As discussed in Part I above, this case has seen heated litigation between the parties and the review of hundreds of thousands of documents and dozens of depositions. The Plaintiffs' lawyers involved have a great deal of experience in antitrust litigations such as these, as discussed in Part II(A)(1)(d), and favor settlement. Defendants' Counsel, including Dean Ringel of Cahill, Gordon, & Reindel and Joseph Rebein of Shook, Hardy & Bacon, are prominent litigators from successful law firms and also favor settlement.

The Court is also satisfied with the qualifications of State Attorneys General who also favor settlement. Furthermore, "the participation of the State Attorneys General furnishes extra assurance that consumers' **[*45]** interests are protected." *In re Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 351 (E.D.N.Y. 2000)*; *accord* *New York v. Reebok Int'l. Ltd., 96 F.3d 44, 48 (2d Cir. 1996)* (noting that Attorneys General in *parens* actions are motivated by concern for the public interest); *Wellman v. Dickinson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980)*.

Finally, there have been few objectors to the settlement, as discussed in Part II(C)(4)(b). This Court determines that an initial presumption of fairness attaches, although such finding is not dispositive.

3. Standard for Court Approval of Settlement

A class action may be settled under *Rule 23(e)* upon a judicial finding that the settlement is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)(C)*. Under *Rule 23(e)*, this Court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. *See* *Walsh v. Great Atlantic and Pacific Tea Co., 96 F.R.D. 632, 642 (D.N.J. 1983)*. The range "recognizes the uncertainties of law and fact in any **[*46]** particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)*.

Because a settlement represents an exercise of judgment by the negotiating parties, cases have consistently held that the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement. *Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir. 1974)*; *Bullock v. Administrator of Kircher's Estate, 84 F.R.D. 1, 4 (D.N.J. 1979)*. "The temptation to convert a settlement hearing into a full trial on the merits must be resisted." *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1315 (3d Cir. 1993)*.

To determine whether the settlement is fair, reasonable and adequate under *Rule 23(e)*, courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*, and recently reaffirmed in *Warfarin Sodium, 391 F.3d at 534-35*. These factors are:

> (a) The complexity, **[*47]** expense, and likely duration of the litigation;
>
> (b) the reaction of the class to the settlement;
>
> (c) the stage of the proceedings and the amount of discovery completed;
>
> (d) the risks of establishing liability;
>
> (e) the risks of establishing damages;
>
> (f) the risks of maintaining the class action

through the trial;

(g) the ability of the defendants to withstand a greater judgment;

(h) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (quoting *Girsh, 521 F.2d at 156-57*). [5]

[*48] 4. Evaluation of the Settlement Under Applicable Standards

a. The Complexity, Expense and Likely Duration of the Litigation

By reaching a favorable settlement prior to dispositive motions or trial, the End-Payor Plaintiffs and Plaintiff States avoided significant expense and delay, and ensured recovery. An "antitrust action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004)* (citations omitted); *see also Nichols v. Smithkline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *12 (E.D. Pa. Apr. 22, 2005)* (same). This litigation involves complicated patent, regulatory, and antitrust laws, including interpretation of provisions of the *Hatch Waxman Act* and their application to antitrust law.

Although the End-Payor Plaintiffs have conducted a substantial amount of discovery, significant additional work would be necessary if this case proceeded beyond the current 12b6 and class certification stages. First, expert witness reports and depositions would need to be undertaken. Then, summary judgment motions would need to be resolved. In the Direct Purchaser case, which recently came to **[*49]** a preliminary settlement, thousands of pages of materials were filed with this Court on summary judgment issues such as market definition, market power, and improper / late listing in the FDA Orange Book. These issues would most likely come up again in the End-Payor Plaintiffs' litigation.

Furthermore, a trial on the merits of the action would entail considerable expense: Market definition alone would require dozens of hours of testimony at this stage. Finally, trial would likely not end the litigation, given the right to appeal. This factor weighs in favor of the settlement. *See In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 642 (E.D. Pa. 2003)* (noting that the "protracted nature of class action antitrust litigation means that any recovery would be delayed for several years," and thus settlement's "substantial and immediate benefits" to class members favors settlement approval); *Slomovics v. All for a Dollar, Inc., 906 F. Supp. 146, 149 (E.D.N.Y. 1995)* (where litigation is potentially lengthy and will result in great expense, settlement is in the best interest of the class members).

b. The Reaction Of The Settlement Group

As described **[*50]** above in Part II(B)(1)(b), CCS sent out 13,431 notices to third-party payors, and caused the mailing of more than 850,000 notices to potential consumer class members across the country. In addition, CCS developed and maintained a website and a toll-free telephone "hotline" to provide information about the settlement and arranged

---

[5] When evaluating settlements in *parens patriae* actions brought by state Attorneys General under either the *Clayton Act* or comparable state laws, courts have generally utilized the standards used to analyze private class action settlements under *Rule 23*. *See, e.g., In re Toys "R" Us Antitrust Litig., 191 F.R.D. at 352*; ***New York by Vacco v. Reebok Int'l, 903 F. Supp. 532, 535 (S.D.N.Y. 1995)***; *In re Minolta Camera Prod. Antitrust Litig., 668 F. Supp. 456 (D. Md. 1987)*.

for publication of the summary notice over a period of approximately six weeks in selected publications throughout the country.

In response, no TTP excluded itself from the settlement, [6] and about 70 individual consumers timely submitted Requests for Exclusion. Given that the TPP portion of the class is made up largely of sophisticated managed care companies, the fact that not one of them wishes to exclude itself is strong evidence of a positive reaction to the settlement. Equally strong evidence is the very low number of consumer opt-outs relative to the hundreds of the thousands notified and the tens of thousands who submitted claims forms.

[*51] Also relevant is the number of objections. Eight individuals and two TPPs filed objections. [7] **[*52]** This Court has considered all of the objectors' written submissions [8] and the three oral arguments that were made at the Fairness Hearing. The non-monetary objections that have been filed are the following: (1) the name of the charity that would receive left over funds has not been disclosed, (2) Rider A, a confidential attachment to the settlement agreement containing provisions regarding the number of opt-outs that would lead to termination of the settlement, was not disclosed, (3) consumer information should have been subpoenaed from the ten largest retail pharmacies and those consumers should have received direct payments without having to file Claims Forms, and (4) the settlement should not contain a boilerplate provision that allows for modification of the settlement without notice to the class, despite agreement by the settling parties and Court approval, and (5) 30 days after the 45-day notice period was an insufficient amount of time to object to the settlement and the 45-day notice period was an insufficient amount of time to opt-out of the settlement.

These objections are considered in turn. First, when providing notice, the law does not require that the charity that may receive left over funds be disclosed in notice to the class. *See* Mangone v. First USA Bank, 206 F.R.D. 222, 230 (S.D. Ill. 2001) ("Courts have broad discretion in distributing unclaimed class funds, and where the parties agree on the distribution of unclaimed class funds, the court should defer to that method of distribution.") (citing Wilson v. Southwest Airlines, Inc., 880 F.2d 807, 815-16 (5th Cir. 1989) (where parties agree to distribution of unclaimed class fund, and agreed distribution is equitable, court will defer to such agreement)). More importantly, this objection is moot as the claims administrator has advised that there are no surplus funds because of the high response to the notice.

Second, Courts have held that information regarding conditions that **[*53]** may terminate a settlement need not be detailed in the notice to the class. *See* In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 253 (D. Del. 2002) (stating that notice did not need to include details on "the confidential opt-out' threshold beyond which defendant reserved the right to withdraw from the settlement"). The Court, the Attorneys General, and Class

---

[6] Five TPPs did initially opt out, but they soon entered into an agreement with the parties to request that the Court permit them to rescind their notices of exclusion. That agreement is reflected in a Memorandum of Understanding filed with the Court that guaranteed $ 450,000 more to the Settlement Fund, instead of going to Plaintiffs' Attorneys' Fees. The Court granted the request.

[7] Two objections were filed on behalf of TPPs, Health Care Service Corporation and certain Blue Cross entities; and eight were filed by consumers, Eugene Clasby, Roberta Geha, Rhonda Marcus, Nadine Street, William L. Bedford, Susan Ruth Hall, Dot K. Kensinger, and Robert L. Kensinger. The objections by the latter five individuals were filed by the same attorney, Stephen Tsai, who spoke at the Fairness Hearing.

[8] As some objection points are entirely unsupported, too vague to comprehend, or clearly without merit, the Court only writes on those objections that require some explanation.

Counsel know the contents of Rider A and agreed to its sealing in the interest of consummating the settlement. The Rider has no legitimate bearing on a class member's decision to opt-out of the settlement, object, or file a claims form.

Third, the suggested subpoenas of the top 10 retail pharmacies is unnecessary given that 14 of the top 25 pharmacy chains, 3 of the top 6 supermarket, and 6 of the top 7 mass merchant retailers voluntarily participated in searching their databases for Remeron purchasers and sending notices with Claims Forms to them. This process led to 800,000 notices being sent and nearly 65,000 consumer claims being filed. As to the objector's additional suggestion to automatically distribute money to those who purchased Remeron through a top 10 pharmacy, this Court will not favor one **[*54]** group of class members over another. *See, e.g.,* *In re Diet Drugs Prods. Liab. Litig., 93 Fed. Appx. 338, 343 (3d Cir. 2004)* ("a class action settlement cannot arbitrarily prefer one group of plaintiffs over another -- because such a rule would be inimical to the very principles of class advocacy"). In addition, there are practical problems with the suggestion, including those associated with blindly sending checks to addresses that may be outdated.

Fourth, the boilerplate provision that allows for modification of the settlement without notice to class is satisfactory and necessary. The class is protected from adverse modifications by *Rule 23* and the requirements of due process, regardless of what the provision says, and the Court is charged with enforcing these protections. Minor modifications may be necessary to a settlement agreement (indeed may be favorable to the class), and additional class notice is not always required because, e.g., of the cost of notice that would take recovered money from the class. *See In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 473 n.10* ("Class members need not be informed of the [amendment **[*55]** to the settlement agreement] because the [settlement] is only more valuable with these changes"). In this case, the adjustment that was made to the settlement that favored the class, after notice went out, was followed by additional notice and by opportunity for any opt-outs to return to the class in order to partake in the additional recovery. [9]

Fifth, 30 days after a 45-day notice period is a sufficient amount of time to object to the settlement. This Court suggested this deadline to Plaintiffs' Counsel shortly after the preliminary fairness hearing. Many district courts have set a similar deadline in antitrust class action settlements. In *In re Augmentin Antitrust Litig.* (Case No. 02-CV-442, E.D. Va.), Judge Morgan approved a forty-five day notice period and set the opt-out and objection deadline two weeks from the close of the notice period. In *In re Buspirone Antitrust Litig.* (Case No. 01-CV-7951-JGK, S.D.N.Y), Judge Koeltl set the opt-out and objection deadline forty-five **[*56]** days after the notice date. And in *In re Lorazepam & Clorazepate Antitrust Litig.* (Case No. 99-276-TFH/JMF, D.D.C.), Judge Hogan also set the objection deadline forty-five days after the notice date. Indeed, the objector Health Care Service Corporation, submitted its objection on May 16, 2005, two weeks before the May 28, 2005 objection deadline, thus revealing the adequacy of the objection period.

As to the opt-out deadline, this Court passes no judgment because the issue is moot. Of over 800,000 notices only two objections were made stating insufficient time to opt-out during the 45-day notice period. On the other hand, at least 65,000 class members chose not to opt-

---

[9] *See supra* note 6.

out, as evidenced by their filing of claims forms. At the Fairness Hearing, both objectors on this issue took the opportunity to be heard. Counsel to Health Care Service Corporation informed the Court at the Fairness Hearing that, despite objecting, the company did not wish to opt-out. Counsel to Nadine Street, the other objector in this regard, also spoke at the Fairness Hearing. Rather than expressing a desire to opt-out of the settlement, the lawyer requested additional time to forge an objection to Plaintiffs' **[*57]** motion for attorneys' fees, which the Court granted, as discussed in Part II(E)(1)(b). Thus, the issue is moot.

Six additional objection points were made pertaining to the class's compensation. They are the following: (1) one group in the class (TPPs or individual consumers) is getting more than its fair share than the other group, (2) the Plan of Distribution's reliance on "expenditures" rather than "damages" is inappropriate and unfairly benefits TPPs, (3) claim rates of the TPPs or individual consumers should not be considered in distributing monies between the two groups, (4) money should "spill over" from the individual consumers' allocation to the TPPs' allocation before any money is made available for a *cy pres* distribution, (5) the individual consumers are not receiving sufficient compensation, and (6) class members from states whose antitrust laws do not provide for the recovery of damages to indirect purchasers should not receive compensation.

These objections are also considered in turn. First, both the TPP group and the individual consumer group make the same argument that the other group is getting more than it should. Two (of two) TPP objectors contend that they **[*58]** are entitled to more than the Plan of Distribution's dedicated 50.7%, while at the same time five (of seven) individual consumers contend that the individuals are entitled to more than the Plan of Distribution's dedicated 32.8%. As discussed in Part II(D), the Court finds the Plan of Distribution to be fair. These conflicting objections are without merit. [10]

Second, the reasons put forth as to why reliance on "expenditures" would be inappropriate is inapplicable here. The objector, Eugene Clasby, is concerned that damages based on the end-payors **[*59]** "expenditures" would be skewed in favor of TPPs because such a measurement would not discount for co-payments paid by individual consumers or for certain rebates received by TPPs. However, the "expenditures" data used in this case in fact does factor in these offsets. Furthermore, the Third Circuit has approved settlement allocations based on expenditures rather than damages, *see* *In re Warfarin Sodium Antitrust Litig., 391 F.3d at 539*, and this precise objection by Eugene Clasby was overruled in *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, *18 (E.D. Pa. Apr. 22, 2005)*.

Third, claim rates were not a factor in determining the Plan of Distribution's distribution percentages. The allocation is based on each group's expenditures. That TPPs might be more likely to claim their damages did not give them a higher percentage of the Settlement Fund.

Fourth, the issue of "spill over" from individual consumers to TPPs prior to any *cy pres* distribution is moot. The claims administrator has reported that consumer claims already exceed the amount available to them by a very wide margin, thus no funds remain for a *cy pres* distribution or a transfer **[*60]** to the

---

[10] Several objectors also objected that they did not have access to the economic reports that were the basis of the Plan of Distribution, and objector Eugene Clasby made a motion to this effect. As a result, the Court ordered that End-Payor Plaintiffs make this underlying information available prior to the Fairness Hearing, which they did. The objection was not pursued at the Fairness Hearing and one TPP objector, the Blue Cross entities, withdrew its relevant objections.

TPPs.

Fifth, the individual consumers are receiving adequate compensation. They are receiving an estimated $ 8.1 million in the aggregate which, based on the estimated number of claims filed, will result in each claiming consumer receiving approximately 34 cents for every dollar spent on Remeron. Discounting for litigation risk, cost, and delay, as discussed in Part I and Part II(C)(4), this Court cannot find that such a recovery is inadequate.

Sixth, class members from states whose antitrust laws do not provide for the recovery of charges to indirect purchasers should still receive compensation if the parties agreed to it. An important part of a settlement like this one is that Defendants achieve "total peace," thus all potential plaintiffs must be compensated in order to preclude future litigation attempts and allow such a settlement to consummate. *See* *In re Chicken Antitrust Litig., 669 F.2d 228, 238 (5th Cir. 1982)*. Furthermore, Plaintiffs are being compensated not just for state antitrust law violations but also for the common law claim of unjust enrichment. These two objectors, both represented by Stephen Tsai, provide no legal authority for their position **[*61]** nor do they at all consider that the Settlement Fund would likely have been much smaller if end-payors from certain states were barred from compensation (assuming the settlement would still have been consummated at all). The objection is without merit.

c. The Stage of the Proceedings and the Amount of Discovery Completed

In examining the stage of the litigation at which a settlement was reached, the proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Warfarin Sodium, 391 F.3d at 537*. Under this standard, End-Payor Plaintiffs and the Plaintiff States were clearly in a position to make the necessary risk assessments in the context of settlement negotiations. As discussed in Part I, End-Payor Plaintiffs conducted an extensive economic and factual investigation, including review hundreds of thousands of pages of documents and data produced by Defendants and third parties, taking depositions of many current or former employees of the Defendants, and consultation with counsel for the Direct Purchasers, counsel for the Generic Manufacturers, the State Attorneys General, and others.

The Office of the Attorney General **[*62]** of Texas also began an investigation into Defendants' alleged Remeron monopoly maintenance practices in March 2003, and a multi-state working group was formed in July 2003 with several other State Attorneys General to pursue that investigation. The investigation included issuance of Civil Investigative Demands to Defendants and third parties, and review of documents produced. In cooperation with the Federal Trade Commission, the Plaintiff States conducted interviews of experts, potential experts, and potential witnesses. The Plaintiff States reviewed and analyzed thousands of documents from the Defendants' voluminous production, and read numerous deposition and hearing transcripts.

"The pursuit of early settlement is a tactic that merits encouragement; it is entirely appropriate to reward expeditious and efficient resolution of disputes." *In re Vitamins Antitrust Litig., 1999 U.S. Dist. LEXIS 21963, 1999 WL 1335318, at *4 (D.D.C. Nov. 23, 1999)*. "Early settlements benefit everyone involved in the process and everything that can be done to encourage such settlements, especially in complex class action cases, should be done." *In re M.D.C. Holdings Sec. Litigation, 1990 U.S. Dist. LEXIS 15488, 1990 WL 454747, at *7 (S.D. Cal. Aug. 30, 1990)* **[*63]** . Given the

extensive amount of time devoted to this case, End-Payor Plaintiffs and Plaintiff States have obtained sufficient information to adequately evaluate the merits of their claims.

d & e. The Risks of Establishing Liability and Damages

These two factors "survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *Warfarin Sodium, 391 F.3d at 537*. End-Payor Plaintiffs and the Plaintiff States initially proceeded against Defendants on four theories of antitrust liability: (1) Fraud on the PTO in connection with the prosecution and obtaining of the 099 patent; (2) wrongful listing of the 099 patent in the Orange Book; (3) sham patent litigation against generic competitors based on the 099 patent; and (4) late listing of the 099 patent.

This Court issued a series of rulings that limited the possibility of Plaintiffs achieving ultimate success on the merits. First, regarding the Generic Manufacturers' claims against Organon, the Court on December 3, 2003 dismissed those antitrust claims that were based on the theory that the 099 Patent **[*64]** was improperly listed in the Orange Book. The Court held that "the then existing statute and regulation, *21 U.S.C. §§ 355(b)(1)* and *(c)(2)* and *21 C.F.R. § 314.53(b)*, gave Organon a reasonable basis for listing in the Orange Book." *Organon Inc. v. Mylan Pharms., Inc., 293 F. Supp. 2d 453, 459 (D.N.J. 2003)*. The Court also dismissed the allegations that Organon initiated sham patent infringement lawsuits against the Generic Manufacturers, ruling that Organon's infringement theory was reasonable, in large part because of the existence at the time of three district court decisions allowing such claims against Generic Manufacturers.

Although these rulings were made in the litigation involving the Generic Manufacturers, this Court applied those rulings to the Direct Purchaser litigation (and, by inference, to this litigation) under the doctrine of collateral estoppel or the doctrine of law of the case. *Walgreen Co. v. Organon, Inc. (In re Remeron Antitrust Litig.), 335 F. Supp. 2d 522, 526, n.4 (D.N.J. 2004)*. This Court also dismissed the Direct Purchasers' antitrust claims based on fraud on the PTO in that Opinion.

As a result of **[*65]** these rulings, the late listing claim is, for practical purposes, the only remaining claim in End-Payor Plaintiffs' and the Plaintiff States' case. [11] Without this settlement, this final claim would need to survive summary judgment, where the definition of the relevant antitrust market would be the dominant threshold issue. In the Direct Purchaser case, this Court denied the Direct Purchaser class's motion for summary judgment regarding their proposed antitrust market definition and whether the Defendants had monopoly power in that market. *In re Remeron Direct Purchaser Antitrust Litig., 367 F.Supp.2d 675 (D.N.J. 2005)*. This Court held that the "direct evidence" the plaintiffs put forth was, on its own, insufficient to establish monopoly power. Thus, unless End-Payor Plaintiffs could perhaps put forth more convincing direct evidence than that of the Direct Purchaser plaintiffs, End-Payor Plaintiffs would need to use the traditional market definition approach in order to demonstrate monopoly power, thus increasing the risk of losing of merits and significantly increasing the amount of discovery and expert analysis needed.

[*66] Finally, trial itself would be risky to Plaintiffs on their one surviving claim. *See e.g.,*

---

[11] To the extent End-Payor Plaintiffs and the Plaintiff States would advance an "overall scheme" claim, finding such a scheme would likely be predicated upon proving the late listing claim.

In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 785 (7th Cir. 1999) (plaintiff class suffered directed verdict after eight weeks of trial); *United States Football League v. Nat'l Football League, 644 F.Supp. 1040 (S.D. N.Y. 1986)*, *aff'd*, *842 F.2d 1335 (2d Cir. 1988)* (antitrust jury awarded $ 1.00 in nominal damages to successful plaintiffs). These risks of proving liability and damages weigh in favor of approving this settlement.

f. Risks of Maintaining Class Action Status Through Trial

"Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *Warfarin Sodiu, 391 F.3d at 537* (internal quotes and citation omitted). The End-Payor Plaintiffs moved for class certification on October 27, 2003. As a result of the settlement discussions that began shortly thereafter, the Defendants' response to the class **[*67]** certification motion was extended to April 12, 2004. The Defendants never filed their response, as the settlement had been tentatively reached by the time their response was due. Consequently, the record does not reflect vigorous opposition, but class certification throughout trial is not guaranteed. This factor neither favors nor disfavors settlement.

g. Defendants' Ability to Withstand a Greater Judgment

The parties do not contend that Defendants could not withstand a larger judgment. However, many settlements have been approved where a settling defendant has had the ability to pay greater amounts. *See, e.g., Warfarin Sodium, 391 F.3d at 538* ("The fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."); *Young Soon Oh v. AT & T Corp., 225 F.R.D. 142, 150-51 (D.N.J. 2004)*; *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004)*; *Erie County Retirees Assoc. v. County of Erie, Pennsylvania, 192 F. Supp. 2d 369, 376 (W.D. Pa. 2002)*; **[*68]** *Lazy Oil Co. v. Witco Corp., 95 F. Supp. 2d 290, 318 (W.D. Pa. 1997)*. This factor does not favor nor disfavor settlement.

h & i. The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation.

A court evaluating a proposed class action settlement should also consider "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Warfarin Sodium, 391 F.3d at 538*; *Girsh, 521 F.2d at 157* (court must examine the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation); *see also Hammon v. Barry, 752 F. Supp. 1087, 1095 (D.D.C. 1990)* (court must "evaluate the strengths and weaknesses of class members' claims within the framework of their likelihood of establishing liability and damages at trial"). In the process, however, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re National Student Marketing Litigation, 68 F.R.D. 151, 155 (D.D.C. 1974)*.

Continued litigation of this lawsuit would require further **[*69]** decisions by the Court on (a) End-Payor Plaintiffs' pending class certification motion, (b) Defendants' pending motion to dismiss the End-Payor Plaintiffs' Amended Consolidated Complaint, (c) future summary judgment motions, and (d) at trial.

(i) Estimated Damages

On the basis of estimates by End-Payor Plaintiffs' expert economists, the maximum antitrust single damages totaled $ 109,704,738.00. Economists retained by the Plaintiff States reached a similar estimate of antitrust single damages for settlement purposes. These estimates likely overstate the amount of damages that would be available to Plaintiffs absent this settlement, because they were compiled before the Court issued its decisions that effectively limited End-Payor Plaintiffs' and Plaintiff States' claims to only a late listing claim. This claim has a shorter period of antitrust injury than some of the others.

(ii) Comparison of the Settlement Amount to Estimated Damages and Weighed Against the Risks of Non-Recovery

In order to evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. *In re Ampicillin Anttitrust Litigation, 82 F.R.D. 652, 654 (D.D.C. 1979)* **[*70]** (citing *Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)*). Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain. Moreover, in the present case, End-Payor Plaintiffs and Plaintiff States represent consumers pursuant to state laws that provide for varying levels of recovery -- some provide only for recovery of equitable relief, and many do not provide for recovery of treble damages.

As the Second Circuit emphasized in *Detroit v. Grinnell Corp, 495 F.2d at 455*, an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors, such as the risk of no recovery. "In fact there is no reason, at least in theory, why satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.*

Relative to maximum estimated damages of $ 109,704,738, the Settlement Consideration represents about one-third of single damages, quite a substantial recovery, especially given that three of the **[*71]** initial four theories of antitrust liability can no longer be advanced. This recovery must, of course, be weighed against the substantial risks of continued litigation, including future risks at summary judgment and trial. The Court is satisfied that the settlement agreement accounts for the risks inherent in this complex litigation and provides appropriate relief in light of these risks.

j. Conclusion

Given this Court's analysis, the Court concludes that the nine-factor test utilized by the Third Circuit is satisfied. The settlement is fair, adequate, and reasonable under *Federal Rule of Civil Procedure 23(e)*.

D. Approval Of The Plan of Distribution

"As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate." *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 381 (D.D.C. 2002)*; *see also In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 8931, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000)*. "In evaluating the formula for apportioning the settlement fund, the Court keeps in mind that district courts enjoy broad supervisory powers over the administration of class **[*72]** action settlements to allocate the proceeds among the claiming class members equitably." *Hammon v. Barry, 752 F. Supp. 1087, 1095 (D.D.C. 1990)* (internal quotation marks and citations omitted); *accord In re "Agent Orange" Prod. Liability Litig., 818 F.2d 179, 181 (2d Cir.*

1987).

At the Court's request, End-Payor Plaintiffs' Co-Lead Counsel and State Liaison Counsel jointly proposed a Plan of Distribution to the Court. As described in the long form notice, the Plan of Distribution is as follows:

> 32.8% of the Net Settlement Fund will be allocated to consumers ("Consumer Fund"), 16.5% of the Net Settlement Fund will be allocated to state governmental purchasers ("State Fund"), and 50.7% of the Net Settlement Fund will be allocated to Third-Party Payors ("TPP Fund"). Consumers who submit valid claims will receive a *pro rata* share of the Consumer Fund based on the amount he or she paid for Mirtazapine Products during the Class Period, and on how many other consumers file valid claims, and the amount they paid for Mirtazapine Products during the Class Period. Third-Party Payors who submit valid claims will receive a *pro rata* share of the **[*73]** TPP Fund based on the amount paid by that entity for Mirtazapine Products during the Class Period and on how many other Third-Party Payors file valid claims, and the amount they paid for Mirtazapine Products during the Class Period. The maximum payment to any Class Member may be limited to 100% of the amount that Class Member paid for Mirtazapine Products during the Class Period.

This distribution plan was based on Plaintiffs' expert economists' findings, using data produced by defendants and the Plaintiff States, as well as CMS statistics and data from other reliable sources. These calculations were performed in anticipation of the mediation of this case, and they were used in the mediation and submitted to the Court confidentially during the mediation.

Kim Van Winkle, Liaison Counsel for the Plaintiff States, informed the Court by affidavit and orally at the Fairness Hearing that she reviewed the proposed allocation on behalf of consumers and the Plaintiff States and concluded it is fair, reasonable and adequate for consumers and Plaintiff States. Similarly, Kevin Love, counsel for Vista Healthplan Inc., informed the Court that he reviewed the proposed allocation, and also concluded **[*74]** that it is fair, reasonable and adequate for TPPs. Mr. Love retained and consulted with a separate expert economist for TPPs only in reaching his conclusion.

As the Plan of Distribution appears fair based on the experts' calculations, and all three groups of Plaintiffs including the Attorneys General support it, and the few related objections that have been made were overruled in Part II(C)(4)(b), this Court gives the plan final approval.

E. Plaintiffs' Motion for Award of Attorneys' Fees, Interest, Reimbursement of Expenses, and Incentive Awards.

Class Counsel request that the Court award attorney fees in the amount of $ 7.8 million plus interest accrued on that amount since it has been held in escrow. The $ 7.8 million requested fee represents 23.6% of the $ 33 million Settlement Fund. [12] Class Counsel also request recovery of reasonable litigation expenses and incentive awards to named Plaintiffs.

[*75] 1. Attorneys' Fees and Interest

This Court first finds that the percentage of fund method is the proper method for

[12] Class Counsel initially indicated they would request up to 25% of the Settlement Fund, as indicated in the notice that was sent to the class. They later reduced that number by providing $ 450,000 more to the class in order to prevent the terms of Rider A from terminating, as described in footnote 6.

compensating Plaintiffs' Counsel in this common fund case. *See, e.g.,* Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 333 (3d Cir. 1998) (stating "the percentage of recovery method is generally favored in cases involving a common fund, and is designed to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"); Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 734 (3d Cir. 2001) (stating "the percentage-of-recovery method has long been used in this Circuit in common-fund cases").

The Third Circuit set forth with specificity the factors that a court should consider in evaluating such requested attorneys' fees in Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000) (overturning a decision that reduced a requested fee of 25% of the recovered fund to 18%). The *Gunter* factors "need not be applied in a formulaic way, and their weight may vary on a case-by-case basis." Oh v. AT & T Corp., 225 F.R.D. 142, 146 (D.N.J. 2004) **[*76]** (citing Gunter, 223 F.3d at 195). The *Gunter* factors include (a) the size of the fund created and number of persons benefitting from the settlement, (b) the presence/absence of substantial objections to the fee, (c) the skill of Plaintiffs' counsel, (d) complexity and duration of the litigation, (e) the risk of nonpayment, (f) amount of time devoted to the litigation, (g) awards in similar cases. *See* Gunter, 223 F.3d at 195; In re Aremissoft Corp. Sec. Litig., 210 F.R.D. 109, 129 (D.N.J. 2002).

a. The size of the fund created and the number of persons benefitted by the settlement

Pursuant to the parties' settlement agreement, the class will obtain an immediate and certain benefit of $ 33 million plus accrued interest, less attorneys fees, expenses and incentive award payments as awarded by the Court. Over 65,000 individuals and entities will receive significant financial benefit, without having to go through the time, expense, and risk of continued litigation.

b. The presence or absence of substantial objections to the request for fees

In response to the Notice Plan, only one TPP and seven individual consumers objected to the **[*77]** payment of the requested attorneys' fees. Of the seven individuals, four are represented by the same counsel and filed near verbatim statements. [13] The presence of a handful of objections does not mean that the requested fee should be denied. *Cf.* In re Lloyd's American Trust Fund Litig., 2002 U.S. Dist. LEXIS 22663, 2002 WL 31663577, *3, *38 (S.D.N.Y. Nov. 26, 2002) (approving fee request of 28% of settlement fund, even though 18% of class members filed objections to the settlement on one or more grounds); In re Auto. Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29162 (E.D. Pa. Oct. 13, 2004) (stating that, where nearly 60,000 notices sent out and only three objections were received, the vast majority of the class members had no objection, which counseled in favor of a 32% fee award).

The single TPP objection was filed by Health Care Service Corporation. In its papers, it objected that 30 **[*78]** days after the close of the 45-day Notice Period was an insufficient amount of time to file its objections and that Class Counsel do not deserve their fee request. These objections were made without any legal support and were made in a total of three sentences. The TPP's objections are overruled. 30 days after the close of the 45-day Notice Period is a sufficient amount of time to forge an objection, as discussed in Part

---

[13] These are the objections of Dot K. Kensigner, William L. Bedford III, Susan Ruth Hall, and Robert L. Kensinger, represented by Stephen Tsai.

II(C)(4)(b). Further, Plaintiffs' Counsel did provide support in the record for their time spent litigating case and their contribution to the litigation process has been explained throughout this Opinion.

Objector Nadine Street initially objected that the (a) distribution to Plaintiffs' Counsel should be reduced to 15%, and that (b) Ms. Street did not have sufficient information to further support its objection because the deadline for filing objections coincided with Plaintiffs' deadline for filing its motion for attorneys' fees. As a result, at the Fairness Hearing, the Court granted an extension of time to file objections regarding attorneys' fees so that End-Payor Plaintiffs' brief in support of attorneys' fees could be more fully considered by objectors.

Only **[*79]** Ms. Street took this opportunity, filing a second objection which further explained her claim that only a 15% distribution to Plaintiffs' Counsel was warranted. The bases were essentially that several law firms were not necessary to litigate Plaintiffs' claims and that Plaintiffs' papers in favor of their fee request were deficient. Based on the complexity of this case as explained in Part I and Part II(C)(4), and based on the supporting documentation in favor of granting Plaintiffs' attorney fees request, this Court finds Ms. Streets's objections to be without merit. [14]

[*80] The nearly identical objections of Dot K. Kensigner, William L. Bedford III, Susan Ruth Hall, and Robert L. Kensinger claimed that Class Counsel should not be allowed a percentage of the $ 33 million Settlement Fund that was created but rather such fund should first be discounted by the 16.5% portion going to the State Attorneys General. The objections state that the State Attorneys General "are already being paid $ 1 million in fees for their recovery of the 16.5% that is being paid to the states."

The Court understands the thrust of the objection; however, Plaintiffs' Counsel were largely responsible for creating a $ 35 million benefit for the class ($ 33 million Settlement Fund and $ 2 million Notice Fund). Class Counsel took the lead in creating that fund for the states. The States Attorneys General have not objected to Class Counsel's fees and have endorsed the settlement. The objection is without merit.

The remaining objectors are Rhonda Marcus and Robert Geha. Both of them take issue with the percentage of recovery counsel requests but provide little substantiation of why the percentage is excessive. In light of the consideration of the below factors that consider Plaintiffs' **[*81]** Counsel fee award, these two objections are also without merit. The courts do not hesitate to grant attorneys' fees despite the presence of objections when the rationale for awarding fees outweighs the objections. *See e.g.,* Nichols v. Smithkline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *21 (E.D. Pa. Apr. 22, 2005) (awarding 30% fee despite six substantive objections to settlement, three of which mentioned attorneys' fees); Oh, 225 F.R.D. at 152 (awarding fee despite three objections); In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005) (affirming district court's finding that only two objections weighed in favor of awarding fee); Varacallo, 226 F.R.D. at 251 (awarding fee despite almost 50 objections in large class case).

---

[14] Ms. Street also objected to the agreement between the litigating parties and five TPPs that initially opted out of the settlement which stated that, *inter alia*, Defendants would advance up to $ 500,000 of if they rescinded their notices of exclusion. By Order dated June 24, 2005, this Court rejected that part of the agreement, and the five TPPs were afforded absolutely no special treatment in exchange for returning to the class. Thus, Ms. Street's objection as to this point had been resolved before the objection was filed. *See also supra* notes 6 and 9 and accompanying text.

The absence of meaningful class member objection to the proposed fee ordinarily supports the reasonableness of the request. *See* *In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001)*; *In re Orthopedic Bone Screw Prods. Liab. Litig., 2000 U.S. Dist. LEXIS 15980, 2000 WL 1622741, at *6 (E.D. Pa. 2000)*. Further, a working group of State Attorneys General, who worked alongside Class Counsel, **[*82]** have concluded that the proposed settlement terms, including Class Counsel's request for attorneys' fees, is fair and appropriate.

c. The skill of Plaintiffs' counsel

This settlement was achieved by Class Counsel who include some of the preeminent antitrust firms in the country with decades of experience in prosecuting and trying complex actions, as described in Part II(A)(1)(d). Class Counsel have considerable experience in FDA regulatory matters through other generic drug litigations. The settlement result achieved is a reflection of counsel's skill and expertise. *See* *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 261 (D. Del. 2002)* (class counsel "showed their effectiveness through the favorable cash settlement they were able to obtain"); *see also In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000)* (awarding 30% fee and stating "the most significant factor in this case is the quality of representation, as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with **[*83]** which counsel prosecuted the case and the performance and quality of opposing counsel'").

d. The complexity and duration of the litigation

"As to the complexity of the case, an antitrust class action is arguably the most complex action to prosecute.'" *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004)* (quoting *In re Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)*). This matter is extremely complicated, involving the patent, regulatory and antitrust laws, including interpretation of complex provisions of the *Hatch Waxman Act*, as discussed throughout this Opinion.

The discovery process in this case was difficult. Class Counsel (i) reviewed over 800,000 million documents, (ii) for a time, held regular lengthy conference calls with Defendants that resulted in contentious debate and multiple motions to compel, which were briefed and argued before the Court, and (iii) participated in over fifty depositions, most of which were technical and complicated covering subjects such as Orange Book listing protocol and the science relating to the chemical composition of mirtazapine products.

[*84] Further, the circumstances surrounding a difficult settlement increase the complexity of a case. *Cf.* *Reinhart v. Lucent Techs., Inc. (In re Lucent Techs., Inc., Sec. Litig.), 327 F. Supp. 2d 426, 434 (D.N.J. 2004)*. Here, they were lengthy and difficult. Class Counsel coordinated the settlement on behalf of End-Payor Plaintiffs and among 56 states and territories. Class Counsel also dealt with the negotiation of opt-out members. Class Counsel's ability to successfully navigate these hurdles enabled the settlement to come to fruition.

e. The risk of nonpayment

The instant case was presented with significant obstacles since its filing. If the settlement is not consummated, class members may very well receive nothing. End-Payor Plaintiffs and the Plaintiff States proceeded against Defendants on four theories of liability: (1) Fraud on the U.S. Patent and Trademark Office ("PTO") in

connection with the prosecution and obtaining of the 099 patent; (2) wrongful listing of the 099 patent in the Orange Book; (3) sham patent litigation against generic competitors based on the 099 patent; and (4) late listing of the 099 patent. As described in Part II(C)(4), three of these claims face dismissal by **[*85]** this Court due to dismissals of such claims in the Generic Manufacturer and Direct Purchaser cases. The Plaintiffs would most likely have been left with their late listing claim and would still have to defeat summary judgment and win at trial. Accordingly, risk of non-payment in this case weigh heavily in favor of approving the requested fee.

f. The amount of time devoted to the litigation

Plaintiffs' counsel have spent over 12,000 combined hours in prosecuting this case on behalf of the class. The complexity of this action required a significant amount of work by a number of attorneys. Class Counsel performed investigations, filed complaints, fought motions to dismiss, filed briefing in support of class certification, participated in extensive and contentious discovery including the review of hundreds of thousands of documents and the conduct of dozens of depositions. Class Counsel's "efforts in posturing this case for trial . . . played a role in spurring the settlement, [and] produced a substantial payout to the class." *In re Newbridge Networks Sec. Litig., 1998 U.S. Dist. LEXIS 23238, *11 (D.D.C. Oct. 22, 1998)*.

Moreover, counsel worked for the class to finalize **[*86]** the settlement, to oversee claims administration, and will have to work on any future appellate issues. Work was allocated in this case between several law firms.

g. Awards in similar cases

In comparing the award in this action with amounts awarded in similar actions, a court's analysis is two-pronged. First, the court compares the actual award requested to other awards in comparable settlements. Second, the court ensures that the award is in line with what an attorney would have received if the fee was negotiated on the open market.

(i) The fee requested here is similar or lower to fees awarded in comparable settlements

"A district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case." *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 736 (3d Cir. 2001)*. A comparison of awards in similar cases is only a factor in determining the appropriateness of a fee award. *See Gunter, 223 F.3d at 195*. In considering this factor, the Court notes the survey of fee awards that have occurred in similar cases. *See, e.g., In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306-07 (3d Cir. 2005)* **[*87]** (review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value that "turns out to be one-third"); *Cullen v. Whitman Medical Corp., 197 F.R.D. 136, 150 (E.D. Pa. 2000)* ("the award of one-third of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district"); *Varacallo v. Mass. Mut. Life. Ins. Co., 226 F.R.D. 207, 249 (D.N.J. 2005)* ("'Many courts, including several in the Third Circuit, have considered 25% to be the standard "benchmark" figure for attorney fee awards in class action lawsuits, with adjustments up or down for significant case-specific factors'"); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *14* ("The above figures are in accord with a recent Federal Judicial Center study that found that in federal class actions generally median attorney fee awards were in the range of 27 to 30 percent.").

Courts within the Third Circuit often award fees

of 25% to 33% of the recovery. *See, e.g.,* *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 (E.D. Pa. 2004)* (approving 30% fee of a $ 202 million settlement in **[*88]** an antitrust class action); *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616 (E.D. Pa. 2005)* (approving 30% fee of the $ 65 million settlement in similar pharmaceutical antitrust action); *In re ATI Technologies Inc. Sec. Litig., 2003 U. S. Dist. LEXIS 7062 (E.D. Pa. Apr. 28, 2003)* (awarding 30% of fund); *In re Cell Pathways, Inc., 2002 U.S. Dist. LEXIS 18359 (E.D. Pa. Sept. 24, 2002)* ("A thirty percent fee is very comparable to awards in similar cases, providing further support for approval of the fee petition"); *Blackman v. O'Brien Envtl. Energy, Inc., 1999 U.S. Dist. LEXIS 7160 (E.D. Pa. May 11, 1999)* (35% fee awarded). The percentage fee requested in this case (23.6% of the fund) is consistent with other cases.

Moreover, Class Counsel's fee request compares favorably to fees awarded in similar pharmaceutical antitrust actions. See *House v. GlaxoSmithKline PLC, 2005 U.S. Dist. LEXIS 33711, No. 2:02cv442 (E.D. Va. Jan. 10, 2005)* (awarding a fee of 25% of the $ 29 million indirect purchaser **[*89]** settlement fund); *In re Relafen Antitrust Litig., 2004 U.S. Dist. LEXIS 28801, Master File No. 01-12239-WGY, Order and Final Judgment (D. Mass. April 9, 2004)* (awarding fees of 33 1/3% of $ 175 million of settlement fund).

(ii) The fee requested here is consistent with a privately negotiated contingent fee in the marketplace

"When deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing Litig., 264 F.3d 712, 718 (7th Cir. 2001)*. "The object . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation." *In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)*.

Consequently, courts should look to the private market when assessing the reasonableness of the percentage fee. *See* *In re RJR Nabisco Sec. Litig., 1992 U.S. Dist. LEXIS 12702, MDL No. 818, 1992 WL 210138, *7 (S.D.N.Y. Aug. 24, 1992)* ("What should govern [fee] awards is . . . what the market pays in similar cases"). A one-third contingency fee is generally standard **[*90]** in individual cases. *See, e.g.,* *In re Copley Pharm., Inc., 1 F. Supp. 2d 1407, 1412 (D. Wyo. 1998)*; *see also* *In re Aetna Sec. Litig., 2001 U.S. Dist. LEXIS 68 (E.D. Pa. Jan. 4, 2001)* ("thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation"). The requested fee award of 23.6% is below that general standard.

h. Lodestar Cross-check

A lodestar cross-check is not a *Gunter* factor but is a "suggested practice." *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d at 735 (3d Cir. 2001)*. When performing the lodestar cross-check, the Third Circuit has recognized that "'multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d at 341* (quoting 3 Herbert Newberg & Albert Conte, Newberg on Class Actions, § 14.03 at 14-5 (3d ed. 1992)). "The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid Corp. Sec. Litig., 396 F.3d at 306-07* (footnote omitted).

The record demonstrates that Class **[*91]**

Counsel's lodestar in this case is $ 4,506,294.25, resulting in a multiplier of 1.73. An examination of recently approved multipliers reveals that the multiplier requested here is on the low end of the spectrum. *See, e.g.,* Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, *24 (E.D. Pa. Apr. 22, 2005) (approving multiplier of 3.15); In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, *4 (E.D. Pa. June 2, 2004) (approving a 2.66 multiplier); Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1304 (D.N.J.), *aff'd*, *66 F.3d 314 (3d Cir. 1995)* (approving a 9.3 multiplier); In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001) (multiple of over 6). This lodestar cross check corroborates the result of the percentage of fund method.

i. Conclusion

Taking into consideration the above factors, this Court awards Plaintiffs' Counsel $ 7.8 million of the Settlement Fund, plus 23.6% of the accrued interest on the Settlement Fund.

2. Reimbursement of Reasonable Expenses

In addition to their request for Attorneys' fees, Plaintffs' Counsel seek reimbursement of $ 494,683.73 in **[*92]** expenses. "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 case." In re Cendant Corp., 232 F. Supp. 2d 327, 343 (D.N.J. 2002) (quoting In re Safety Components Int'l, Inc., 166 F. Supp. 2d 72, 104 (D.N.J. 2001)); Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995).

Upon review of the affidavits submitted in support of this request, the Court finds the requested amount to be fair and reasonable. Plaintiffs' Counsels' expenses reflect costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of deposition transcripts. Reimbursement of similar expenses is routinely permitted. *See e.g.,* Oh v. AT & T Corp., 225 F.R.D. 142, 154 (D.N.J. 2004) (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and **[*93]** express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund relating to *pro hac vice"*).

3. Incentive Awards to Named Plaintiffs

Finally, Plaintiffs' Counsel request the approval of $ 75,000 in incentive awards to the five Class Representatives. They seek $ 30,000 for each of the two TPPs and $ 5,000 for each of three individual consumers. "Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly." In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *18 (citation omitted). In the instant action, the Class Representatives, spent a significant amount of their own time and expense litigating these cases for the benefit of the absent members of the settlement class, and as is recognized by a multitude of courts, their efforts should not go unrecognized. *See e.g.,* FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 400 (D.D.C. 2002) ("Incentive awards are not uncommon in class action litigation and particularly where . . **[*94]** . a common fund has been created for the benefit of the entire class. . . . In fact, courts routinely approve incentive awards to compensate named plaintiffs for the services they provided

and the risks they incurred during the course of the class action litigation") (internal quotations and citation omitted).

In the detailed notice sent to Class members, Class Counsel indicated they would seek incentive awards in an amount not to exceed $ 100,000.00. No class members objected. The amounts requested are similar to amounts awarded in similar settlements. *See e.g., Nichols, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616 at *24* (approving $ 5,000 to each third-party payor named plaintiff, $ 2,500 to each consumer named plaintiff); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, *18 (E.D. Pa. 2004)* (approving $ 25,000 to each representative of the classes). The named Plaintiffs complied with all reasonable demands and provided significant assistance to counsel in the prosecution of this case. The requested incentive awards are both appropriate and reasonable.

III. CONCLUSION

For the foregoing reasons, (a) End-Payor Plaintiffs' and Plaintiff States' motion for final **[*95]** approval of settlement, and (b) Class Counsel for End-Payor Plaintiffs' motion for attorneys' fees of $ 7.8 million (plus accrued interest), litigation expenses, and incentive award to Class Representatives are granted.

September 13, 2005

Faith S. Hochberg

Hon. Faith S. Hochberg, U.S.D.J.

Exhibit 4

2006 WL 3780789
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Law Division, Bergen County.

Robert LUBITZ and Alberto Lemus, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
DAIMLERCHRYSLER CORP., Defendants.

Decided Dec. 21, 2006.

Attorneys and Law Firms

Gary Graifman and Reginald H. Rutishauser (Kantrowitz, Goldhamer & Graifman, attorneys) argued the cause for plaintiffs and class members.

Gary Mason (The Mason Law Firm) of the Washington, D.C. bar admitted pro hac vice argued the cause for plaintiffs and class members.

Keith M. Karr (Karr & Sherman, Co., LPA, attorneys) of the Ohio bar admitted pro hac vice argued the cause for plaintiffs and class members.

Christopher L. Brinkley (The Masters Law Firm, attorneys) of the West Virginia bar admitted pro hac vice argued the cause for plaintiffs and class members.

James M. Crabtree (Crabtree Law Offices, attorneys) of the Kansas bar admitted pro hac vice argued the cause for plaintiffs and class members.

Anthony Anscombe (Sedgwick, Detert, Morgan & Arnold, attorneys) of the Illinois bar admitted pro hac vice argued the cause for defendant.

James Fogelman (Gibson, Dunn & Crutcher, attorneys) of the California bar admitted pro hac vice argued the cause for defendant.

Marc Cruder, objector, argued the cause pro se.

Terrence J. Sweeney (Law Offices of Terrence J. Sweeney, attorneys) and Thomas A. Crosley (Crosley Law Firm, P.C., attorneys) of the Texas bar admitted pro hac vice argued the cause for objectors Britta W. Strickland and Andrew Rodriguez.

Jeffrey L. Weinstein (Jeffrey L. Weinstein, P.C., attorneys) of the Texas bar admitted pro hac vice argued the cause for objector Cynthia B. Balser.

JONATHAN N. HARRIS, J.S.C.

I. INTRODUCTION

***1** This is a consumer product class action brought on behalf of owners and lessees of the 1.2 million Jeep Grand Cherokee motor vehicles manufactured from 1999 through 2004. This opinion treats plaintiffs' applications for 1) a final court determination that this matter shall proceed as a class action, 2) approval of a settlement, and 3) an award of attorneys' fees and expenses. I conclude that a settlement class shall be certified; the settlement is approved because it is fair, reasonable, and adequate; and attorneys' fees and costs are awarded.

II. BACKGROUND

This is one of several civil actions nationally that seeks to redress allegedly defective motor vehicle brake apparatuses that were placed into the stream of commerce on the Jeep Grand Cherokee distributed by DaimlerChrysler Corp. (DCC) between 1999 and 2004. At issue are the front disc brake assemblies that are alleged to contain defective rotors and calipers causing uneven disc thickness, which results in the pulsation of the brakes and vibration of the motor vehicle, as well as a shortening of the expected useful life of the rotors.

Plaintiffs, particularly the first two named plaintiffs Robert Lubitz and Alberto Lemus who purchased Jeep Grand Cherokees in 1999 and 2002 respectively, claim to represent all owners and lessees of the allegedly defective motor vehicles. Other plaintiffs in the corresponding civil actions in New York, Florida, Ohio, Kansas, Missouri, and California seek relief along the lines sought by the instant plaintiffs, for the same grievances.

The instant litigation proceeded through the usual filing of a complaint, motion to dismiss, answer, and discovery. Although the initial theories of liability in the complaint were refined and narrowed through motion practice, the parties had plenty about which to argue. Mediation efforts were thought to be useful by all sides, and Nicholas H. Politan, a retired federal district court judge, was engaged to attempt to forge

a settlement. After several mediation sessions, the parties constructed a settlement that resolves the instant matter, together with all of the parallel litigation elsewhere.

On June 1, 2006, Judge Sybil R. Moses, A.J.S.C., entered an order that provisionally certified a settlement class, determined that the proposed settlement had apparent merit, scheduled a Fairness Hearing, and provided for notice to be given to class members. On October 30, 2006, I conducted the Fairness Hearing called for in Judge Moses' June 1, 2006 order. At the same time, I considered plaintiffs' application for attorneys' fees and expenses.

Among the mixed factual and legal questions that were in dispute before the settlement was reached were whether the rotor/caliper assemblies were defective; what is the duration of any warranty on the rotor/caliper assemblies; what components, if any, are covered by what warranty; and what is the effect, if any, of DCC's decision to reengineer and change the rotor/caliper assemblies for model years after 2002? Also in controversy were the legal theories that remained for plaintiffs to attempt to exploit in order to recover remedies. Those contested legal theories included breach of express warranty, unconscionability of warranty, breach of implied warranty of merchantability, violation of the New Jersey Consumer Fraud Act (N.J.S.A. 56:8–1 to–20)(NJCFA), and breach of contract. Throughout 2004 and 2005, the parties actively deployed the full array of litigational tactics in their efforts to prosecute and defend their respective clients' positions. Extensive motion practice was conducted and detailed discovery processes were implemented here and in the related civil actions. Eventually, a framework for settlement was reached, and I am now called upon to place my imprimatur on the arrangements made.

***2** The definition of the proposed final settlement class is the following:

> All persons in the United States who bought or leased a jeep Grand Cherokee vehicle, model years 1999–2004, between May 1, 1998 and the present, excluding fleet and governmental purchasers and lessees.
>
> The class shall be divided into three subclasses: (1) the "1999–2002 Model Years Subclass" consisting of all members of the Settlement Class who bought or leased a model-year 1999–2002 Jeep Grand Cherokee vehicle; (2) the "2003–2004 Model Years Expired Warranty Subclass" consisting of all members of the Settlement Class who bought or leased a model-year 2003–2004 Jeep Grand Cherokee vehicle, and who contacted DCC about experiencing pulsation during application of the brakes of their Subject Vehicles while the Subject Vehicles were still within the Warranty Period, and whose Warranty Period for the Subject Vehicle may now be expired; and (3) the "2003–2004 Model Years Warranty Subclass" consisting of all members of the Settlement Class who bought or leased a model-year 2003–2004 Jeep Grand Cherokee vehicle, except members of the 2003–2004 Model Years Expired Warranty Subclass (collectively referred to as the "Subclasses).

Under the proposed settlement, qualified members of the 1999–2002 Model Years Subclass will be reimbursed dollar-for-dollar for the cost of prior brake repairs or replacements incurred during the warranty period up to a maximum amount of $12,000,000, but reallocated on a pro rata basis if the aggregated claims exceed said cap. In addition, the $12,000,000 available for this reimbursement will be utilized for the payment of up to $3,000,000 in attorneys' fees and expenses. Thus, the maximum amount allocable to qualified claimants in the 1999–2002 Model Years Subclass actually will be the difference between $12,000,000 and the amount of attorneys' fees and expenses that I award, up to a maximum of $3,000,000. Put more candidly, the more money the attorneys get, the less the class gets. The 2003–2004 Model Years Warranty Subclass will be provided a free brake inspection at DCC's expense during a specified period. If a disc thickness variation is detected and the vehicle is still within its warranty period, DCC will pay for repairs. The 2003–2004 Model Years Expired Warranty Subclass will also be provided a free brake inspection at DCC's expense if a member experiences pulsation. If both a disc thickness variation is detected *and* the member complained about brake pulsation during the warranty period, DCC will pay for repairs.

Notice of the proposed settlement was provided by mailings to approximately 2.8 million addressees. Less than seventy objections were lodged with the court. Only 1,984 persons excluded themselves from membership in the class. Although the majority of objections did not carefully focus upon the terms of the settlement, several objections are noteworthy. It is asserted that there are substantive and procedural deficiencies with the settlement. These include problems with the allegedly overbroad and consideration-free nature of some of the releases being given by absent class members, the meager benefit being provided to class members who complained about brake pulsation after their warranties expired, the absence of cash payments to any class members

for individual damages, the lack of any notice to absent class members by publication, the allegedly onerous nature of the claims procedure (including a cumbersome claims form), and the general overall illusory nature of the settlement with allegedly no benefit to the class, but a windfall in attorneys fees for the prosecuting attorneys.

III. DISCUSSION

A. The Law

***3** Any settlement involving a certified class in a class action requires court approval. *R.* 4:32–2(e) [1] . This rule, modeled after *Fed.R.Civ.P.* 23, has not received extensive treatment in New Jersey reported opinions. Accordingly, I will borrow from federal decisions where necessary to help me parse the operation of the applicable rule. Indeed, it is common for New Jersey courts to refer to congruent federal law when interpreting New Jersey's class action rules. *Morris Cty. Fair Hous. Council v. Boonton Tp., supra,* 197 *N.J.Super.* 359, 369 ("[I]t is appropriate to seek guidance in federal case law in determining the procedures and standards for approval of settlements of representative actions[.]"); *Goasdone v. American Cyanamid Corp.,* 354 *N.J.Super.* 519, 528 (Law Div.2003)(since New Jersey has no reported decision on certification of a medical monitoring class, federal case law lends important guidance); *Delgozzo v. Kenny,* 266 *N.J.Super.* 169, 185 (App.Div.1993)(referring to federal law to parse commonality requirement of *R.* 4:32–1(a)(2)); *In re Cadillac V8–6–4 Class Action,* 93 *N.J.* 412, 424 (recognizing New Jersey's class action rule "is modeled after *Rule* 23(a) and (b) of the Federal Rules of Civil Procedure."); *Riley v. New Rapids Carpet Ctr.,* 61 *N.J.* 218, 226 (1972) ("[o]ur class-action rule, *R.* 4:32, is a replica of *Rule* 23 of the Federal Rules of Civil Procedure as amended in 1966."); *Muise v. GPU, Inc.,* 371 *N.J.Super.* 13, 31 (App.Div.2004)("[c]onstruction of the federal rule may be considered helpful, if not persuasive, authority").

B. The Notice

In order to ensure that the dictates of due process are observed, notice to class members of a settlement must be given. *Rule* 4:32–2(e)(1)(B) provides that:

> The court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

Adequate notice of a proposed settlement that will fix the rights of class members who do not opt-out and forever bar them from seeking further relief on their causes of actions is required not only by the rules of civil procedure, but also by the constitutional mandate of due process. *See Phillips Petroleum Co. v. Shutts,* 472 *U.S.* 797, 811–12, 86 *L. Ed.2d* 628, 105 *S.Ct.* 2965 (1985); *Kyriazi v. Western Elec. Co.,* 647 *F.2d* 388, 395 (3d Cir.1981). In order to satisfy due process, notice to class members must 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." *Mullane v. Central Hanover Bank & Trust Co.,* 339 *U.S.* 306, 314–15, 94 *L. Ed.* 865, 70 *S.Ct.* 652 (1950). It is most appropriate to determine the adequacy of notice before an inquiry is conducted into the merits of the settlement. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 *F.3d* 283, 326–28 (3d Cir.1998). Additionally, in *R.* 4:32–1(b)(3) actions, class members must receive "the best notice practicable under the circumstances, consistent with due process of law." *R.* 4:32–2(b).

***4** The settling parties sent the best notice practicable to class members. Acting upon Judge Moses' order, commencing on July 18, 2006, approximately 2.8 million notices were mailed to potential class members. Extensive efforts were made to follow-up where mailed notices were returned as undeliverable. Anyone requesting information about the settlement was provided a copy, and the settlement data also resided in the court's case files, which were available for public inspection during regular court hours. The settling parties established an internet-based website, www.DCCSettlement.com, which provided thoroughgoing information to anyone interested in the action. A toll-free voice mail system was established to accommodate telephone inquiries regarding the settlement. As of October 4, 2006, over 50,000 calls had been received and over 21,000 return calls were made to inquirers.

Furthermore, the substance of the notice was adequate. It clearly communicated its purpose; the nature of the action; the definition of the class; the class claims, issues, or defenses; the nature of the settlement; the attorneys' fees sought; and notice of the Fairness Hearing. The notice provided that any potential class members who do not wish to be included in the settlement must submit a written request to be excluded.

The dates for submitting claims, exclusion requests, and opposition to the settlement were clearly indicated. Such notice meets the requirements of due process and *R.* 4:32–2(b)(2).

C. The Class

The parties seek final certification of a settlement class pursuant to *R.* 4:32–1(a) and *R.* 4:32–1(b)(3). In order to determine whether the requirements for class action maintainability have been met, inquiry beyond the pleadings must be made because "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. American Tobacco Co.,* 84 *F.3d* 734, 744 (5th Cir.1996); *accord, Carroll v. Cellco Partnership,* 313 *N.J.Super.* 488, 495 (App.Div.1998).

A trial court should not certify a class until it has been determined, through rigorous analysis, that all the prerequisites of the rule governing class actions have been satisfied. As a first hurdle, as noted, a class is appropriate for certification only if it meets the four prerequisites of a class action set out in R. 4:32–1(a). Under this rule, one or more members of a class may sue or be sued as representative parties on behalf of all, only if (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).

1. Numerosity

***5** To begin, *R.* 4:32–1(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." This requirement does not demand that joinder be impossible, but rather that joinder would be extremely difficult or inconvenient. *See Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.,* 149 *F.R.D.* 65, 73–74 (D.N.J.1993) (impracticability does not mean impossibility, but rather that the difficulty or inconvenience of joining all members calls for class certification). Whether joinder of all of the class members would be impracticable depends upon the circumstances surrounding the case and not merely on the number of class members. *See General Tel. Co. of the Northwest v. E.E.O.C.,* 446 *U.S.* 318, 329, 100 *S.Ct.* 1698, 64 *L.Ed.2d* 319 (1980) (numerosity requires examination of specific facts of each case and imposes no absolute numerical limitations). See also Liberty *Lincoln Mercury,* 149 *F.R.D.* at 73 (number is not, by itself, determinative). While no minimum number of class members is required, "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong ... has been met." *Stewart v. Abraham,* 275 *F.3d* 220, 226–27 (3d Cir.2001). A class of 81 property owners seeking money damages was found to be sufficient to meet the numerosity requirement. *Saldana v. City of Camden,* 252 *N.J.Super.* 188, 193 (App.Div.1991). In order to satisfy the numerosity requirement "[p]recise enumeration of the members of a class is not necessary." *Zinberg v. Washington Bancorp, Inc.,* 138 *F.R.D.* 397, 405 (D.N.J.1990); *see also In re Cadillac, supra,* 93 *N.J.* at 425.

Joinder of all class members is impracticable in this case. As of the Fairness Hearing, there were over one million class members identified within the subclasses' descriptions. I conclude that plaintiffs have more than enough to satisfy the numerosity requirement of *R.* 4:32–1(a)(1).

2. Commonality

Rule 4:32–1(a)(2) requires that there be questions of law or fact common to the class, "although not all questions of law or fact raised need be in common." *Weiss v. York Hospital,* 745 *F.2d* 786, 808–809 (3d Cir.1984), cert. denied, 470 *U.S.* 1060, 105 *S.Ct.* 1777, 84 *L.Ed.2d* 836 (citing 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1763, at 603 (1972)). Where class members' factual circumstances are materially identical and the "questions of law raised by the plaintiff are applicable to each [class] member," the commonality requirement is satisfied. *Weiss v. York Hospital, supra,* 745 *F.2d* at 809 (citations omitted). Further, the commonality requirement is met "[w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons and gives rise to a cause of action," resulting in all of the members sharing at least one of the elements of that cause of action. *Newberg Class Actions,* § 3.10 (3d ed.1992). Common questions arise "from a 'common nucleus of operative facts' regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *In re Asbestos School Litig.,* 104 *F.R.D.* 422, 429 (E.D.Pa.1984), *aff'd in part, vacated in part sub nom.; In re School Asbestos Litig.,* 789 *F.2d* 996 (3d Cir.1986), *cert. denied,* 479 *U.S.* 852, 107 *S.Ct.* 182, 93 *L.Ed.2d* 117, 35 *Ed. Law Rep.* 30 (1986). "A common nucleus of operative fact[s] is typically found [when] defendants have engaged in standardized conduct toward members of the proposed class." In *re Life USA Holdings Inc. Ins. Litig.,* 190 *F.R.D.* 359, 366 (E.D.Pa.2000);

Kugler v. Romain, 58 *N.J.* 522 (1971). It should be kept in mind, however, that "commonality becomes obscured when the probable unique issues of liability, causation, and damages in each case are considered, requiring individualized treatment at trial." *Saldana v. City of Camden, supra,* 252 *N.J.Super.* at 197.

***6** The conduct at issue includes the defendant's actions of placing its allegedly defective motor vehicles in the stream of commerce and the manner of responding to warranty claims related to complaints about the operation of the disc brake assemblies. Plaintiffs allege that for each subclass the common questions revolve around the alleged deficiencies of the brakes and the corporate response to complaints relating thereto. This uniform conduct militates in favor of finding a common core of operative facts and circumstances and satisfies the requirement of commonality.

3. Typicality

Rule 4:32–1(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." "When the same unlawful conduct was directed at or affected both the named plaintiff and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that may underlie individual claims." *Cannon v. Cherry Hill Toyota, Inc.,* 184 *F.R.D.* 540, 544 (D.N.J.1999). In order to meet the typicality requirement, a plaintiff must show that her "injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff." *In re Am. Med. Sys. Inc.,* 75 *F.3d* 1069, 1082 (6th Cir.1996)(quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions,* § 3:76 (4th ed.2002). The court must ask 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 to assure that the absentees' interests will be fairly represented. *Baby Neal v. Casey,* 43 *F.3d* 48, 57 (3d Cir.1994). By ensuring that the class representative's claims are similar to those of the class, the typicality requirement, like commonality, promotes efficient case management and fair representation. Yet, despite this similarity, the commonality and typicality requirements serve distinct functions. The commonality requirement tests the sufficiency of the class claim. *See Hassine v. Jeffes,* 846 *F.2d* 169, 177 n. 4 (3d Cir.1988). The typicality requirement focuses on the relation between the representative party and the class as a whole. *Id.* The New Jersey Supreme Court has stated that "[t]he claims of the representatives 'must have the essential characteristics common to the claims of the class.' " *In re Cadillac, supra,* 93 *N.J.* at 425 (quoting 3B Moore's Federal Practice ¶ 23.06–2 (1982)).

A central issue in the instant case, claimed to be shared by plaintiffs and the members of the proposed class alike, is whether defendants' actions amounted to deceptive business practices under New Jersey law or violated its warranty promises. The claims asserted by plaintiffs and the defenses that would be arrayed against plaintiffs are typical of those that would be asserted for and against the members of the three subclasses. Those claims arise from the same nucleus of alleged facts: defendant's installation of defective brakes on its motor vehicles and its subsequent stonewalling when it came time for repairs within the warranty period. Typicality exists.

4. Adequacy of Representation

***7** The binding effect of all class action decrees raises significant due process questions that are directly relevant to *R.* 4:32–1(a)(4). If absent class members are to be conclusively bound by the result of an action prosecuted or defended by a party alleged to represent their interests, basic notions of fairness and justice demand that the representation they receive be adequate. The adequacy requirement mandates an inquiry into the zeal and competence of the representatives' counsel, the willingness and ability of the representatives to take an active role in and control the litigation, while protecting the interests of absentees. The adequacy inquiry also "serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent." *See Amchem Prods., Inc. v. Windsor,* 521 *U.S.* 591, 625, 117 *S.Ct.* 2231, 138 *L.Ed.2d* 689 (1997). Furthermore, because absent class members are conclusively bound by the judgment in any class action brought on their behalf, the court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times. Differences between the named plaintiffs and absent class members render the named plaintiffs inadequate representatives only where those differences create conflicts between the named plaintiffs' and the absent class members' interests.

One accepting employment as counsel in a class action does not become a class representative through simple operation of the free enterprise system; rather, both the class determination and designation of counsel as class representative comes from judicial determinations, and the attorneys so benefited serve in something of a position of public trust, and they share with the court the burden of protecting the class action

device against public apprehensions that it encourages strike suits and excessive attorney fees. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.,* 481 *F.2d* 1045 (2d Cir.1973), on remand, *certiorari denied* 94 *S.Ct.* 722, 414 *U.S.* 1092, 38 *L. Ed.2d* 549. To determine whether the proposed class satisfies *R.* 4:32–1(a)(4), I must evaluate the adequacy of class counsel. Factors such as counsel's experience with class actions, knowledge of the subject matter at issue in the case, and the resources of counsel are relevant to this determination. *Haley v. Medtronic, Inc.,* 169 *F.R.D.* 643, 650 (C.D.Cal.1996); *In re Prudential Secs.,* 163 *F.R.D.* 200, 208 (S.D.N.Y.1995). Additionally, the court is under an obligation to evaluate carefully the legitimacy of the named plaintiffs' plea that they are proper class representatives. Thus, the Supreme Court has admonished federal district courts that they are to 'stop, look, and listen' before certifying a class, *Kremens v. Bartley,* 431 *U.S.* 119, 135, 97 *S.Ct.* 1709, 1718, 52 *L. Ed.2d* 184 (1977). The adequacy of representation issue is of critical importance in all class actions and the court is under an obligation to pay careful attention to the *R.* 4:32–1(a)(4) prerequisite in every case. *Vervaecke v. Chiles, Heider & Co.,* 578 *F.2d* 713, 719 (8th Cir.1978). Finally, it should be noted that plaintiffs have the burden of establishing that a case is certifiable as a class action and that, as class representatives, the named plaintiffs meet all of the *R.* 4:32–1 requirements. In order properly to represent absent members of a class, counsel for named parties who seek to be class representatives must be more than merely attorneys admitted to practice before the particular court hearing the case; they must have sufficient experience and training to satisfy the trial court that they will be strenuous advocates for the class, and their conduct will be evidence of their capability adequately to represent the class. The requirement that the attorneys for class representatives be experienced is intended to mean that they be experienced in the type of litigation involved. *Carpenter v. Hall,* 311 *F.Supp.* 1099 (S.D.Tex.1970).

***8** Generally, "[a]dequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class ." *Wetzel v. Liberty Mutual Insurance Co.,* 508 *F.2d* 239, 247 (3d Cir.), *cert. denied,* 421 *U.S.* 1011, 95 *S.Ct.* 2415, 44 *L.Ed.2d* 679 (1975). The proposed class here satisfies the standards of *R.* 4:32–1(a)(4). From my review of the record presented, plaintiffs' attorneys appear to be qualified and experienced to conduct this litigation. I perceive no interests antagonistic to those of the potential class and no conflicts are apparent on the record. Moreover, the plaintiffs are adequate representatives for all members of the subclasses. The adequacy requirement is satisfied.

5. Rule 4:32–1(b)(3)

The parties seek certification under *R.* 4:32–1(b)(3), requiring that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to any other available methods for the fair and efficient adjudication of the controversy." *R.* 4:32–1(b)(3).

a. Predominance

The issue of predominance under *R.* 4:32–1(b)(3) focuses on "whether the potential class, including absent class members, seeks to remedy a common legal grievance." *In re Cadillac, supra,* 93 *N.J.* at 431; *see also Delgozzo v. Kenny, supra,* 266 *N.J.Super.* at 189. In order to meet the predominance requirement of *R.* 4:32–1(b)(3) plaintiffs must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof. In other words, just because the legal issues involved may be common between class members does not mean that the proof required to establish these same issues is sufficiently similar to warrant class representation and treatment.

Therefore, the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Moore v. Paine Webber, Inc.,* 306 *F.3d* 1247, 1252 (2d Cir.2002). The predominance requirement is far more demanding than the commonality requirement. *See Amchem Prods., Inc. v. Windsor,* 521 *U.S.* 591, 623–24, 117 *S.Ct.* 2231, 138 *L.Ed.*2d 689 (1997). Because *R.* 4:32–1(b)(3) requires that common issues predominate, class certification may be denied where common issues of law are not present or where resolving the claims for relief would require individualized inquiries. *See, e.g., Lewis Tree Serv., Inc. v. Lucent Techs. Inc.,* 211 *F.R.D.* 228, 235 (S.D.N.Y.2002) ("At a basic level, a nationwide class action in which plaintiffs raise claims of fraud would require the application of the law of at least fifty jurisdictions and would make class certification inappropriate."); *In re Methyl Tertiary Butyl Ether* ("MTBE"), 209 *F.R.D.* 323, 350 (S.D.N.Y.2002) (finding no predominance given plaintiffs' allegation that MTBE contamination occurred "over many years across four states indirectly caused by twenty defendants in conjunction with innumerable third parties who released the contaminant

into the environment"). "The critical consideration is whether there is a 'common nucleus of operative facts.' " *Carroll v. Cellco Partnership, supra,* 313 *N.J.Super.* at 499.

***9** In this case, predominance is present. Not only will the same universe of legal principles be employed, but the challenged actions of the defendant are discrete, perhaps similar, if not uniform, and confined to a distinct area of its manufacture and warranty satisfaction operations. This will involve a cohesive set of proofs that lends itself to class action treatment.

b. Superiority

Rule 4:32–1(b)(3) requires that a class action be a superior method for the adjudication of a controversy. Implicit in this requirement is an identification of the relevant factual and legal issues underlying the request for class certification. *In re Cadillac, supra,* 93 *N.J.* at 426. The mere identification of those issues, however, is less penetrating than their subsequent evaluation on a motion for summary judgment or at trial. *Id.* Certification of a class action should not be denied because of the merits underlying the theory on which the action is predicated. *Olive v. Graceland Sales Corp.,* 61 *N.J.* 182, 189 (1974). "Nonetheless, even the identification of the issues to determine the suitability of an action for certification requires some preliminary analysis." *In re Cadillac, supra,* 93 *N.J.* at 426 (citing Miller, *An Overview of Federal Class Actions: Past, Present and Future* 51 (1977)). Thus, the court must engage in a cursory analysis of plaintiffs' claims to determine whether class certification represents a superior form of dispute resolution for the statutory and common law fraud claims.

In evaluating the superiority of a class action, the court should inquire as to the class members' interest in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; whether it is desirable to concentrate litigation of claims in this forum; and the manageability of a class action. As only a settlement class is at issue, manageability of a trial is not a consideration. *In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 *F.R.D.* 166, 178, n. 14. (E.D.Pa.2000)(citing *Amchem Prods. Inc. v. Windsor,* 521 *U.S.* 591, 620 (1997)).

Consideration of the enumerated factors leads to the conclusion that the class action is superior to other forms of suit. Although approximately 2,000 persons have requested exclusion from the class, there has been little individual interest in pursuing individual claims. Even the existence of the parallel actions in other states, particularly when they will be folded into this settlement and resolved, does not militate against a certification here. Indeed, the concentration of the litigation in this forum will likely save judicial resources. An analysis of the superiority factors commends a finding that the class should be certified.

D. The Settlement

It is worthwhile to acknowledge that settlement of litigation holds a lofty position in the pantheon of public policy. *Lahue v. Pio Costa,* 263 *N.J.Super.* 575 (App.Div.), *certif. denied,* 134 *N.J.* 477 (1993); *Pascarella v. Bruck, supra,* 190 N.J.Super. at 125; *Bistricer v. Bistricer, supra,* 231 *N.J.Super.* at 147; *Department of the Pub. Advocate v. Board of Pub. Util.,* 206 *N.J.Super.* 523, 528 (App.Div.1985); *Jannarone v. W.T. Co.,* 65 *N.J.Super.* 472, 476–77 (App.Div.), *certif. denied sub. nom. Jannarone v. Calamoneri,* 35 *N.J.* 61 (1961). The settlement of lawsuits is favored not because of the salutary consequence of relieving overburdened judicial and administrative calendars but because of the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way that is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action that would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general should not be countenanced.

***10** *Rule* 4:32–2(e) imposes upon the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims. *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 *F.3d* 768, 805 (3d Cir.1995). The Third Circuit has noted that in deciding the fairness of a proposed settlement, "the evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* at 806 (citations omitted). At the same time, it has been noted that cases such as this, where the parties simultaneously seek certification and settlement approval, require courts to be even more scrupulous than usual when they examine the fairness of the proposed settlement. *In re Prudential Ins. Co. of Am. Sales Practice, supra,* 148 *F.3d* at 317 (citing *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.,* 55 *F.3d* at

805). This heightened standard is designed to ensure that class counsel has demonstrated "sustained advocacy" throughout the course of the proceedings and has protected the interests of all class members. *Id.* at 317. The Court must "ensure that the settlement is in the interest of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression." *Reed v. General Motors Corp.,* 703 *F.2d* 170, 172 (5th Cir.1983) (quoting *Pettway v. American Cast Iron Pipe Co.,* 576 *F.2d* 1157, 1214 (5th Cir.1978)). Because the parties' interests are aligned in favor of a settlement, I must take independent steps to ensure fairness in the absence of adversarial proceedings. *Reynolds v. Beneficial Nat'l Bank,* 288 *F.3d* 277, 279–80 (7th Cir.2002) (noting that the class action context requires judges to exercise the highest degree of vigilance in scrutinizing proposed settlements). The Court's duty of vigilance does not, however, authorize it to try the case in the settlement hearings.

The hallmark of any settlement to be approved by the court must provide assurances that the settlement "is fair and reasonable to the members of the class." *Chattin v. Cape May Greene, Inc.,* 216 N.J.Super. at 627. In order to give more than lip service to the fairness standard, it is imperative that the court also assure itself that the settlement is "fair, adequate, and reasonable, and not the product of collusion." *Joel A. v. Guiliani,* 218 *F.3d* 132, 138 (2d Cir.2000). To do this requires a framework, one that is readily found in several federal sources. For example, the *Manual for Complex Litigation, Fourth* lists the following non-exclusive factors for judges to consider when reviewing an application to approve a class action settlement:

> 1. the advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;
>
> ***11** 2. the probable time, duration, and cost of trial;
>
> 3. the probability that the class claims, issues, or defenses could be maintained through trial on a class basis;
>
> 4. the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits;
>
> 5. the extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master;
>
> 6. the number and force of objections by class members;
>
> 7. the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under above paragraph 1 or 4;
>
> 8. the effect of the settlement on other pending actions;
>
> 9. similar claims by other classes and subclasses and their probable outcome;
>
> 10. the comparison of the results achieved for individual class or subclass members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims;
>
> 11. whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;
>
> 12. the reasonableness of any provisions for attorney fees, including agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;
>
> 13. the fairness and reasonableness of the procedure for processing individual claims under the settlement;
>
> 14. whether another court has rejected a substantially similar settlement for a similar class; and
>
> 15. the apparent intrinsic fairness of the settlement terms.

In determining the weight accorded these and other factors, courts have examined whether

> • other courts have rejected similar settlements for competing or overlapping classes;
>
> • the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large (differentials are not necessarily improper, but may call for judicial scrutiny);
>
> • the settlement amount is much less than the estimated damages incurred by members of the class as indicated by preliminary discovery or other objective measures, including settlements or verdicts in individual cases;

• the settlement was completed at an early stage of the litigation without substantial discovery and with significant uncertainties remaining;

• nonmonetary relief, such as coupons or discounts, is unlikely to have much, if any, market or other value to the class;

• significant components of the settlement provide illusory benefits because of strict eligibility conditions;

• some defendants have incentives to restrict payment of claims because they may reclaim residual funds;

***12** • major claims or types of relief sought in the complaint have been omitted from the settlement;

• particular segments of the class are treated significantly differently from others;

• claimants who are not members of the class (e.g., opt outs) or objectors receive better settlements than the class to resolve similar claims against the same defendants;

• attorney fees are so high in relation to the actual or probable class recovery that they suggest a strong possibility of collusion;

• defendants appear to have selected, without court involvement, a negotiator from among a number of plaintiffs' counsel; and

• a significant number of class members raise apparently cogent objections to the settlement. (The court should interpret the number of objectors in light of the individual monetary stakes involved in the litigation. When the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction. When the recovery for each class member is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class' sentiments toward the settlement. However, an apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large. A similar phenomenon is the organized opt-out campaign.)

§ 21.662 *Manual for Complex Litigation, Fourth* 316–318 (footnotes omitted).

These factors are similar to factors regularly utilized in the Second and Third Circuits for over thirty years, *see City of Detroit v. Grinnell Corp.,* 495 *F.2d* 448, 463 (2d Cir.1974); *In re Elan Securities Litigation,* 385 *F.Supp.*2d 363, 368 (S.D.N.Y.2005); *Girsh v. Jepson,* 521 *F.2d* 153, 156 (3d Cir.1975); *Varacallo v. Mass. Mut. Life Ins. Co.,* 226 *F.R.D.* 207, 235 (D.N.J.2005), and commend themselves for use in this jurisdiction and in this case in particular.

1. Advantages of Settlement over Probable Outcome at Trial

In evaluating the risks of establishing liability and damages, it is appropriate to survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were take to trial against the benefits of immediate settlement. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 319. However, the court should avoid conducting a "mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel[.]" *In re Ikon Office Solutions, Inc. Sec. Litig., supra,* 194 *F.R.D.* at 181 (citation omitted).

This case is a complex amalgam of products liability claims, consumer fraud, and breach of warranty theories. To succeed on its primary claims, the class must establish that the defendant engaged in unfair business practices. Regardless of the strength of the case class counsel might present at trial, victory in litigation is never guaranteed and here a successful outcome on all proffered theories is dubious at best. A jury could place considerable weight upon the credibility and testimony of defendant's agents and other witnesses, some of whom are well-respected in their industry, who would undoubtedly deny all aspects of knowledge of consumer fraud. Such risks as to liability strongly weigh in favor of the settlement.

***13** In addition, the class would have to overcome significant damage defenses that defendant would assert relating to individual driving idiosyncrasies as the source of class members' brake problems. As is often the case, the parties would likely engage in a battle of experts on the question of ascertainable damages, the outcome of which would be unpredictable. Settlement is favored because it eliminates these inherent, unavoidable litigation risks.

2. Probable Time, Duration, and Cost of Trial

This factor is intended to capture the probable costs, in both time and money, of continued litigation through trial. *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 812. Although the parties have already expended enormous sums to enable them to reach this settlement, much more would be necessary to conclude this dispute under the auspices of a jury.

After this costly and lengthy discovery, it is likely that the parties would have engaged in extensive motion practice, consisting of, at a minimum, motions for summary judgment and evidentiary in limine applications. The costs associated with prosecuting and defending these motions would have diminished the recovery of the class, perhaps depleted the resources of defendant, and presented the court with thorny legal, evidential, and factual issues to resolve. What would happen in the actions pending in other states would only serve to more fully drain the resources of all parties.

Finally, trial of the liability issues would involve substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, vigorously contested motions, and the considerable expenditure of judicial resources. The damages calculation at trial, would involve time-consuming and complex economic analyses, straining the patience of even the most engaged jurors. All of these expenses would impose a significant burden on any recovery obtained for the subclasses if plaintiffs were even ultimately successful. A result that avoids an unnecessary and unwarranted expenditure of time and resources benefits everyone. *Computron Software, Inc., Sec. Litig.,* 6 *F.Supp.2d* 313, 317 (D.N.J.1998).

3. Probability of Maintaining the Class Action Through Trial

"The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action." *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 817. While decertification is always a possibility in any class action, the parties do not identify any particular issue or circumstance in this case that might lead to a particular risk of decertification.

4. Maturity of the Underlying Substantive Issues

***14** This factor evaluates, among other things, the novelty of the class theories of liability and assesses the probable outcome of those theories at trial. In this action, where plaintiffs assert traditional statutory consumer fraud and products liability theories, there is but a small likelihood that legal issues will be paramount at trial. Instead, the hotly contested factual disputes, especially those that revolve around the allegations of defective products and sharp business practices regarding the warranty, will be the engine that drives the litigation. Thus, this factor neither favors nor militates against the fairness of the settlement.

5. Nature of Settlement Negotiations

The settling parties have trumpeted the arms-length manner in which the settlement was reached. Starting out as wary adversaries, they voluntarily entered a mediation process and spent months working under the stewardship of a retired member of the federal judiciary. The long involvement of the neutral mediator during the settlement negotiations lends support to the parties' claim that they bargained as adversaries and at arms length. This backs the settlement. I have no sense that there was collusion among the parties that results in unfairness to the subclasses.

6. Number and Force of Objections by Class Members

This factor is a very significant element in assessing the fairness of the settlement. Since court approval is a substitute for the usual right of litigants to determine their own best interests, the reaction of class members who object can not be lightly ignored or rejected out of hand. In like vein, courts will not ignore the absence of objection to a settlement. Courts construe class members' failure to object to proposed settlement terms as evidence that the settlement is fair and reasonable. *See Fickinger v. C.I. Planning Corp.,* 646 *F.Supp.* 622, 631 (E.D.Pa.1986) ("Unanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight."). However, courts must be cautious about "inferring support from a small number of objectors to a sophisticated settlement." *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 812. This is particularly true in large consumer fraud class action cases, as many consumers may have such small amounts at stake that it is imprudent to invest the time and resources to contest a settlement. To date, there have been less than 70 objections lodged. This is an inconsequential number and does not militate toward derailing the settlement. *Bell Atl.*

Corp. v. Bolger, 2 *F.3d* 1304, 1313 n. 15 (3d Cir.1993)(finding that 30 objectors in a class of 1.1 million is an "infinitesimal number").

For the most part, the objections focus almost exclusively on discrete components of the settlement. Most complain about the seemingly inadequate amount of cash paid, in light of class members' aggravation engendered by the motor vehicles' performance and DCC's wary responses to warranty claims. I am satisfied that although many of the objections are heart-felt and articulate, they do not present a convincing case to reject the settlement. The thunderous silence from the vast majority of class members is an overwhelming indication that the settlement is fair and adequate. A settlement need not be perfect in order to be approved; it need not equally satisfy every member of the class.

***15** Although there is a rational argument to be made that a differently configured settlement might make sense, and would be within the reach of the parties, there is nothing fundamentally unfair about the way the instant settlement treats all class members, even with the differential treatment that is proposed among the subclasses. The most that might be said for the arguments of the objectors is that they are entitled to respectful consideration. There is nothing in their arguments that commands the exercise of judicial discretion towards scuttling an eminently just compromise. Even the great hew and cry concerning the sheer number of complaints lodged with federal agencies is unavailing when compared to the deafening silence of the vast majority of the class. There is always a "better" settlement just around the corner, but without a principled way to reject the instant compromise other than to nitpick it to death, there is no just reason to disturb the efforts of those who toiled so long and hard to reach a reasonable accommodation of all parties' interests.

I reject as unfounded the notion that a more generous notice procedure should have been employed to notify more potential class members of the settlement, including the deployment of magazine and newspaper advertisements. There is no showing that any significant numbers of probable class members are wandering in the wilderness without knowledge or information about this matter. The notice appears the best practicable under the circumstances.

I further decline to disturb the settlement on the ground that the release on behalf of class members is too expansive and, for some, is not supported by consideration. This point of view reflects a rather myopic position of the objector who claims an entitlement to tangible benefits for each and every class member. Some of the benefits of the settlement are tangible, some are intangible. All of the give and take in the settlement reflects a measured balancing of the strengths and weaknesses in each subclass, and an appropriate accommodation of each is embodied in the settlement terms.

7. Ability of the Parties to Pay, Collect, or Enforce the Settlement

This factor weighs neither in favor nor against the settlement. There is nothing to suggest that there is a significant risk of nonpayment of the settlement by the defendant, and even a larger settlement would likely be capable of performance by DCC.

8. Effect of Settlement on Pending Actions

It appears that several other putative class actions have been commenced by class members that seek similar relief to that sought in this action. The instant settlement will obviate those other class actions by class members, thereby conserving the resources of those parties and judicial resources in those jurisdictions. This favors settlement here.

9. Similar Claims by Other Classes

This factor plays no role in determining whether the instant settlement is fair, reasonable, and adequate.

10. Comparison of Results Achieved by Individual Class Members

***16** This factor neither favors nor disfavors settlement because the parties have not brought the results of such individual claims to my attention.

11. Exclusion Requests

In a class of over one million, less than 2,000 class members exercised their right to opt-out of the settlement. This is less than 0.2%, a miniscule and insignificant number. This factor favors the settlement.

12. Reasonableness of Attorneys' Fees

The attorneys in this case seek approval of up to $3,000,000 in attorneys' fees ($2,916,746) and costs ($83,254), all of which will be paid from the $12 million cash fund that is set aside for the 1999–2002 Model Years Subclass. If, as plaintiffs contend, the value of the settlement is $14.5 million,

reflecting the cash fund together with the putative value of the free brake inspections offered to class members, the attorneys' fees represent approximately 20% of this common fund. The attorneys' fees sought are in excess of the actual time value of the work done. In other words, the simple expedient of multiplying the actual hours of work expended times the hourly rate of the attorney or paralegal yields a lodestar fee in the amount of $1,417,919. The requested attorneys' fees reflect a multiplier of 2.06 times the lodestar.

For reasons that will be outlined in detail later in this opinion, I conclude that the requested attorneys' fees are excessive. Instead, I will award the amount of $2,175,000 as attorneys' fees, representing a multiplier of only slightly more than 1.5 times the lodestar and 15% of the common fund. Since the award effectively will be paid by or charged to class members, this generous amount of attorneys' fees does not militate for the settlement. However, because the attorneys' fees were negotiated *after* the terms of the settlement that strictly applied to the subclasses were completed, there is little evidence of collusion or conflict of interest on the part of the class attorneys. In short, the settlement is not subject to rejection just because the requested attorneys' fees are so high.

13. Other Actions

This factor explores whether other courts have already rejected substantially similar settlements for similar classes. There is no evidence that any court has rejected a settlement akin to this one, given the scope and breadth of this case. This slightly favors settlement here.

14. Intrinsic Fairness of the Settlement

By almost any standard, plaintiffs engaged in a difficult quest to obtain remedies for consumers against an domineering foe. Plaintiffs faced formidable obstacles in arriving at a satisfactory resolution of their grievances. If the plaintiffs were able to obtain class certification in a contested environment, resist the inevitable dispositive motions of defendants, survive the crucible of the trial, and obtain the best possible result from a jury, the result would likely resemble this settlement, or less. Indeed, the grave difficulties of convincing a trier of fact that brake wear is the primary responsibility of the car manufacturer and not otherwise attributable to the peculiarities of individual driving styles and road conditions would likely lead to a ruinous result for plaintiffs. Thus, I see nothing that commends a rejection of the settlement in favor of casting class members' fates to the wind by going to trial. The elements of the instant settlement present a powerful array of relief that cannot be meaningfully challenged. It is easy to nitpick and second-guess discrete elements of the settlement, and to take cheap shots at the attorneys' fees, but in the end, the settlement stands tall on its own two feet. This factor favors settlement.

15. Miscellaneous Factors

***17** The most substantial component of the miscellaneous group of factors that are relevant to this case is an analysis of the stage of the litigation when the action settled. A settlement should not be approved if the parties do not have an adequate appreciation of the merits of the case. Consequently, the type and amount of discovery, formal or informal, that has occurred since the inception of the action are relevant to the propriety of the settlement. However, the fact that this case settled before class certification was decided and before the completion of all formal discovery should not mask the fact that plaintiffs' attorneys had obtained substantial discovery data through litigational processes and the mediation mechanism. I am satisfied that the parties reached this settlement only after plaintiffs' counsel engaged in careful and extensive research, investigation, and analysis of the facts and circumstances surrounding the conduct of defendants' business practices. I conclude that class counsel have a sufficient basis upon which to assess the strengths and weaknesses of the claims and the terms of the settlement. For all of the reasons heretofore expressed, I am thoroughly convinced that the factors favoring settlement substantially outweigh those few factors that counsel against the settlement. Accordingly, I approve the settlement as fair, reasonable, and adequate.

E. The Attorneys' Fees

Plaintiffs' attorneys seek the court's approval of the terms of the settlement that would enable them to reap $2.9 million in attorneys' fees. The defendant does not object to the payment of these attorneys fees as required by the settlement agreement, for the obvious reason that its liability for all cash contributions is capped at $12 million. Accordingly, this "clear sailing" agreement requires even greater scrutiny by the court. *See In re Fine Paper Antitrust Litig.*, 751 *F.2d* 562, 583 (3d Cir.1984); *Weinberger v. Great N. Nekoosa Corp.*, 925 *F.2d* 518, 519 (1st Cir.1991) (In the case of a "clear sailing" agreement (i.e., where the party paying the fees agrees not to contest the court-awarded amount as long as it does not exceed a negotiated ceiling), "rather than merely rubber-stamping the request, the court should scrutinize it to ensure that the fees awarded are fair and reasonable.").

In ruling on a motion for award of attorneys' fees, I have two goals. The court seeks to protect the interests of class members by acting as a fiduciary for the class. *In re Cendant Corp. Litig.,* 264 *F.3d* 201, 231 (3d Cir.2001). The court's fiduciary role arises from a recognition that there is a potential economic conflict of interest between class members, who seek to maximize recovery from a settlement, and lawyers, who seek to maximize fees. The United States Court of Appeals for the Third Circuit has explained that the "divergence in [class members' and class counsel's] financial incentives ... creates the 'danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.' " *In re Cendant Corp. Prides Litig.,* 243 *F.3d* 722, 730 (3d Cir.2001) (quoting *In re General Motors Corp. Pick–Up Truck Fuel Tank Prod. Liab. Litig.,* 55 *F.3d* 768, 820 (3d Cir.1995)). Consequently, "the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial scrutiny of fee arrangements' in class action settlements.' " *Id.* (quoting *In re General Motors Corp. Pick–Up Truck Fuel Tank Prod. Liab. Litig., supra,* 55 *F.3d* at 820).

***18** In examining an application for an award of attorneys' fees from a common fund, the Court also seeks to protect the public interest and, with it, the integrity of the judicial system:

> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding "windfall fees" and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough,* [105 *U.S.* 527, 26 *L. Ed.* 1157 (1881)], when it advised that fee awards under the equitable fund doctrine were proper only "if made with moderation and a jealous regard to the rights of those who are interested in the fund."
>
> *City of Detroit v. Grinnell Corp.,* 495 *F.2d* 448, 469 (2d Cir.1974) (quoting *Trustees v. Greenough,* 105 *U.S.* 527, 536, 26 *L. Ed.* 1157 (1881)), abrogated on different grounds by *Goldberger v. Integrated Resources, Inc.,* 209 *F.3d* 43 (2d Cir.2000)).

Keeping these two goals in mind, I am bound to review thoroughly and with the eye of a skeptical client the attorneys' fee application for fairness.

1. The Incollingo Case

There appears to be only one reported decision in New Jersey that directly deals with the method of setting attorneys fees in connection with a common fund class action settlement. *Incollingo v. Canuso,* 297 *N.J.Super.* 57 (App.Div.1997). The opinion is noteworthy because it does not examine the extensive body of federal law that has emerged nationally relating to attorneys' fees in common fund cases. Indeed, it ignores federal precedent and treats the matter as if it were solely a fee application pursuant to a fee-shifting statute[2] subject to *Rendine v. Pantzer,* 141 *N.J.* 292 (1995). *See Incollingo v. Canuso, supra,* 297 *N.J.Super.* at 63.

In *Incollingo,* the total attorneys' fees of $925,000.00 plus costs of approximately $150,000.00 were to be deducted from the settlement common fund created by the total cash recovery of $2,975,000.00 (plus coupons with a face value of $231,000). The method espoused by the court requires that the trial judge first determine the lodestar amount. Next, I am obligated to reduce the lodestar if it includes unreasonable charges or because the level of success is limited compared to the relief sought. *Id.* at 63. Then I must ascertain whether the hourly rates for the attorneys performing the work are reasonable. Finally, I must determine whether to increase the lodestar to "consider whether to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent upon a successful outcome." *Id.* (citing *Rendine v. Pantzer, supra,* 141 *N.J.* at 337).

This methodology is at odds with the majority view of how to award attorneys' fees in common fund class actions, and is not advocated by plaintiffs' attorneys. Courts typically use the percentage of recovery method in common fund class actions, as that method is "generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.' " *In re Rite Aid corp. Sec. Litig.,* 396 *F.3d* 294, 300 (quoting *In re Prudential Ins. Co. of Am. Sales Practice, supra,* 148 *F.3d* at 333.) When a court uses the percentage of recovery method, it "first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." *In re Cendant Corp. Litig.,* 264 *F.3d* 201, 256 (3d Cir.2001). This is mirrored in the *Manual for Complex Litigation, Fourth,* which states:

> ***19** Historically, attorney fees were awarded from a common fund based on a percentage of that fund. After a period of experimentation with the lodestar method (based on the number of hours reasonably expended multiplied by the applicable market rate for the lawyer's services), the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases. The only court of appeals that has not explicitly adopted the percentage method seems to allow considerable flexibility in approving combined percentage and lodestar approaches.
>
> § 14.121 *Manual for Complex Litigation, Fourth* 187 (footnotes omitted).

Thus, even though *Incollingo* may not be in the mainstream of modern class action jurisprudence, I may neither ignore, nor disobey its mandate. Thus, as instructed by *Incollingo,* I will view plaintiffs' requested attorneys' fees under the lens of *Rendine.*

A. Determine the Lodestar

As of October 10, 2006, the summary records of plaintiffs' attorneys showed that they had logged 3,777.25 hours in this case. The requested lodestar is $1,417,919 reflecting a blended hourly rate of slightly more than $375 per hour. Although summary in nature, the attorneys' fees information that I have reviewed do not appear to contain any unreasonable charges, churning, or any other reason to adjust the lodestar downward. The average hourly rate—the blended rate—is within a reasonable range that matches the skill and resolve exhibited by plaintiffs' attorneys during this litigation. Moreover, there is no principled reason to adjust the lodestar downward because of a purported lack of success as compared to the original relief sought. Since qualifying class members will obtain tangible and intangible benefits provided by the defendant, it would be wholly inaccurate to characterize the settlement as either incomplete or unsatisfactory. To the contrary, plaintiffs' counsel obtained some valuable benefits in a litigational environment that defendant made decidedly unfriendly.

B. Lodestar Adjustment

This process calls for the most difficult analysis because here I am asked to increase the lodestar by a factor of 207% to reflect the $2.9 million request for legal fees under the settlement agreement. I decline, under the *Rendine* iteration, to adjust the lodestar by such a sizeable factor, especially where no exceptional circumstances exist.

The element that will move the lodestar is primarily the risk of nonpayment where the compensation is entirely or substantially contingent on a successful outcome. In *Rendine,* the New Jersey Supreme Court noted that in the usual fee-shifting case, the contingency enhancement should be between five and fifty-percent of the lodestar. In fact, exercising its original jurisdiction in *Rendine,* the New Jersey Supreme Court increased the lodestar by 33%. *Id.* at 345. I am exceeding that percentage and allowing a high end lodestar enhancement of 50%. This reflects a blended hourly rate of approximately $563 per hour, a fulsome compensation by any standard. Moreover, it adequately compensates plaintiffs' counsel for the risks inherent in pursuing this action. Thus, I award plaintiffs' attorneys a fee of $2,126,878, plus their reasonable expenses of $83,254, for a total award that will come from the cash fund of $2,210,132.

***20** In light of this result, and recognizing that *Incollingo* may not be the sole controlling precedent, I will crosscheck the result using principles derived from federal jurisprudence in common fund class action settlement cases. Ironically, this is exactly backwards to the federal scheme, which first computes a percentage of recovery as the basis for the attorneys' fees, and then crosschecks the result with the lodestar method.

The methodology that I will employ is that of the United States Court of Appeals for the Third Circuit, not just because New Jersey is part of the Third Circuit, but because the most mature and well-developed analyses of attorneys' fees has emerged from that court. It is said that the 1985 recommendation of a Third Circuit task force, *Court Awarded Attorney Fees: Report of the Third Circuit Task Force,* reprinted in 108 *F.R.D.* 237 (1985), was one of the driving forces that spurred the percentage method to gain favor. § II(B)(2)(a), *Awarding Attorneys' Fees and Managing Fee Litigation, Second,* Alan Hirsch and Diane Sheehey (Federal Judicial Center 2005) at 72. The D.C. and Eleventh Circuits require the percentage method. The First, Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have stated that the district court may use either the percentage method or the lodestar method. The Seventh Circuit has indicated that the percentage method is preferred. The Ninth Circuit has suggested that the percentage method is particularly appropriate when there are multiple claims and it would be difficult to determine what hours were expended on the claims

that produced the fund. The Ninth Circuit also suggested that the lodestar is preferable when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors. The Fifth Circuit has not explicitly adopted the percentage method, but seems to allow a combined percentage and lodestar approach. *Id.* at 72–73.

In this action, the plaintiffs' attorneys have urged that I follow the Third Circuit's methodology as outlined in *Gunter v. Ridgewood Energy Corp.*, 223 *F.3d* 190 (3d Cir.2000). I accept their invitation because *Gunter* represents an appropriate methodology that may be readily deployed in the instant case.

2. The Gunter Case

Gunter sets forth the analysis for determining the reasonableness of a percentage fee award. The court stated in common fund cases, a trial court should first consider several factors in setting a fee award. Those factors include:

> (1) the size of the fund created and the number of person benefited; (2) the presence or absence of substantial objections by members of the class to the ... 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.
>
> ***21** *Gunter v. Ridgewood Energy Corp., supra,* 223 *F.3d* at 195 ((citing *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 336–340; and *In re General Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig., supra,* 55 *F.3d* at 819–22).

The court also instructed that a court should "cross-check the percentage award at which [it] arrive[s] against the 'lodestar' award method, which is normally employed in statutory fee-award cases." *Id.* These factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Gunter v. Ridgewood Energy Corp., supra,* 223 *F.3d* at 195 n. 1.

A. Size of Fund and Number of Persons Benefited

Generally speaking, as the size of the settlement fund increases, the percentage award decreases. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 339; *Cullen v. Whitman Med. Corp.,* 197 *F.R.D.* 136, 148 (E.D.Pa.2000). The basis for the inverse relationship is the belief that at some point the size of the recovery is attributable to the size of the class and has no direct relationship with the efforts of counsel. *In re Prudential Ins. Co. of Am. Sales Practices Litig., supra,* 148 *F.3d* at 339.

Plaintiffs' contend that the value of the settlement is more than $14.5 million, based upon the sum of the cash fund, the cost of brake inspections, and the administrative costs that are being borne by defendant. Although it is unclear exactly how much of the $12 million fund will actually be used up through the claims process, the objectors speculation that only a small fraction of claims will be honored is belied by the unusually robust response of class members for the free brake inspections. If this response is emblematic of those who will take advantage of the fund, I believe that most, if not all of it will be devoted to compensate individual class members. As for the estimated value of the brake inspections, the assignment of $50 for each inspection appears soundly based in the record, and when combined with the 50,000 requests for inspection, results in the $2.5 million additur to the $12 million cash fund. Lastly, the administrative costs that will be shouldered by defendant surely have value to plaintiffs, even if a mathematically precise amount may not be calculable at this time.

Since the requested fees ($2.9 million) reflects only 20% of the value of the settlement, it is neither outrageous nor shocking. Thus, this first *Gunter* factor disfavors reduction of the requested attorneys' fees.

B. Presence or Absence of Substantial Objections

The second *Gunter* factor assays the quality and quantity of objections by class members to the settlement terms and to the fees requested by their counsel. The majority of objections directed against the attorneys' fees addressed the unrealistic comparison of the benefit to individual class members with the aggregate of the fee request. The objectors point out the difficulty in assessing the true value of the settlement at this time, and continually argue that a better settlement should have been demanded by plaintiffs' attorneys. The objectors' position echoes a familiar refrain seen in class action settlements and the concomitant application for attorneys' fees. They have not persuasively argued that plaintiffs' attorneys' fees request is anything more than a product of lawyer's avarice. This emotional argument does not hold sway. This factor neither favors nor disfavors the award of the requested attorneys' fees.

C. Skill and Efficiency of Attorneys Involved

***22** A goal of the percentage fee-award is to ensure that competent counsel continue to undertake risky, novel, and complex litigation that serves the public interest. The experience and expertise of plaintiffs' attorneys supports the requested award. All counsel conducted themselves thus far in a professional and expert manner throughout this case.

D. Complexity and Duration of the Litigation

Although this case involves complex legal and factual issues, it contains none of a sort that would engender novel or first impression considerations. Indeed, although defendant put plaintiffs' counsel through extensive and time consuming motion practice and discovery procedures, and dispositive motions would certainly follow, the heat created by the friction of the adversary process in this case does not appear too great. In other words, this litigation is not unduly demanding, nor overly taxing to the attorneys for plaintiffs.

E. Risk of Nonpayment

This case, like most consumer product class actions, presents the potential for an uncertain outcome and a significant risk of not recovering anything. On the other hand, there was a favorable outlook for recovery sufficient for seasoned counsel to undertake the case on behalf of plaintiffs and the class on a contingency fee basis. This factor does not favor the requested fee to any great extent.

F. Amount of Time Devoted by Counsel

Plaintiffs' attorneys had expended 3,777 of hours on this action as of October 2006. This amount of attorney time is disproportionate to the request for $2.9 million in fees, especially where the tangible cash benefits to the class are less than $12 million. I find that the amount of time devoted to this case weighs against the percentage of recovery requested as a fee in this case.

G. Awards in Similar Cases

This factor requires the court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. *In re Cendant Corp. Prides Litig., supra,* 243 *F.3d* at 737. In *Vizcaino v. Microsoft Corp.,* 290 *F.3d* 1043 (9th Cir.2002), the court surveyed percentage based attorneys' fee awards in thirty-four common fund cases. The awards included in the survey ranged from 2.8% to 40% of the common fund. *Id.* at 1052–54. Eighteen of the thirty-four cases analyzed by the Ninth Circuit involved settlements of $100 million or more. Attorneys' fees of 30% of the common fund were awarded in only three of those cases. Percentage based fees of 25% or more were awarded in nine of the eighteen megafund cases surveyed. *Id.* The *Vizcaino* court affirmed a fee award of 28% of a common fund of approximately $97 million. *Id.* at 1052. The Third Circuit examined the percentage based fee awards in eighteen megafund cases in *In re Cendant Corp. Prides Litig., supra,* 243 *F.3d* at 737–38. The "attorneys' fee awards ranged from 2.8% to 36% of the common fund in those cases." *Id.* at 738. Percentage based fees of 30% or more were awarded in only three of the cases reviewed by the Third Circuit. *Id.* The fee award was more than 25% of the common fund in five of the eighteen cases. *Id.* Attorneys' fees of 25% of the common fund of $ 126.6 million were awarded to plaintiffs' counsel in *In re Rite Aid. In re Rite Aid Sec. Litig.,* 362 *F.Supp.*2d 587 (E.D.Pa.2005). See also *In re Combustion, Inc.,* 968 *F.Supp.* 1116, 1136 (W.D.La.1997) (setting a maximum cap reserve for attorneys fees of 36% of common fund of $ 127 million); *In re Ikon Office Solutions, Inc. Sec. Litig., supra,* 194 *F.R.D.* at 192–196 (awarding attorneys' fees of 30% of common fund (less costs) of $108 million with an excess of 45,000 attorney hours).

***23** Having exhaustively reviewed the *Gunter* factors, I conclude that they do not support plaintiffs' request for an award of $2.9 million, representing 20% of the tangible settlement fund. Instead, a fee based upon the percentage method of 15% ($2,175,000) would be more appropriate, and yields an attorneys' fee slightly more than using the *Incollingo* method. This confirms that the attorneys' fee shall be $2,126,878.

IV. CONCLUSION

For the reasons set forth above, I grant class action status to this matter and appoint plaintiffs' attorneys as class counsel. I grant the motion to approve the settlement. I approve attorneys' fees and expenses for plaintiffs' attorneys in the total amount of $2,210,132. I request that plaintiffs' attorneys prepare the final judgment memorializing this decision, circulate it among all counsel and any objectors who appeared at the Fairness Hearing, and submit it to me for signature as soon as practicable pursuant to *R.* 4:42–1(c).

All Citations

Not Reported in A.2d, 2006 WL 3780789

Footnotes

1 This action and Judge Moses' provisional determinations that the action may proceed as a class action and that the settlement had apparent merit were pending before the New Jersey Rules of Court affecting class actions changed on September 1, 2006. I will apply the Rules in effect as of the date of this decision.

2 Statutory awards are generally calculated using the lodestar method (number of hours reasonably spent on the litigation multiplied by the hourly rate, enhanced in some circumstances by a multiplier), subject to any applicable statutory ceiling on the hourly rate. § 21.71 *Manual for Complex Litigation, Fourth* 334–335. Common fund awards are generally based upon a percentage of the common fund the class action has produced.

End of Document © 2019 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit 5

Education Station Day Care Ctr. Inc. v. Yellow Book USA, Inc.

Superior Court of New Jersey, Appellate Division

March 27, 2007, Argued; May 1, 2007, Decided

DOCKET NO. A-1653-05T1, A-1834-05T1, A-1693-05T1

Reporter

2007 N.J. Super. Unpub. LEXIS 1607 *; 2007 WL 1245971

THE EDUCATION STATION DAY CARE CENTER INC., Plaintiff-Respondent, v. YELLOW BOOK USA, INC., Defendant-Respondent. THE EDUCATION STATION DAY CARE CENTER INC., Plaintiff-Appellant, v. YELLOW BOOK USA, INC., Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Bergen County, L-13657-04.

Counsel: Randall S. Ford and Lillian Young, appellants, Pro se, in A-1653-05T1.

John J. Pentz of the Massachusetts bar, admitted pro hac vice, argued the cause for appellants, Hansen Stierberger Downard Melenbrink & Schroeder, Tri-County Abstract Inc., Connie Pentz Realty Co., and John J. Pentz, Jr. in A-1834-05T1 (Smith & Stein and Mr. Pentz, attorneys; Mr. Pentz and David M. Nieporent, on the brief).

Michael S. Stein argued the cause for appellant, The Education Station Day Care Center Inc. in A-1693-05T1 (Pashman Stein, attorneys; John T. Whipple, on the brief).

Pashman Stein, attorneys for respondent, The Education Station Day Care Center Inc. in A-1653-05T1 (John T. Whipple, on the brief).

Davis Wright Tremaine and McCusker, Anselmi, Rosen, Carvelli & Walsh, attorneys for respondent, Yellow Book USA, Inc. in A-1653-05T1 (Bruce S. Rosen, of counsel; Robert D. Balin and Bruce Lamka, of the Washington bar, admitted pro hac vice, on the brief).

Oren S. Giskan (Giskan, Solotaroff & Anderson) of the New York bar, admitted pro hac vice, argued the cause for respondent, The Education Station Day Care Center Inc. **[*2]** in A-1834-05T1 (Pashman Stein and Mr. Giskan, attorneys; John T. Whipple, on the brief).

Robert D. Balin argued the cause for respondent Yellow Book USA, Inc. in A-1834-05T1 (Davis Wright Tremaine and McCusker, Anselmi, Rosen, Carvelli & Walsh, attorneys; Bruce S. Rosen, of counsel; Mr. Balin and Bruce Lamka, of the Washington bar, admitted pro hac vice, on the brief).

Robert D. Balin argued the cause for respondent, Yellow Book USA, Inc. in A-1693-05T1 (Davis Wright Tremaine and McCusker, Anselmi, Rosen, Carvelli & Walsh, attorneys; Bruce S. Rosen, of counsel; Mr. Balin and Bruce Lamka, of the Washington State bar, admitted pro hac vice, on the brief).

Judges: Before Judges Coburn, Axelrad and R.B. Coleman.

Opinion

PER CURIAM

These consolidated appeals arise out of a court approved settlement of a certified class action for false advertising against defendant, Yellow Book USA, Inc. One group of objectors challenges the fairness of the settlement and the other group of objectors challenges the sufficiency of notice. Plaintiff, Education Station Day Care Centers, Inc. (Education Station), challenges the methodology and quantum of the counsel fee approved by the court. We affirm as to the objectors' appeals. **[*3]** As to plaintiff's appeal, we affirm in part and exercise original jurisdiction and modify in part.

In November 2004, Education Station, an advertiser in Yellow Page directories, filed this class action litigation, alleging that Yellow Book made false representations in its advertisements and sales presentations concerning the usage of its telephone directories during the period from May 2002 through July 2004. Plaintiff alleged that as a result of Yellow Book's claims of superior usage, class members paid more than they should have for their Yellow Book advertisements, and sought damages under the Consumer Fraud Act (CFA), *N.J.S.A. 56:8-1 to -106*, and similar statutes in all other states nationwide, and also pled companion common law claims. At the time plaintiff commenced this lawsuit, several other putative class actions were pending against Yellow Book in other jurisdictions.

In January and February 2005, the parties participated in mediated settlement discussions, with the Hon. Geoffrey Gaulkin, P.J.A.D. (Ret.) presiding, and after four days a settlement was reached. The proposed settlement provided relief for a class of 529,087 Yellow Book customers, consisting of 391,525 current **[*4]** customers and 137,562 former customers. Current customers were eligible for a fully transferable credit voucher for future advertising purchases, with a fourteen-month expiration period, valued between $ 48 to $ 720, depending on the amount of advertising purchased by the customer during the class period. Former customers were eligible for the same credit vouchers as current customers toward future Yellow Book advertising, or had the option of receiving a lower cash payment of between $ 22 to $ 265, depending on the amount of advertising purchased by the customer during the class period. Yellow Book also agreed to pay all administrative costs, including costs associated with notice to the settlement class. The parties estimated the total potential value of the proposed settlement, excluding administrative costs and counsel fees and costs at between $ 65,709,220 and $ 71,900,000, depending on whether credit or cash options were chosen.

Following an agreement on the substantive terms of the settlement, the parties, with the assistance of the mediator, negotiated attorneys' fees to be paid to plaintiff's counsel. The agreement was that Yellow Book would pay attorneys' fees separate and **[*5]** apart from any relief provided to the class so that the fees would not decrease the value of the settlement to the class members. On April 28, 2005, the parties executed a Settlement Agreement pending the court's approval as required by *Rule 4:32-2(e)*. As part of the Settlement Agreement, Representative Plaintiffs' Counsel agreed to "apply to the Court for an award of attorneys' fees and litigation expenses not to exceed $ 5,000,000" and Yellow Book "agreed to pay, subject to Court approval, the sum of $ 5,000,000 to Representative Plaintiffs' Counsel for their attorneys' fees and expenses in connection with the Action and the Litigation." Paragraph IX(A).

On May l3, 2005, the trial court entered a

preliminary approval order incorporating the terms of the agreement and scheduling the final approval hearing. The court specifically found the requirements under *Rule* 4:32 were provisionally met and the manner of notice described in the agreement was valid and sufficient. As of the fairness hearing on August 26, 2005, in excess of ninety-six percent of the class members had been contacted. According to plaintiff's counsel, with four weeks remaining in the claims period, about 81,000 people **[*6]** (15% of the class) had filed claims. Thirteen members filed objections. Counsel for Yellow Book represented that 65,000 current customers had made claims for their advertising credits totaling over $ 11.2 million. Counsel recounted that the parties "painstakingly negotiated" the settlement over the four days of mediation, which resulted in "major compromises on both sides."

Plaintiff's counsel touted the benefit that each class member received from the settlement without the risk and delay of trial, explaining that its economist predicted that if plaintiffs were successful at trial, their maximum possible damages would be that class members paid eleven percent more for their advertising as a result of Yellow Book's misleading campaign. The settlement agreement, however, provided each class member with a range of fifty to seventy to eighty percent of that amount, which was a tremendous result considering the average nine to twelve percent recovery of maximum possible damages in a typical class action settlement. Plaintiff's counsel also explained the rationale for negotiating the cash option solely for former customers was that such customers could have gone out of business, moved out **[*7]** of state or, for whatever reason, did not want to advertise in Yellow Book and would have no need for a credit voucher. Credit vouchers, however, were a viable option for current customers in view of Yellow Book's seventy percent customer retention rate.

Appellant John Pentz and counsel for an objector who did not appeal presented their views. Pentz primarily argued that the class should have only included the class members who relied upon the misleading advertising campaign. He also argued the court should not apply a multiplier in determining attorneys' fees and the excess funds between the court-awarded fee and the agreed-upon maximum should be distributed to the class. Furthermore, Pentz suggested that, due to the inherent linkage between the parties' settlement for the class award and the attorneys' fees, the court should require the parties in a class action to resettle the class award after settling the amount of attorneys' fees. The court reviewed submissions by objectors who were unable to appear, including appellants Ford and Young.

The court certified the class under *Rule 4:32-1(a)* and *(b)*, and approved the terms of the settlement as "fair and reasonable [and] adequate under **[*8]** the totality of the circumstances" pursuant to *Rule 4:32-2*. The court recited the factors it took into consideration, including: (1) the inclusiveness of the meaningful class members within the time period; (2) the risk of trial; (3) the substantial recovery provided by the settlement considering the maximum possible recovery provided by the economist; (4) the flexible redemption period for class members to exercise their vouchers once received; (5) the ability for class members to opt out; and (6) the increased value of the voucher as opposed to a current cash payment, particularly in view of the likelihood the current customers would exercise that voucher for future advertising.

On October 24, 2005, after reviewing the parties' arguments and itemized fees submitted by class counsel, the court issued a

written decision regarding plaintiff's attorneys' fees and expenses. The court recited the history of the case and the terms of the parties' proposed settlement and noted the representation of Yellow Book's counsel at the fairness hearing that "the attorneys' fees and expenses were negotiated not with a finite amount, but with a cap or maximum of $ 5,000,000 to be paid by Yellow Book," **[*9]** the provision in the proposed Settlement Order and Judgment for the maximum amount of attorneys' fees, and the objectors' position that such award was not justified. The court, citing *Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 248 (D.N.J. 2005)*, explained that its obligation as part of a fairness determination in a class action settlement was to thoroughly analyze a fee application and assess a reasonable fee and expenses within its discretion in accordance with the appropriate methodology. It further recited the two primary methods for calculating attorneys' fees, the lodestar method, noting this method is more typically applied in statutory fee-shifting cases, and the percentage of recovery method. The court concluded that the lodestar amount, i.e., the legal fees as billed for the six law firms totaling $ 1,060,266, was an appropriate attorneys' fee award, plus costs and disbursements of $ 33,909.87, as opposed to the $ 5 million requested. On October 24, 2005, the court entered a Settlement Order and Judgment confirming the Settlement Agreement and approving payment of $ 1,094,175.87 to Representative Plaintiffs' Counsel as attorneys' fees and expenses to be paid by **[*10]** Yellow Book as provided in the Settlement Agreement. These appeals ensued.

In appeal No. A-1834-05T1, objectors, Hanzen Stierberger Downard Melenbrink & Schroeder, Tri-County Abstract Inc., Connie Pentz Realty Co., and John J. Pentz, Jr. ("Pentz" objectors) assert the following arguments: (1) the court abused its discretion in approving the settlement because it discriminates unfairly between similarly situated class members; (2) attorneys' fees may not exceed one-and-one half times class counsel's reasonable lodestar; and (3) the difference between the $ 5 million fund set aside for payment of attorneys' fees and the amount actually awarded should be treated as class funds.

In appeal No. A-1653-05T1, objectors Randal Ford and Lillian Young argue that since individuals who signed Yellow Book contracts on behalf of companies that were plaintiffs in the class action were not included as class members and did not receive individual notice of the proposed settlement, the judgment approving the settlement should be reversed.

In appeal No. A-1693-05T1, plaintiff Education Station asserts the following arguments: (1) the trial court should only have reviewed the record and class counsel's fee **[*11]** request for taint or conflict, and if there was none, approved the $ 5 million fee; (2) the Appellate Division should exercise original jurisdiction and set the fee; and (3) even if analyzed under the majority view in awarding common fund class action counsel fees, the $ 5 million fee was fair and reasonable.

We first address the objectors' challenges to the overall settlement and then address the counsel fee award. The Pentz objectors argue that the settlement agreement discriminates between similarly situated class members, in that former customers may elect a cash payment and current customers can only use a credit voucher for future advertising. They contend such distinction arbitrarily prefers one group of plaintiffs over another, which is inimical to the very principle of class advocacy. They suggest we disapprove the settlement as structured by the parties, citing *Parker v. Time Warner Entm't Co., L.P., 239 F.R.D. 318 (E.D.N.Y. 2007)*, as persuasive authority for the proposition that treating current and former

customers is *de facto* unfair differential treatment of similarly situated class members. The Pentz objectors propose that the settlement should be amended to remove the **[*12]** disparity by providing the current customers with the cash option, and that such amendment would have little effect on Yellow Book's ultimate payout because the current customers who are satisfied with Yellow Book would choose the higher-valued vouchers.

We are not persuaded by these arguments. A trial court's task in reviewing a class action settlement is to determine whether it is fair, reasonable, and adequate to the class as a whole. *R. 4:32-2(e)(1)(A)*; *Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 627, 524 A.2d 841 (App. Div. l987)*. The trial court's role is to approve or reject the proposed settlement in its entirety, not to revise or amend particular provisions. *See City of Paterson v. Paterson Gen. Hospital, 104 N.J. Super. 472, 250 A.2d 427 (App. Div.)*, *aff'd*, *53 N.J. 421, 251 A.2d 131 (1969)*. "[T]he court's function [is] to determine the reasonableness of the agreement, not to renegotiate the terms of the settlement." *Tabaac v. Atlantic City, 174 N.J. Super. 519, 524, 417 A.2d 56 (Law Div. l980)*. The issue is the reasonableness of the settlement as written, "not whether one could conceive of a better settlement." *In re Cendant Sec. Litig., 109 F. Supp. 2d 235, 255 (D.N.J. 2000)*.

On appeal, the trial court's decision to **[*13]** approve a proposed class settlement is reviewed for abuse of discretion. *Chattin, 216 N.J. Super. at 628*; *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004)*(standard of review is abuse of discretion, and approval of class settlement must be affirmed absent clearly erroneous finding of fact or misinterpretation or misapplication of law). Deference to the trial court's approval of a complex class action settlement is particularly appropriate given courts' endorsement of the policy of encouraging the settlement of litigation. *See* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002); *In re General Motors Corp. Pick-Up Truck Prod. Liab. Litig., 55 F.3d 768, 784 (3d Cir. l995)* ("[t]he law favors settlement, particularly in class action and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation); *Cotton v. Hinton, 559 F.2d 1326, 1331* (5th Cir. l977) ("[p]articularly in class action suits, there is an overriding public interest in favor of settlement").

The Pentz objectors point to no abuse of discretion that would justify overturning the settlement. They merely challenge a single feature, contending **[*14]** that current customers like themselves are provided with less valuable benefits because they are not offered the cash option available to former customers and, thus, that portion of the settlement is unfair and should be reformed. Their reliance on *Parker* is misplaced. *Parker* involved a class action suit regarding Time Warner's disclosure and sale of its cable subscribers' personal identification information in violation of state and federal privacy laws. The proposed settlement provided benefits to class members who could be identified from a sales database. Under the settlement, current subscribers ("Category I") received credit for free movies or other service and former subscribers who were still living in Time Warner's service area ("Category II") received a credit for a month of free service with no installation fee. *Parker, 239 F.R.D. at 326*. Employing the "range of reasonableness standard," the court found these in-kind, non-cash credits to be substantially fair and adequate means of compensation for the class claims at issue. The court, however, declined to approve the settlement agreement for two other reasons, one being the disparate and unfair treatment of "Category III"

[*15] members, former subscribers who no longer lived in the cable company's service area, who were only given the right, within 120 days, to transfer either benefit available to a current or former subscriber to a person living in the area serviced by Time Warner. [1] The court found that merely providing this group of customers, which represented a significant number of members, with a credit that they did not even have the option of using themselves, was not a sufficient benefit of the settlement. Of significant concern was that the parties failed to offer any difference between the three categories of claimants that would justify providing the former subscribers who had moved out of the area with only the "mere right to transfer their benefit to someone else." *Id. at 340*.

Entirely **[*16]** consistent with the case law, and recognized by the court in *Parker*, a class settlement can offer different benefits to differently situated class members, so long as it offers fair and adequate compensation to the class as a whole. There was more than adequate explanation given in the present case as to why the settlement provided two separate awards to the class, and the parties explained the rationale in detail for compromising different award options due to distinguishing needs of current and former customers, making the cash option available only to the latter. Moreover, the Pentz objectors' assertion that providing settlement credits to current customers is inadequate because they are no more likely to purchase future advertising in Yellow Book than former customers is belied by the undisputed fact in the record of Yellow Book's seventy-percent customer retention rate. As such, the settlement credit may even be better than a cash rebate for this vast majority of current customers who have an ongoing, recurring business relationship with Yellow Book. The trial court was satisfied there was ample evidence in the record of distributional fairness, equal treatment among class members, **[*17]** and an overall fair, reasonable and adequate settlement to the class, and we discern no basis to second-guess that decision.

The Ford and Young objectors argue that individuals such as themselves who signed Yellow Book contracts on behalf of companies that were plaintiffs in the class action should have been included as class members and given notice because they are co-obligors on the contract, thereby incurring joint liability. This argument is without sufficient merit to warrant discussion. *R. 2:11-3(e)(1)(E)*. These individuals signed contracts as authorized representatives of companies, not on their own behalf. They arranged for the payment of advertising to Yellow Book from their respective companies and did not draw from their own accounts in making the payment. They are not class members and, as such, were never entitled to notice of the proposed settlement.

We turn now to the counsel fee award. Plaintiff contends the parties agreed that Yellow Book would pay $ 5 million in attorneys' fees to plaintiff's counsel separate from the relief to the class members, and the trial court's sole function was to ascertain that the counsel fee settlement was reached as a result of arms-length **[*18]** negotiations, with the assistance of a highly-respected mediator, following an agreement on the substantive terms of the class settlement, and was free of taint or collusion. According to plaintiff, consistent with our courts' deference to parties' agreements

---

[1] The other reason was that the settlement deprived a large number of class members, apparently a majority of the total class, of any remedy. The "Category IV" members, who were not listed in the sales database that the parties used to determine settlement benefits, would be releasing their claims against Time Warner and receiving nothing in return. There were other databases from which additional plaintiffs could be identified.

absent taint or conflict, if the court was satisfied there were no such impediments, it should have approved the $ 5 million fee.

We have no doubt as to the integrity of the mediation process but disagree that the court's scope of review should have been as narrow as suggested by plaintiff. "[A] thorough judicial review of fee applications is required in all class action settlements." *In re General Motors Corp., supra, 55 F.3d at 819*. It is apparent from the comments of Yellow Book's counsel at the fairness hearing and the language of the proposed Settlement Agreement that attorneys' fees and expenses were negotiated with the knowledge that Yellow Book could be required to pay up to $ 5 million, depending upon what the court determined was a reasonable fee under acceptable standards for fee approvals. For example, in addition to the aforementioned provision in the Settlement Agreement referencing the "not to exceed $ 5,000,000" **[*19]** language and "court approval" of the amount, the agreement contains several provisions acknowledging the court will determine whether the attorneys' fees and expenses requested by Representative Plaintiffs' counsel are "reasonable." The Agreement also contemplates the court may award less than the $ 5 million requested, providing in P IX(B) that installments of "$ 2,500,000 will be paid, *or in the event the Court awards some lesser amount*, half of that less amount will be paid . . . "(emphasis added) and in P X(F) that "no order of the Court awarding Representative Plaintiffs' Counsel attorneys' fees and expense in an amount less than the amount agreed to in P IX(A) . . . shall constitute grounds for cancellation or termination of the Settlement Agreement."

The court explained that of the two primary methods for calculating attorneys' fees, the percentage of recovery method and the lodestar method, the lodestar method is more typically applied in statutory fee-shifting cases, and that the alternate method may be used to cross-check the reasonableness of the fee. The court then analyzed the itemized breakdown of attorneys' fees, totaling $ 1,060,266, from each of the six law firms comprising **[*20]** Plaintiffs' Representative counsel whose hourly rates descended from the highest at $ 550 per hour for retired Supreme Court Justice Gary S. Stein. The court found the hourly rates were "current, prevailing hourly market rates considering [plaintiff's] skill and proficiency" exhibited in its submissions and oral arguments and the rates, including former Justice Stein's, were "not disproportionate considering the vastness, preparedness and expertise necessary for this type of Settlement." The court elaborated:

> The litigation itself required considerable resources in order to argue and prepare the issues involved for early resolution. It is unquestioned that this matter required preparation for litigation as well as for Settlement. Without that preparation, defense counsel would not have considered such a Settlement offer. Further, the Court observed the skill of competent counsel during the Fairness Hearing and also recognizes that the papers submitted are commensurate with the skill represented.

The court further noted that the "miniscule amount of objections filed [thirteen] compared to the amount of Class members [529,000] is an additional, persuasive basis to determine that the fees **[*21]** as billed are fair and reasonable." The court concluded that the amount of actual time billed was "fundamentally unchallenged by any meritorious objection" and there was nothing before the court that "substantiate[d] any reduction of time billed on a belief of fabrication, exaggeration or claim of unnecessary hours billed." Thus, citing

Rendine v. Pantzer, 141 N.J. 292, 337, 661 A.2d 1202 (1995), the court found the hourly rates and the amount of hours billed were "realistic, fair, reasonable and unchallenged by any meritorious defense." The court then approved a counsel fee award in the amount of the lodestar plus actual costs, totaling $ 1,094,175.87, stating it was a fair and reasonable fee for the class action settlement.

Contrary to plaintiff's argument on appeal, the Rendine lodestar analysis was the appropriate method for calculating counsel fees in this fee-shifting CFA action. *See* In re General Motors Corp., supra, 55 F.3d at 821 ("Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases."). Under specific statutory enactments, courts are authorized to award a "reasonable" **[*22]** attorneys' fee to the prevailing party. R. 4:42-9(a)(8); Rendine, supra, 141 N.J. at 322. *See also* R.M. v. Supreme Court of New Jersey, 190 N.J. 1, 9, 918 A.2d 7 (2007). The CFA expressly provides that a prevailing plaintiff is entitled to reasonable attorneys' fees, filing fees, and costs. N.J.S.A. 56:8-19; Wanetick v. Gateway Mitsubishi, 163 N.J. 484, 490, 750 A.2d 79 (2000). The first step in calculating a fee award under a fee-shifting statute is to determine the "lodestar," which is arrived at by multiplying the number of hours reasonably expended by a reasonable hourly rate. Rendine, supra, 141 N.J. at 334-35. The determination of the lodestar amount is the "most significant element in the award of a reasonable fee" because it requires the trial court to "evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application." Id. at 335. Here, the court found both the hours expended and the hourly rates reasonable. No challenges were made on appeal to those findings.

The Court also instructed in Rendine, that after determining the appropriate lodestar amount, the trial court should "consider whether **[*23]** to increase that fee to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." Id. at 337. As the Court recognized, "[b]oth as a matter of economic reality and simple fairness . . . a counsel fee awarded under a fee-shifting statute cannot be 'reasonable' unless the lodestar, calculated as if the attorney's compensation were guaranteed irrespective of result, is adjusted to reflect the actual risk that the attorney will not receive payment if the suit does not succeed." Id. at 338. The Court also held that an additional enhancement may be justified in certain circumstances based on the likelihood of success, "[w]hen the result achieved in such a case is significant and of broad public interest . . . ." Id. at 341 (quoting Pennsylvania v. Delaware Citizens' Council for Clean Air, 483 U.S. 711, 751, 107 S. Ct. 3078, 97 L. Ed. 2d 585 (1987)). Ordinarily, contingency enhancements in fee-shifting cases should range between five and fifty-percent of the lodestar fee; "with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." Id. at 343. The **[*24]** Court instructed, however, that such enhancements should never exceed onehundred percent of the lodestar, and enhancements of that magnitude will be appropriate only in a rare and exceptional case. *Ibid.*

Although the court applied the Rendine methodology in calculating plaintiff's counsel fee, the court ceased its analysis after calculating the lodestar amount, did not award any enhancement, and provided no explanation as to why it did not give what *Rendine* describes as the ordinary enhancement in a fee-shifting case. We are satisfied the record is sufficiently complete to

permit us to perform the second step of the *Rendine* analysis in the exercise of our original jurisdiction. R. 2:10-5. We affirm the lodestar counsel fee determination but conclude that plaintiff's counsel is entitled to an enhancement to the lodestar billed fees. This class action was taken on a contingent fee basis, with substantial risks to plaintiff's counsel. Moreover, based on plaintiff's economist's assessment of maximum possible damages recoverable if successful at trial, plaintiff's counsel achieved an excellent result for the class members without the risk, delay and additional expenses of a trial. Plaintiff's **[*25]** counsel also deserves an enhancement for resolving the matter expeditiously through mediation rather than increasing the lodestar through protracted litigation, and for not seeking a fee against the class, which could have been based on a percentage of recovery. We therefore conclude that plaintiff's counsel is entitled to an enhancement of thirty-five percent of the lodestar ($ 371,093) to be added to the counsel fee award entered by the trial court.

We reject the Pentz objectors' argument that the difference between the requested $ 5 million and the approved counsel fee should be added to the class award. This argument ignores the purpose of negotiating attorneys' fees only after the terms of the substantive settlement are reached, i.e., avoiding the subject of fees from improperly influencing the settlement. Indeed, the class settlement amount and the attorneys' fees are two separate and distinct funds. The settlement was negotiated prior to the fee agreement, and it is not the court's role to renegotiate the terms of the settlement. *See* *Tabaac, supra, 174 N.J. Super. at 524*.

Appeal Nos. A-1834-05T1 and A-1653-05T1 are affirmed. We remand Appeal No. A-1693-05T1 for entry of an appropriate **[*26]** order consistent with this opinion.

End of Document

Exhibit 6

Alves v. Main

United States District Court for the District of New Jersey

December 4, 2012, Decided; December 4, 2012, Filed

Civil Action No. 01-789 (DMC)

Reporter
2012 U.S. Dist. LEXIS 171773 *; 2012 WL 6043272

RAYMOND ALVES, et al., Plaintiffs, v. MERRILL MAIN, Ph.D., et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Affirmed by *Alves v. Main, 559 Fed. Appx. 151, 2014 U.S. App. LEXIS 5234 (3d Cir. N.J., Mar. 20, 2014)*

Prior History: *Alves v. Main, 2012 U.S. Dist. LEXIS 84761 (D.N.J., June 19, 2012)*

Counsel: [*1] For RAYMOND ALVES, Plaintiff: LAWRENCE S. LUSTBERG, LEAD ATTORNEY, GIBBONS, PC, NEWARK, NJ; BAHER AZMY, NEW YORK, NY.

For RICHARD BAGAROZY, (Civil 04-3066), Plaintiff: IAN S. MARX, REBECCA A. FROST, LEAD ATTORNEYS, GREENBERG TRAURIG, LLP, FLORHAM PARK, NJ.

For GRADY BROWN, (Civil 04-3066), LAMONT BROOKS, (Civil 04-3066), EMILIO VELEZ, (Civil 04-3066), STEVE RASINSKI, (Civil 04-3066), GERALD DOOLEY, (Civil 04-3066), JOHN WALKER, (Civil 04-3066), BHARAT MALDE, (Civil 04-3066), EDWARD SALERNO, (Civil 04-3066), RODNEY ROBERTS, (Civil 04-3066), DOUGLAS MINATEE, (Civil 04-3066), FREDEIRCK DUBOSE, (Civil 04-3066), RALPH WALDRON, (Civil 04-3066), JASON D. OVERBY, (Civil 04-3066), JOHN DE ANGELIS, (Civil 04-3066), DARRICK BAILEY, (Civil 04-3066), MIGUEL LORENZO, (Civil 04-3066), CHARLES F PETERS, (Civil 04-3066), JABOZZ SPENCE, (Civil 04-3066), SALAAM HAKEEM ABDULLAH, (Civil 04-3066), GILBERT DAVIS, (Civil 04-3066), KARL SIEGLE, (Civil 04-3066), JASON DAVIS, (Civil 04-3066), CRAIG BLUE, (Civil 04-3066), FRED BROWN, (Civil 04-3066), MICHAEL GARGIULO, (Civil 04-3066), WALTER HARRELL, (Civil 04-3066), Plaintiffs: REBECCA A. FROST, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, FLORHAM PARK, NJ.

For MICHAEL **[*2]** HASHER, (Civil 04-3066), Plaintiff: GARY J. LESNESKI, KERRI E. CHEWNING, ARCHER & GREINER, PC, HADDONFIELD, NJ; REBECCA A. FROST, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, FLORHAM PARK, NJ.

JOSEPH ARUANNO, Plaintiff, Pro se, AVENEL, NJ.

For Mr. DERRICK SESSOMS, Mr. MICHAEL CULBRETH, Plaintiffs: LAWRENCE S. LUSTBERG, GIBBONS, PC, NEWARK, NJ.

ROBERT ANDREW MCGARREY, Consol Plaintiff, Pro se, AVENEL, NJ.

For WILLIAM H. MOORE, MARY ANN HYSLER, Consol Plaintiffs: JOHN STUART FURLONG, LEAD ATTORNEY, FURLONG & KRASNY, ESQS., WEST TRENTON, NJ.

RONALD NASH, Consol Plaintiff, Pro se, AVENEL, NJ.

For LORENZO OLIVER, Consol Plaintiff: NEAL WIESNER, LEAD ATTORNEY, LAW OFFICE OF NEAL WIESNER, STATEN ISLAND, NY.

For ROBERT DEAVERS, (Civil 04-3066),

Intervenor Plaintiff: REBECCA A. FROST, LEAD ATTORNEY, GREENBERG TRAURIG, LLP, FLORHAM PARK, NJ.

For GAIL FERGUSON, Dr. Clinical Program Director, Defendant: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ; TAMARA L. RUDOW, LEAD ATTORNEY, DEPUTY ATTORNEY GENERAL, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ; KEITH S. MASSEY, JR., OFFICE OF THE NJ ATTORNEY **[*3]** GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ.

For GWENDOLYN HARRIS, Commissioner DHS (Civil 04-3066), Defendant: KEITH S. MASSEY, LEAD ATTORNEY, JR., OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ.

For JOHN E. MAIN, Chief Executive Officer DMHS (Civil 04-3066), Defendant: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ; KEITH S. MASSEY, LEAD ATTORNEY, JR., OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ.

For MERRIL MAIN, Director of Psychologu Dept. (Civil 04-3066), Defendant: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ; KEITH S. MASSEY, LEAD ATTORNEY, JR., OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ.

For TOM CALABRESE, Program Coordinator (Civil 04-3066), TINA SELLETTI, Program Coordinator (Civil 04-3066), **[*4]** Defendants: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ.

For JON CORZINE, govenor, New Jersey, KEVIN M. RYAN, Commissioner - DHS, et al, GLEN FERGUSON, Clinical Program Director, Defendants: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ.

For WILLIAM F. PLANTIER, Director of Operations, DOC, PAUL LAGANA, Assistant Administrator - STUs, Defendants: DANIEL MICHAEL VANNELLA, DIANNE M. MORATTI, LEAD ATTORNEYS, OFFICE OF NJ ATTORNEY GENERAL, TRENTON, NJ; DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ.

For JEFFREY S. CHIESA, in his official capacity as Attorney General of the State of New Jersey, LYNN A. KOVICH, in her official capacity as Assistant Commissioner and Deputy Director of the New Jersey Division of Mental Health and Addiction Services, Defendants: SUSAN JENNISON DOUGHERTY, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, DIVISION OF LAW, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ.

For OFFICER OSCAR **[*5]** TORRES, Consol Defendant: DAVID L. DACOSTA, LEAD

ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ; TAMARA L. RUDOW, LEAD ATTORNEY, DEPUTY ATTORNEY GENERAL, TRENTON, NJ.

For JAMES DAVY, Consol Defendant: KEITH S. MASSEY, JR., LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ.

For GRACE ROGERS, Consol Defendant: DANIEL MICHAEL VANNELLA, DIANNE M. MORATTI, LEAD ATTORNEYS, OFFICE OF NJ ATTORNEY GENERAL, TRENTON, NJ; KEITH S. MASSEY, JR., LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ.

For CHRIS CHRISTIE, GOV. of N.J., PAULA DOW, Attorney General, GARY LANIGAN, Commissioner- D.O.C., JONATHAN POAG, SHANTAY BRAME ADAMS, MS. JACKIE OTTINO, JOHN MAIN, Consol Defendants: DAVID L. DACOSTA, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ.

For JENNIFER VELEZ, Commissioner-D.H.S., Consol Defendant: SUSAN JENNISON DOUGHERTY, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, DIVISION OF LAW, DEPARTMENT OF LAW & PUBLIC **[*6]** SAFETY, TRENTON, NJ; DAVID L. DACOSTA, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ.

For PAULA T. DOW, individually and in her official capacity as Attorney General for the State of New Jersey, Consol Defendant: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ.

For PhD. MERRILLL MAIN, individually and in his official capacity as Clinical Director of the Special Treatment Unit, Consol Defendant: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ; SUSAN JENNISON DOUGHERTY, LEAD ATTORNEY, OFFICE OF THE ATTORNEY GENERAL, DIVISION OF LAW, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ.

For GARY M. LANIGAN, individually and his official capacity as the Commissioner of the Department of Corrections, Consol Defendant: DANIEL MICHAEL VANNELLA, LEAD ATTORNEY, OFFICE OF NJ ATTORNEY GENERAL, TRENTON, NJ.

For DAVID SAMSON, DEPARTMENT OF CORRECTIONS OFFICER MCCORRMICK, Defendants: DAVID L. DACOSTA, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY, TRENTON, NJ; TAMARA L. RUDOW, LEAD ATTORNEY, DEPUTY ATTORNEY **[*7]** GENERAL, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ; KEITH S. MASSEY, JR., OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ.

For ALAN G. KAUFMAN, JAMES W. SMITH, JR., Defendants: TAMARA L. RUDOW, LEAD ATTORNEY, DEPUTY ATTORNEY GENERAL, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ; KEITH S. MASSEY, JR., OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF

LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ.

For DEVON BROWN, Defendant: DANIEL MICHAEL VANNELLA, DIANNE M. MORATTI, LEAD ATTORNEYS, OFFICE OF NJ ATTORNEY GENERAL, TRENTON, NJ; TAMARA L. RUDOW, LEAD ATTORNEY, DEPUTY ATTORNEY GENERAL, TRENTON, NJ; VICTORIA L. KUHN, LEAD ATTORNEY, OFFICE OF THE NJ ATTORNEY GENERAL, TRENTON, NJ; KEITH S. MASSEY, JR., OFFICE OF THE NJ ATTORNEY GENERAL, DEPARTMENT OF LAW & PUBLIC SAFETY - DIVISION OF LAW, TRENTON, NJ.

Judges: DENNIS M. CAVANAUGH, UNITED STATES DISTRICT JUDGE.

Opinion by: DENNIS M. CAVANAUGH

Opinion

CAVANAUGH, U.S.D.J.

This action began with the filing of a *pro se* complaint by Plaintiff Raymond Alves more than a decade ago. Since then, the case has transformed into a large-scale **[*8]** consolidated class action on behalf of all involuntarily civilly committed residents of New Jersey's Special Treatment Unit ("STU") in Avenel, New Jersey, confined pursuant to the New Jersey Sexually Violent Predator Act, *N.J.S.A. 30:4-27.24, et seq*. ("NJSVPA" or "the Act").

Represented *pro bono* by the Seton Hall Law School Center for Social Justice and Gibbons P.C., the plaintiff class challenges the mental health treatment provided at the STU, alleging that the New Jersey Department of Human Services does not provide minimally adequate treatment required by federal and state law. After years of litigation followed by years of complex and intense settlement negotiations, a class wide settlement has been reached that the settling parties contend substantially improves the treatment available at the STU and provides the residents with a better opportunity to regain their liberty.

Presently before the Court is the joint motion for final approval of the parties' settlement. [CM/ECF No. 193.] The parties, through their counsel, seek: (1) approval of the proposed Settlement Agreement; (2) a nominal award of attorney's fees to Class Counsel; and (3) the appointment of a monitor in furtherance **[*9]** of the Settlement Agreement. The papers submitted have been carefully considered, as have objections to the settlement. A Fairness Hearing was held on November 13, 2012. For the reasons that follow, the Court **approves** the final settlement and **grants** attorney's fees to the Seton Hall Law School Center for Social Justice in the amount of $78,000. The Court will appoint a monitor by separate order.

I. BACKGROUND[1]

A. The Parties

Plaintiffs are Raymond Alves, Derrick Sessoms and Michael Culbreath on behalf of themselves and a class consisting of all persons involuntarily confined to the STU under the New Jersey Sexually Violent Predator Act. [2] Defendants are Merrill Main, Ph.D., in his official capacity of Clinical Director of the STU; Jennifer Velez, in her official capacity as Commissioner of the New Jersey Department of Human Services ("DHS"); Lynn A. Kovich, in her official capacity as Assistant Commissioner of the New Jersey

[1] Aspects of this Opinion are drawn from the parties' joint submission.

[2] At times in this Opinion, Plaintiffs and the Class are referred **[*10]** to as "residents." This is the term the parties use to refer to individuals confined to the STU.

Division of Mental Health and Addiction Services ("DMHAS"); and Jeffrey Chiesa, in his capacity as the Attorney General of New Jersey.

B. Overview

Plaintiffs are convicted sex offenders who have completed prison sentences but remain involuntarily confined pursuant to the NJSVPA, which authorizes the indefinite civil commitment of any individual determined to be a "sexually violent predator." *N.J.S.A. 30:4-27.26*. A sexually violent predator is defined as a person who has been convicted of at least one sexually violent offense and who suffers from "a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined to a secure facility for control, care and treatment." Id. The "secure facility" that houses the Plaintiffs in this case is the STU in Avenel, New Jersey, which is operated by the New Jersey Department of Corrections. *N.J.S.A. 30:4-27.34(a)*.

Once committed to the STU, a sexually violent predator remains there until such time as a state court finds that he "will not be likely to engage in acts of sexual violence," in which case he may be "conditionally discharged." *N.J.S.A. 30:4-27.32(c)(1)*. In order to be "conditionally discharged," the individual must establish **[*11]** that he has been successfully treated for the mental abnormality or personality disorder that was the basis for his confinement to the STU. In order for residents to have a meaningful opportunity to work toward a potential release, the Act provides that class members receive mental health treatment, which is provided by the New Jersey Department of Human Services. *N.J.S.A. 30:4-27.34(b)*.

Plaintiffs claim, *inter alia*, that the various Defendants have failed to provide the class with adequate mental health treatment required by federal and state law. Mental health treatment is key for STU residents. As discussed below, without adequate mental health treatment, Plaintiffs and the class members will likely never be released from the STU. However, with adequate treatment, the residents have an opportunity to show that they have been cured of their mental abnormality and deserve a conditional discharge.

C. The STU - Present Day

Dr. Main, the clinical director at the STU, has submitted a declaration that details the treatment programs presently in place at the facility. According to Dr. Main, the primary therapy provided to Class Members is a form of group therapy administered in "process groups." **[*12]** The process groups are supplemented, for some residents, by individual resident specific, psycho-educational "modules" devoted to topics such as victim empathy, relapse prevention, and arousal reconditioning. (Declaration of Merril Main, Ph.D. ("Main Decl.") ¶ 3.) At present, two process groups are offered to the residents per week.

The treatment program at the STU is divided into phases, from phase 1 (Orientation) to phase five (Transition). (Main Decl. ¶ 5.) When the STU staff believes that a resident has sufficiently progressed through the stages and further involuntarily commitment is unnecessary, a conditional discharge is recommended pursuant to the Act. (Id.) Dr. Main states that in nearly every case where a conditional discharge has been recommended, the resident had reached stage 5 of the program. (Id.) Discharge of STU residents is rare; since the Act was implemented in 1999, 525 individuals have been committed under

the NJSVPA. (Declaration of Barbara Moses, Esq. ("Moses Decl.") ¶ 22(a).) [3] Of the 525 individuals committed, 47 residents have been released from the STU into the community at large. (Id.) Of the 47 residents released from the STU, 28 were discharged, in accordance **[*13]** with the recommendation of their treatment team, after reaching stage 5 of the treatment program. (Id.) The remaining 19 were released by state courts at phases 1-4 of the treatment program, nearly always over the objection of the STU treatment team. (Id.)

As of June 26, 2012, the total population of the STU stood at 469. (Moses Decl. ¶ 22(d).) 165 of these residents have been continuously confined for 10 years or more. (Id) As of May 4, 2012, there were 5 men confined to the STU who had reached stage 5 of the treatment program and 20 men in phase 4. (Id)

D. The Operative Complaint

Plaintiffs in this case challenge the quantum and quality of therapy offered, contending it is inadequate. Plaintiffs' Second Amended Complaint ("SAC") alleges inadequacy with respect to current treatment at the STU based on, among other things, the following:

- That Defendants offer Class Members a maximum of two 90-minute process groups per week, and that **[*14]** the groups are often overcrowded, start late, or end early, further reducing therapy time (SAC ¶¶ 32-33);

- That Defendants prevent many Class Members from enrolling in the modules they need in order to progress in treatment by failing to offer those modules at all or offering them too infrequently (SAC ¶¶ 34-35);

- That Defendants arbitrarily restrict certain Class Members (particularly those housed in the South Unit) from enrolling in therapy sessions that meet elsewhere in the STU, thus preventing them from completing modules prescribed for them and necessary for advancement (SAC ¶¶ 36-37);

- That Defendants improperly withhold therapy as punishment for infraction of STU rules (SAC ¶ 38);

- That Defendants fail to give Class Members timely and concrete information concerning the criteria used to evaluate their treatment progress and readiness for release, the goals they must accomplish in order to progress towards discharge, and the time it will take to do so, leading to confusion, frustration, and a counter therapeutic sense of hopelessness throughout the STU (SAC ¶ 42);

- That Defendants fail to assist Class Members with the discharge planning that is crucial to convince a court that **[*15]** they can in fact be safely released (SAC ¶ 43);

- That treatment is not adequately tailored to the specific needs of each Class Member, as required by the NJSVPA (SAC ¶ 31);

- That these deficiencies are caused in part by Defendants' failure to hire and retain sufficient qualified mental health professionals with training in sex offender specific treatment (SAC ¶ 33);

- That as a result of these deficiencies, few Class Members have been able to regain their liberty, even conditionally, and few are now sufficiently advanced in the

[3] Ms. Moses is a Visiting Clinical Professor at Seton Hall University School of Law and serves as the Director of the Civil Rights and Constitutional Litigation Clinic at Seton Hall's Center for Social Justice, co-class counsel in this case. (Moses Decl. ¶ 1.)

treatment program to have a reasonable hope of discharge in the foreseeable future (SAC ¶¶ 39-41); and

• That although the DOC has appointed an ombudsman to address complaints about the STU facilities or security issues, there is no comparable mechanism for addressing complaints regarding the treatment program, leading to frustration—and a large number of *pro se* complaints by STU residents (SAC ¶ 44).

E. Relevant Procedural History

i. Commencement of the Action

On February 15, 2001, the original Complaint in the Alves case was submitted *pro se* by Plaintiff Raymond Alves. On March 9, 2001, this Court granted Alves *in forma pauperis* status, directed that his Complaint **[*16]** be filed, and appointed *pro bono* counsel. On July 30, 2002, the Seton Hall University School of Law Center for Social Justice, through its then director, Baher Azmy, Esq., entered an appearance as *pro bono counsel* for Mr. Alves. (Declaration of Baher Azmy, Esq. ("Azmy Decl.") ¶¶ 1-3, 6.) [4] Gibbons P.C., through Lawrence S. Lustberg, Esq., has joined the Center for Social Justice as *pro bono* co-counsel for Plaintiffs.

On October 25, 2002, Alves filed an amended complaint asserting claims against both the DHS officials responsible for the mental health program at the STU and New Jersey Department of Corrections officials responsible for the STU facility where Alves was confined at the time, then located in Kearney, New Jersey. (Azmy Decl. ¶¶ 7-11.) On November 17, 2003, this Court granted in part a pre-answer motion to dismiss the Amended Complaint, finding that the NJSVPA was non-punitive on its face, and that, after *Seling v. Young, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001)*, **[*17]** a plaintiff could not state a viable claim under the *Double Jeopardy Clause* on the theory that the Act was punitive "as applied." (Opinion dated November 17, 2003, at 9-11.) This Court also dismissed Plaintiff's claim under the *Equal Protection Clause*. (Id.)

ii. Discovery & Consolidation

From 2003 through 2005, the parties engaged in extensive discovery, including written discovery and depositions. (Azmy Decl. ¶¶ 14-26.) During this general time frame, approximately 30 additional cases filed by *pro se* residents of the STU were consolidated into the Alves case. (Declaration of David L. DaCosta, Esq. ("DaCosta Decl.") ¶ 3.) These consolidations included the case captioned Bagarozy v. Harris, 04-3066, which was filed by a group of STU residents led by Richard Bagarozy (the "Bagarozy Plaintiffs"). Prior to consolidation of the Bagarozy case into Alves, the Honorable Faith Hochberg, U.S.D.J., entered an Order granting the Bagarozy Plaintiffs' request for *pro bono* counsel, and eventually the law firm of Greenberg Traurig, LLP entered an appearance on behalf of the Bagarozy Plaintiffs. (DaCosta Decl. ¶ 4.)

iii. Settlement Negotiations

Starting in late 2004 and gaining steam in early 2005, the **[*18]** parties decided to concentrate on settlement negotiations with the goal of resolving all cases on behalf of all STU residents on a class wide basis. (Azmy Decl. ¶¶ 20-21.) Although no formal motion to amend the complaint or certify a class was

[4] Mr. Azmy is the Legal Director of the Center for Constitutional Rights in New York, and is on leave from Seton Hall University School of Law, where he was a Professor of Constitutional Law and Director of the Center for Social Justice. (Azmy Decl. ¶ 1.)

brought at that time, it was understood by all that, given the nature of the relief sought and the alterations to the treatment structure at the STU that were being discussed, negotiations on a class-wide basis were the only feasible way for the case to resolve. This began a period of intensive settlement negotiations, which were hard-fought and often highly contentious. (Azmy Decl. ¶¶ 27-38; DaCosta Decl., ¶¶ 3-4; Moses Decl. ¶¶ 6-9.)

In 2008, after the parties had reached an impasse over what would constitute adequate mental health treatment at the STU, the parties agreed upon the utilization of a joint neutral expert, Judith Becker, Ph.D., who was selected by Plaintiffs' *pro bono* counsel and Defendants. (Azmy Decl. ¶¶ 36-38; DaCosta Decl. ¶7.) The concept was that Dr. Becker would review the existing STU treatment program, offer her opinion on the program, and produce a report, which would be considered solely for purposes of breaking the stalemate **[*19]** in settlement discussions. On December 29, 2008, Dr. Becker issued her report. (See Report of Judith V. Becker, Ph.D., attached to the Certification of Ian Marx, Esq., as Exhibit C (the "Becker Report").)

Negotiations were continuing into 2010 when Alves and others were moved from Kearney, New Jersey facility to the current STU located in Avenel. As a result of this move, the Department of Corrections and DOC-affiliated defendants took the position that the claims against them were moot. (Azmy Decl. ¶¶ 50-51.) In response, the parties agreed to work primarily toward a settlement of Plaintiff's treatment related claims, which were pending only against the Department of Health and Human Services and DHS-related defendants. (Azmy Decl. ¶¶ 51-52.) Although the DOC defendants were not formally dismissed at this time, the case turned away from DOC issues and toward resolving the treatment claims against the DHS defendants.

II. OVERVIEW OF THE SETTLEMENT AGREEMENT

In September 2011, the parties agreed to a tentative settlement, which required final approval from various levels of the state government. (Azmy Decl. ¶ 52; Moses Decl. ¶ 15.)

On January 20, 2012, the Court conducted an in-person conference **[*20]** with counsel at which it was represented that counsel had authority to finalize the settlement agreement. (Moses Decl. ¶ 16.) In attendance, by video conference, were the three lead plaintiffs in the case, Raymond Alves, Michael Culbreath, and Derrick Sessoms. (Id)

On February 3, 2012, the Settlement Agreement was executed. (Moses Decl. ¶¶ 16-17 & Settlement Agreement (attached as Exhibit A).) [5] The settlement requires Defendants to improve both the quantity and quality of the mental health treatment offered in the STU, thereby affording Class Members a better chance to be released from the facility. The Settlement Agreement itself is a lengthy document, running 35 single-spaced pages with an additional 35 pages of exhibits. The crux of the settlement is to respond to the issues in the Complaint and increase the volume and availability of treatment. Some of the more pertinent terms are the following. [6]

- ***Guarantee of Comprehensive, Individualized Treatment Plan***. The Settlement Agreement requires that Defendants provide every member of the STU with a comprehensive treatment plan

[5] An addendum to the Settlement Agreement was executed in July 2012. (Moses Decl., Ex. B.)

[6] The pertinent settlement terms are merely summarized herein. In the event the description of settlement terms in this Opinion conflicts with the actual language of the Settlement Agreement, the Settlement Agreement, of course, controls.

within 45 days of the individual's commitment to the facility. (Moses Decl., ¶ 19(a).) The treatment plan must **[*21]** be narrowly tailored to the individual resident's needs. (Id) Moreover, the plan will be reviewed every six months by the resident's treatment team and once a year by the STU's Treatment Progress Review Committee ("TPRC"). (Id)

• ***Guarantee of Therapy Hours***. The Settlement Agreement increases and guarantees a specific number of hours of treatment. Upon approval, Defendants are required to offer "every class member (including detainees not yet committed who nonetheless wish to commence treatment, but excluding residents who refuse treatment and those on MAP) [7] a minimum of 20 hours per week of professionally-led or professionally monitored therapeutic programming, regardless of the resident's living quarters." In addition, the "therapy offered must include, at a minimum, three 90-minute process group sessions per week, one to two psycho-educational modules, if recommended for that resident, and a 90-minute self help group . . . . If a module recommended to a resident in phase 3 or higher is unavailable, Defendants must provide that resident with the equivalent self-study materials." (Moses Decl. ¶ 19(b).) Although residents on program MAP "may not be entitled to the full 20 hours of therapy, **[*22]** they will continue to attend their core therapy, consisting of regularly scheduled process groups and modules, unless therapeutically contraindicated. Residents on tier or wing MAP will be offered twice-weekly MAP process group." (Id)

• ***No Changes in Program Phases Without Notice***. The Settlement Agreement provides that Defendants may not increase the number of treatment phases (as discussed previously, presently at 5) without notice to Class Counsel. And the treatment phases cannot be altered so as to intentionally prolong a resident's confinement to the STU. (Moses Decl. ¶ 19(c).)

• ***Communication and Feeedback for Residents***. The Settlement Agreement provides that "[t]he treatment plans, six-month reviews and TPRC reviews must include specific and individualized recommendations for each resident's treatment goals. Residents must be informed of the objective criteria needed to meet those goals (for example, completion of certain modules and successful post-module testing) and must be given anticipated time frames for completion of the objective criteria and for attainment of their ultimate treatment goals. Similarly, the TPRC reports must include an anticipated time frame for promotion **[*23]** for the next phase of the program. In addition, Defendants must adopt objectively measurable pre-and post module testing and provide residents with their results within 15 days of the test. Defendants must also inform the residents of any significant decision regarding their treatment . . . both orally and in writing within 15 days." (Moses Decl. ¶ 19(d).)

• ***Post-Discharge Preparation***. The Settlement Agreement requires that social work staff at the STU develop a discharge plan for residents in phase 4 or higher, which includes requiring the staff to assist with housing and obtaining the support

---

[7] MAP is a program generally reserved for residents displaying more volatile or problematic behavior. A more fulsome discussion of the MAP program can be found in prior opinions. See *Fournier v. Corzine, No. 07-1212, 2007 U.S. Dist. LEXIS 54110, 2007 WL 2159584, at *8 n.11 (D.N.J. July 26, 2007)*.

necessary for discharge. (Moses Decl. ¶ 19(e).)

• ***Vocational, Educational, and Recreational Opportunities.*** "Defendants must conduct an individualized vocational assessment of each resident within 45 days of final commitment, develop a plan for building on his skills and strengths, and offer each resident not on MAP or treatment refusal status an average of 10 weekly hours of institutional (paid) work or other vocational activities. Residents will also be entitled to ten hours of educational activities per week, including GED coursework. . . . Recreational activities must also be available six **[*24]** days per week." (Moses Decl. ¶ 19(f).)

• ***Hire Additional Treatment Staff***. The STU must hire additional licensed and qualified therapists so that the therapist to resident ratio is 8 therapists for every 50 residents. Therapists must spend 16 hours a week in direct contact with the residents. (Moses Decl. ¶ 19(g).)

• ***Staff Training & Evaluation*** The Settlement requires the DHS to retain independent experts in the field of sex offender treatment and have at least one expert visit the facility per quarter. The expert will evaluate the STU program, report his or her findings to the STU administration and provide continuing education to the STU's therapists and staff. (Moses Decl. ¶ 19(h).)

• ***The Appointment of a Treatment Ombudsperson***. The Settlement Agreement requires Defendants to retain a treatment ombudsperson who will establish a resident complaint system for treatment issues. The ombudsperson will be required to investigate all treatment related complaints and report back to residents. The ombudsperson will also meet with the residents in town hall meetings. (Moses Decl. ¶ 19(i).)

• ***The Appointment of an Independent Monitor*** The Settlement Agreement will also result in the appointment **[*25]** of a neutral monitor by the Court. The monitor will be responsible for conducting annual inspections of the facility, during which he or she will be given full access to the facilities, residents and staff. The agreement also provides that the monitor will prepare a written report regarding defendant's compliance for the period being evaluated, which will be provided to counsel for Plaintiffs and Defendants. Defendants will then have a period to respond to the monitor's report. If Defendants lodge objections and they are overruled, Defendants will have a 75 day period to cure any deficiency identified. If they fail to do so, Plaintiffs can seek enforcement from the Court or declare the provisions null and void and resume litigation. The monitoring period is for a presumptive five years. There are certain triggers that can shorten the monitoring period for specific provisions to no less than 3 years. (Moses Decl. ¶ 19(j).)

• ***Preservation of Individual Claims.*** The settlement agreement also preserves for class members the right to pursue damages with respect to any claims not alleged in the Second Amended Complaint, including tort claims. (Moses Decl. ¶ 31(a) citing Settlement Agreement **[*26]** § Section IX.)

III. CERTIFICATION OF THE CLASS & PRELIMINARY APPROVAL

On March 24, 2012, Plaintiffs filed an amended consolidated class action complaint,

which remains the operative pleading. [8] Shortly thereafter, the parties filed a joint motion for class certification and preliminary approval of the settlement. By Order dated March 29, 2012, modified on April 4, 2012, this Court certified a class pursuant to *Federal Rules of Civil Procedure 23(a)* and *23(b)(2)* that is defined as:

> all persons who are committed or confined pending commitment to the New Jersey Special Treatment Unit pursuant to the New Jersey **[*27]** Sexually Violent Predator Act, *N.J.S.A. 30:4-27.24, et seq*.

(Order dated April 4, 2012; CM/ECF No. 158.)

This Court also: (1) found that the settlement is "preliminarily approved as fair, reasonable and adequate subject to further consideration by this Court"; (2) designated Plaintiffs as class representatives; (3) appointed Gibbons P.C. and Seton Hall's Center for Social Justice as Class Counsel; (4) approved the form and manner of notice to be given to the class, including a deadline for class members to submit objections; and (5) scheduled a Fairness Hearing. Id.

The Class includes approximately 471 residents of the STU. (Declaration of Barbara Moses, Esq., Regarding Notice and Objections, dated June 12, 2012 ("June 12 Decl.") ¶ 8; CM/ECF No. 177.) Notice of the settlement was provided to all class members who were given a chance to submit objections. (June 12 Decl. ¶¶ 4-7.) [9] Approximately 156 objections to the settlement have been received. (June 12 Decl. ¶ 9.)

Thereafter, Class Counsel and Defendants submitted a joint motion for final approval of the settlement. *Pro bono* **[*29]** counsel for the Bagarozy Plaintiffs submitted a brief in opposition to the settlement. Generally speaking, as is discussed more below, the Bagarozy Plaintiffs are dissatisfied with the settlement because it does not incorporate all of the recommendations of Dr. Becker, the expert who evaluated the STU during settlement negotiations. This group of Plaintiffs also objects to the settlement's lack of guaranteed funding. In addition to the brief from the Bagarozy group, 156 objections were received by individuals confined to STU. These objections are, at times, difficult to understand and run the gamut from objecting to issues or parties that are not involved in the case, to seeking millions of dollars in damages, even though this is an injunctive class action.

On November 13, 2012, a Fairness Hearing was held pursuant to *Federal Rule of Civil Procedure 23(e)(2)*. Appearing for Plaintiffs was Class Counsel, Seton Hall's Center for Social Justice and Gibbons, as well as three Seton Hall Law School students working under the supervision of Professor Moses. [10] *Pro bono* counsel Greenberg Traurig appeared for the Bagrozy Plaintiff/Objectors. Also appearing was Jack Furlong, Esq., representing **[*30]** two Plaintiffs, William Moore and Maryann Hysler. [11]

---

[8] Of note, the Department of Corrections and the DOC-related defendants are not named in the SAC and the parties, and any related claims, are not part of this settlement. (Moses Decl. ¶ 31(e); Azmy Decl. ¶ 51.)

[9] *Rule 23(e)* requires **[*28]** that notice of a proposed class settlement be provided "in a reasonable manner to all class members who would be bound." Id. Here, no legitimate challenge to the adequacy of class notice has been made. And the fact that a number of objections have been received confirms that notice of the proposed settlement was adequate.

[10] The students are Lisa Savadjian, Rose Harper, and Kyle Bruno. (Transcript of Fairness Hearing, dated November 13, 2012 ("Tr.") at 3:21-25.)

[11] Lamont Brooks and Douglas Minatee, two former residents of the STU, also appeared at the Fairness Hearing and placed comments on the record. (Tr. at 49:4-56:4.) However, the Court notes that neither Mr. Brooks nor Mr. Minatee are class members since neither is confined to the STU.

IV. APPROVAL OF CLASS ACTION SETTLEMENTS

Under *Rule 23*, a court may only approve a class settlement after it has held a hearing and determined that the settlement is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*. The fairness of a class action settlement is most commonly evaluated by consideration of the factors found in *Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*:

> 1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action **[*31]** through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

The Girsch factors are a guide and the absence of one or more does not automatically render the settlement unfair. See *In re American Family Enters., 256 B.R. 377, 418 (D.N.J. 2000)*. Rather, the Court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness. See *In re AT&T Corp. Secs. Litig., 455 F.3d 160 (3d Cir. 2006)*. In addition, a district court should consider whether the settlement is proposed by experienced counsel who reached the agreed-upon terms through arms-length bargaining. See *In re Warfain Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004)*. Settlement of litigation is generally favored by courts, especially in the class action setting. "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal **[*32]** litigation." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995)*; see also *In re Warfain, 391 F.3d at 535* (noting the "overriding public interest in settling class action litigation"). At the same time, the district court functions as "a fiduciary who must serve as a guardian of the rights of absent class members" by ensuring that the proposed settlement is fair, reasonable, and adequate." *In re General Motors, 55 F.3d at 785*. In sum, the Court's evaluation of the settlement is guided by the Girsch factors, but the Court is "free to consider other relevant considerations and tacts involved in the settlement." *Colon v. Passaic County, No. 08-4439, 2012 U.S. Dist. LEXIS 58718, 2012 WL 1457764, at *2 (D.N.J. Apr. 24, 2012)*.

V. APPLICATION OF THE GIRSCH FACTORS

1. Complexity, Expense and Likely Duration of the Litigation

This factor is intended to "capture 'the probable cost, in both time and money, of continued litigation.'" *In re General Motors, 55 F.3d at 812* (quoting *Bryan v. PPG Indus., 494 F.2d 799, 801 (3d Cir. 1974)*). Where the complexity, expense, and duration of litigation are significant, the Court will view this factor as favoring settlement. *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 536 (D.N.J. 1997)* **[*33]** ("Prudential I").

If this action were to continue, the parties would expend considerable time and money pursuing their claims. Absent settlement, additional discovery would be required,

including depositions, additional expert discovery and dispositive motion practice. If the action survived dispositive motion practice (in whole or in part), a trial would also be required, which could take weeks. Appeals that would likely follow could take additional years. Added to all of this would be the further complication that the consolidated cases contain a mix of individual *pro se* litigants who would likely seek to pursue individual claims. By reaching a settlement now, the parties "avoid[] the costs and risks of a lengthy and complex trial." *Ehrheart v. Verizon Wireless, 609 F.3d 590, 595 (3d Cir. 2010)*. Since continued litigation would be time-consuming and expensive, settlement makes eminent sense. This factor weighs in favor of approving the settlement.

2. Reaction of Class

The second Girsch factor evaluates whether members of the class generally support or object to the settlement. See *In re General Motors, 55 F.3d at 812*. In order to properly evaluate the settlement, "the number and vociferousness **[*34]** of the objectors" must be examined. Id. Generally, "silence constitutes tacit consent to the settlement." Id.

Here, there are approximately 471 members in the Class. (See June 12 Decl. ¶ 8.) Two-thirds of the class did not submit timely objections to the settlement. (Id.) Thus, the Court presumes that two-thirds, or approximately 312 class members, support the settlement. See *In re General Motors, 55 F.3d at 812*. This is strong support in the STU community for approval of the Settlement Agreement. See, e.g., *Pack v. Beyer, No. 91-3709, 1995 U.S. Dist. LEXIS 19542, 1995 WL 775360, at *6 (D.N.J. Dec. 22, 1995)* (approving prison conditions settlement with more than 40% of class objecting because, in part, "a clear majority of the class favors settlement"). The two-third support is even more impressive because Class Counsel states that she observed a flyer posted in the STU, which was apparently created by an objecting member of the class, attempting to gather support for opposition to the settlement, stating: "Counsel has told us that the more residents that make valid challenges, the better chance we have of getting a better deal." (June 12 Decl. ¶ 7.) The Court does not comment on the flyer to suggest that the effort **[*35]** was in any way improper, but rather to illustrate that, despite this effort, more than two-thirds of the class (i.e., over 300 STU residents) agreed with the settlement reached. (Moses Decl. ¶ 29.) Thus, overall, the Court considers the reaction of the class to be very positive.

Objections to the settlement were also received. The Bagarozy Plaintiffs, through *pro bono* counsel, the Greenberg Taurig law firm, submitted a brief, which primarily objects to the settlement based on their concern that the settlement does not incorporate all or mostly all of the report of Dr. Becker. In addition, the Court received 156 timely *pro se* objections to the settlement, which amounts to about one-third of the class. (June 12 Decl. ¶ 9.) These objections were submitted by un-counseled class member residents of the STU and touch on a wide range of issues. Some of the objections are difficult to understand, and many are repetitive. [12] Moreover, a number of the objections lack legal merit on their face [13] and/or are "the result of a fundamental

[12] For example, a number of objections are presented in the context of form letters, which means that the letter was prepared by a resident (or residents) and then circulated to others who changed the name on the letter and submitted it. Form letters like those described are submitted multiple times and are signed by various class members, sometimes with alterations and comments. (June 12 Decl. ¶ 12.)

[13] By way of example only, one objection complains about life in the STU but also states that the objector generally "does not wish to escape and that if the doors were opened he would get some burgers but return to the STU to eat them." (Moses Decl. ¶ 25(d).)

misunderstanding of the underlying purpose of the class action, a lack of knowledge of the ramifications to class members of a court-approved settlement, and unrealistic **[*36]** or overly optimistic expectations." *Hawker v. Consovoy, 198 F.R.D. 619, 628 (D.N.J. 2001)*. [14] Class Counsel has submitted a declaration that attempts to summarize these *pro se* objections. (See generally June 12 Decl.)

Turning to the objections, the Court begins with Dr. Becker's report.

(i) Objections Based on the Becker Report

Judith Becker, Ph.D., evaluated the STU facility in 2008, pursuant to a Court-approved regimen for the sole purpose of aiding settlement negotiations. Following the evaluation, a report was issued in which Dr. Becker opined on whether aspects of the facility were "minimally adequate/satisfactory" or "not minimally adequate/unsatisfactory." (See Procedures of Joint Expert Review and Evaluation; CM/ECF No. 214 at 41.) The primary objection to the settlement, from counseled objectors like the Bagarozy Plaintiffs and from *pro se* objector/class members alike, is that the settlement agreement does not adopt *all* or nearly all of the Report's recommendations.

This objection confuses the appropriate inquiry for **[*38]** evaluating the fairness of the settlement, essentially contending that the settlement must be measured by Dr. Becker's report. In short, these objectors ostensibly state that any settlement that does not fully incorporate Dr. Becker's report is inadequate or unfair. This is unrealistic and incorrect. The applicable legal standard is much different than the one relied upon by Dr. Becker in preparing her report. Under an appropriate legal analysis guided by controlling principles, there is no question that the settlement is fair, reasonable and adequate and would provide Plaintiffs with more than the minimally adequate mental health treatment to which they are entitled.

a. The Becker Report Does Not Apply the Applicable Law

"Minimally adequate" treatment is determined by the standard set forth by the Supreme Court in *Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982)*. In Youngberg, which arose under facts different from those here, the Supreme Court held that an individual involuntarily confined to an institution for the mentally retarded had a fundamental liberty interest in "minimally adequate" treatment, defined as "such training as an appropriate professional would consider reasonable" to facilitate **[*39]** his freedom from restraint. *Id. at 318*.

The Third Circuit has applied the Youngberg standard to involuntarily committed sex offenders confined to the STU. See *Deavers v. Santiago, 243 Fed. Appx. 719, 722 (3d Cir. 2007)* (applying Youngberg to STU resident committed under the NJSVPA); cf. *Leamer v. Fauver, 288 F.3d 532 (3d Cir. 2002)* (applying Youngberg to individual confined under New Jersey's former sex offender statute). Thus, in cases where, like here, state officials have imposed substantial deprivations of liberty associated with civil commitment, they must

[14] In cases of this type, it is not unusual to have a large number of objections, nor is it unusual for a court to approve a settlement over such objections. See, e.g., *Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983)* (approving settlement over objections of more than 40% of class members and 23 out of 27 named **[*37]** plaintiffs); ***Austin v. Pa. Dep't of Corr., 876 F. Supp. 1437, 1472 (E.D. Pa. 1995)*** (approving settlement related to prison conditions over objections of 457 class members); *Hawker, 198 F.R.D. at 628* (approving prison conditions settlement over objections from 250 class members); *Pack, 1995 U.S. Dist. LEXIS 19542, 1995 WL 775360, at *5* (approving prison conditions settlement over objection from 41% the class)

also provide access to mental health treatment that gives those committed a chance to be cured or to improve the medical condition for which they were confined. See *Greenfield v. Corzine, No. 09-4983, 2011 U.S. Dist. LEXIS 154617, 2012 WL 1134917, at *22 (D.N.J. Apr. 4, 2012)*; see also *Badu-Shabazz v. Sharp, No. 10-5637, 2012 U.S. Dist. LEXIS 171773, 2011 WL 1080521, at *14 (D.N.J. Mar. 21, 2011)*.

However, Youngberg only requires "minimally adequate" treatment, which is not the same as optimal treatment, perfect treatment, desired treatment, or state-of-the-art treatment. *Id. at 202*; see also *Haggert v. Adams, No. 02-1456, 2005 U.S. Dist. LEXIS 6240, 2005 WL 399300, at *18 (N.D. Ill. Jan. 14, 2005)* (noting, in action **[*40]** by Illinois sexually violent predators, that Youngberg "does not provide for optimal treatment"); *Canupp v. Sheldon, No. 04-260, 2009 U.S. Dist. LEXIS 113488, 2009 WL 4042928, at *11 (M.D. Fla. Nov. 23, 2009)* (noting that Youngberg requires only "minimal" treatment). Indeed, under Youngberg there is a presumption that a treatment professional's decisions are correct, and a constitutional violation only occurs when there is "such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible did not base the decision on such a judgment." *Id. at 323*; see also *Deavers, 243 Fed. Appx. at 722*; *Badu-Shabazz, 2012 U.S. Dist. LEXIS 171773, 2011 WL 1080521, at *14* (finding no Youngberg allegation could be sustained because there is "no factual allegation of an absolute denial of treatment . . . and [plaintiff] does not allege that he has been denied treatment altogether"); *Canupp, 2009 U.S. Dist. LEXIS 113488, 2009 WL 4042928, at *11* (noting in, SVP case, that "[u]nder the professional judgment standard decisions made by trained professionals are entitled to a presumption of correctness"). [15]

Dr. Becker's report does not mention or apply the Youngberg standard. This alone invalidates using her report as the measure of fairness of the settlement. No one disputes Dr. Becker's expertise or that her report was comprehensive, learned, and scholarly and that it furthered the settlement process in this case. However, in performing her review, Dr. Becker was to rely on the "professional standards [she] believed relevant and applicable." (See Joint Settlement Procedures at 40.) That is, Dr. Becker gave her opinion as any expert would based on her expertise and her personal view of the circumstances she was evaluating. However, Dr. Becker's report does not substitute for the judgment of the court and does not replace the Youngberg standard **[*42]** for determining minimally adequate care.

b. The Becker Report Conflicts With Other Relevant Authority

There are other problems with using the Becker Report to judge the settlement's fairness. For example, the objectors fail to acknowledge that Dr. Becker is not the only expert in the field of sex offender treatment, and other experts have substantially differing opinions about what constitutes adequate treatment. For example, Dr. Main, a defendant in this case, is also an expert on the subject of treatment for civilly committed sex offenders. And while his view with respect to this case is

---

[15] While obviously bound by the law of this Circuit, it is worth noting that that the Eighth Circuit has not read Youngberg the **[*41]** same as the Third Circuit and has held that sex offenders are not constitutionally entitled to any mental health treatment. See *Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012)* ("the district court was correct that Strutton does not have a fundamental right to sex offender treatment). Of course, the NJSVPA requires that the New Jersey DHS "provide or arrange for treatment for a person committed pursuant to [the Act]." *N.J.S.A. 30:4-27.34(b)*.

weighted, he has also served as an expert in other cases. In one such case, Strutton v. Meade, Dr. Main testified as an expert witness that a program offering substantially less than what is already offered to STU residents would satisfy Youngberg. See *2010 U.S. Dist. LEXIS 31944, 2010 WL 1253715, at *4, 17-18 (E.D. Mo. Mar. 31, 2010)*. There, the treatment offered consisted of only one weekly process group (one third of what the settlement here requires) and no modules at all (less than what is already offered at the STU and certainly less than what the settlement provides). See *2010 U.S. Dist. LEXIS 31944, [WL] at *17-18*. After a jury trial, the district **[*43]** court found such treatment more than sufficient, concluding that sex offenders did not have a right to *any* treatment. Id. The Eighth Circuit affirmed on direct appeal. See *Strutton v. Meade, 668 F.3d 549, 557 (8th Cir. 2012)* ("the district court was correct that Strutton does not have a fundamental right to sex offender treatment").

Likewise, the objectors' reliance on the Becker Report fails to account for the fact that many of the Report's recommendations are not required for the provision of minimally adequate care based on existing case law. The Bagarozy Plaintiffs (and other *pro se* objectors) claim that Dr. Becker's recommendations were not followed with respect to, primarily, the following subjects: the gradual de-escalation of restraints; [16] increased therapeutic community time; increased visitation; recreational activities; and psychiatric consultation. (Bagarozy Br. 22.) However, in light of preexisting case law in this district, the inclusion of these recommendations are not required under the Youngberg standard, and it is hard to see how Class Counsel could have forced Defendants to relent on any of these subjects during settlement negotiations.

For example, in Greenfield v. Corzine, this Court already dismissed a class member's claim alleging, among other things, that the vocational, recreational, and educational offerings at the STU were inadequate. See *2011 U.S. Dist. LEXIS 154617, 2012 WL 1134917 (D.N.J. Apr. 4, 2012)* (Cavanaugh, J.). In Minatee v. Special Treatment Unit, another court in this district dismissed claims of one of the Bagarozy Plaintiffs alleging that Defendants should have placed him in a community based setting, and rejected the plaintiff's request for an injunction directing the creation of a halfway house or community-based treatment facility. See *2011 U.S. Dist. LEXIS 134205, 2011 WL 5873055, at *4 n.6 (D.N.J. Nov. 16, 2011)*; see also *Fornier v. Corzine, 2007 U.S. Dist. LEXIS 54110, 2007 WL 2159584 (D.N.J. July 26, 2007)* (Cavanaugh, J.) (rejecting challenge that NJSVPA was punitive because residents are not permitted to transfer to halfway houses). Finally, in Badu-Shabazz, another court dismissed allegations that treatment program at the STU was inadequate because there is "no **[*45]** factual allegation of an absolute denial of treatment . . . and [plaintiff] does not allege that he has been denied treatment altogether." *2012 U.S. Dist. LEXIS 171773, 2011 WL 1080521, at *14*.

In sum, the Becker Report contains recommendations that could be described as "pie-in the-sky" in terms of the quality and quantity of sex offender treatment. However, the report is not based on the Youngberg standard and does not control whether the settlement is fair and reasonable. [17] Despite

[16] This refers to STU residents' **[*44]** desire for to have more freedom of movement, including greater opportunities for furloughs and/or supervised forays into the community and the use of a halfway house or group home community. (See Bagarozy Br. at 22.)

[17] The objectors frequently invoke a statement in Dr. Becker's report that the living conditions in the STU were "the worst she has ever seen." (Becker Report at 9.) However, this was not a reference to the STU's treatment programs, which is what this

the objectors' protestations to the contrary, the Court does not find that the Becker Report weighs against approval of the settlement.

c. The Settlement Incorporates Many of Dr. Becker's Recommendations

Although full implementation of the Becker Report is not necessary for a fair and reasonable settlement, **[*46]** the Bagarozy Plaintiffs and the unrepresented class member objectors fail to account for the fact that the Settlement Agreement does, in fact, implement many of Dr. Becker's recommendations.

For example, Dr. Becker recommended that the STU conduct a comprehensive psychological evaluation of each resident upon admission, that pre- and post-module testing be performed, and that certain instruments, including the "Psychopathy Checklist Revised," be utilized to assess treatment progress. (See Becker Report at 12-13, 27.) The Settlement Agreement responds to these recommendations. See Settlement Agreement §§ VI.A.3.a, VI.A.3.c., and VI.A.3.e. [18]

Dr. Becker also suggested that the STU provide more "clear criteria" for the advancement through the STU treatment phases and ensure that therapists were available to further that advancement. The settlement addresses these issues. It increases the number of process groups, mandates a greater number of available modules, requires the staff to provide a minimum number of resident to therapist hours, and results in the hiring of additional therapists. See generally Settlement Agreement at §§ VI.A.3.a.3, VI.B.2.

Dr. Becker also recommended that "more process groups and more modules be offered," so that each resident is provided "a minimum of 15 to 20 hours in direct clinical service." The Settlement Agreement incorporates this recommendation. See Settlement Agreement §§ VI.B.3 and VI.B.10.

Likewise, Dr. Becker criticized the STU's procedures for "release preparation **[*48]** and programming" based on her primary concern that a majority of men on conditional release "felt that had to find housing and jobs on their own." The Settlement Agreement again addresses this issue by requiring the STU's social work staff to develop a discharge plan for every resident in stage 4 or higher and assist the resident in finding housing and obtaining support. See generally Settlement Agreement at § VI.G.

The Settlement Agreement also adopts additional recommendations in the Becker Report regarding staffing levels, vocational and recreational offerings, and the hiring of an Ombudsman. (Moses Decl. ¶ 33.) Thus, even though much of the treatment recommended does not appear to be constitutionally required, the Settlement Agreement does not ignore or minimize the Becker Report, as the objectors contend. In fact, the Settlement Agreement adopts much of it.

In sum, the objections that have been filed

---

case is about, but rather a reference to the physical facilities, which have since changed and are nevertheless within the control of the New Jersey Department of Corrections, a non-party.

[18] Coincidentally, Dr. Becker recommended that *every* resident be assessed using the Hare Psychopathy Checklist (which is psycho-diagnostic tool commonly used to asses psychopathy) and urged the parties to utilize penile plethysmography "with every resident who is willing to undergo such assessment." (Becker Report at 12.) The settlement does *not* implement these recommendations; indeed, the settlement agreement prohibits the use of both techniques unless they are administered by properly trained staff. This is noteworthy because a number of objectors **[*47]** oppose the use of these assessment tools for any reason, while at the same time championing the Becker Report as the barometer of the settlement's fairness. This inconsistency underscores that Dr. Becker's opinion is subject, like any other assessment, to negotiation and compromise, especially in the course of settlement discussions.

based on the Becker Report do not demonstrate to the Court that the settlement is unfair or unreasonable.

(ii) Objections Based on the Possibility of Inadequate Funding

The Bagarozy Plaintiffs and other class members also object to the settlement because it requires funding by the State **[*49]** of New Jersey, which is not guaranteed. The Court does not view this objection as a serious impediment to approving the settlement. Defendants cannot guarantee the funding needed to fully implement the settlement because it is subject to the budget process. However, that does not make the settlement illusory, as the objectors suggest. Indeed, the Settlement Agreement clearly provides that the Defendants will seek "as one of DHS's top priorities" sufficient funding for the settlement. See Settlement Agreement § VIII.A.

The settlement also goes a step further. In the event funding is not secured, the Plaintiffs are *not*, as they suggest, without recourse. The Settlement Agreement specifically provides that, if funding is not secured, the Plaintiffs have the opportunity to declare any affected provisions "void" and resume litigation with respect to that provision. See Settlement Agreement §§ VIII.B, X.A. Plaintiffs are not required to give up any additional rights or forfeit any other terms of the settlement and can simply resume litigation with respect to any affected portion. This is a palpable benefit to Plaintiffs; if a portion of the settlement is not funded, Plaintiffs will continue **[*50]** to reap the benefits of whatever portions of the agreement are not affected, and still have the right to pursue litigation to address any shortfalls.

Defendants cite *Levell v. Monsanto, 191 F.R.D. 551 (S.D. Ohio 2000)*, to suggest a lack of guaranteed funding undercuts the fairness of the settlement. This case is easily distinguishable. In Monsanto, the settlement, which was contingent on funding from the federal government, did not have a provision that allowed the Plaintiffs to reinstitute suit such as the one present here, leaving the Plaintiffs with absolutely no recourse if the necessary funding was not secured. *Id. at 551-53*. Rather than suggesting that guaranteed funding was required for a fair settlement, the Monsanto court went out of its way to say that, had the parties provided a contingency for the funding issue, such as one that would allow the plaintiffs to resume litigation if funding was not secured, the settlement could have been approved. See *id. at 553 n.16*. [19] That is precisely what has happened here.

This case is very much like *Austin v. Pa. Dep't of Corr., 876 F. Supp. 1437 (E.D. Pa. 1995)*, where the court specifically rejected the argument that the settlement was illusory and unenforceable because it required statutory funding, noting that the ability to reinstiute suit gave Defendants a "clear incentive to achieve full compliance." *Id. at 1448*. So too here.

Finally, it should be noted that Defendants have *already* begun to implement the settlement, even though it has not yet been approved. Dr. Main represents that, using funds already received from prior appropriations acts, "even in advance of the approval of the settlement," the STU has begun to develop pre- and post-module testing; revised the Resident Guide; implemented a newly devised and developed treatment plan, and conducted individualized vocational assessments for residents. (Main

---

[19] Objectors also cite *Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)* and *Harris v. Vector Marketing Corp., 2011 U.S. Dist. LEXIS 117927, 2011 WL 4831157 (N.D. Cal. Oct. 12, 2011)* to support their **[*51]** argument. The precise reason is unclear, however, because neither case has anything to do with settlement or fairness of class action settlements.

Decl. ¶ 8; Supplemental Declaration of Merrill Main, Ph.D. ("Supp. Main Decl.") ¶¶ 2-4.) Moreover, the state has entered into two previous settlement agreements with similar funding contingencies **[*52]** and neither of those agreements has been voided due to insufficient funding. (See Supplemental Declaration of David L. DaCosta ("Supp. DaCosta Decl.") ¶ 4.)

(iii) Additional Objections

The Court has received additional *pro se* objections from class member residents of the STU. These objections have been summarized by Class Counsel. (See June 12 Decl. & Ex. D (Table Summary of Objections).) Some of the objections are difficult to understand. Some are also repetitive in the sense that there are a number of objections stating, in verbatim fashion, the same grievances but signed by different residents. And, as mentioned before, a number of additional objections appear to be "the result of a fundamental misunderstanding of the underlying purpose of the class action, a lack of knowledge of the ramifications to class members of a court-approved settlement, and unrealistic or overly optimistic expectations." *Hawker, 198 F.R.D. at 628*. To the extent possible, the objections are grouped by category and addressed below. The Court has also tried to identify representative objections for each category; however, many of the objections raise a number of issues, and thus, do not fit neatly within any **[*53]** single category.

a. Objections Based on Claims for Monetary Damages

There are a number of objections that seek monetary damages, often tens of millions of dollars. [20] These objections are meritless because this is a class action certified pursuant to *Rule 23(b)(2)* that seeks only injunctive relief. See *Hawker, 198 F.R.D. at 630* (when complaint did not seek money damages "the absence of an award of money damages is neither unfair nor unreasonable).

b. Objections Based on Commitment to the STU

There are a large number of objections that claim that the writer was improperly committed to the STU; that civil commitment to the STU is unconstitutional; that the living conditions at the STU are substandard; and that actuarial instruments used in pre-commitment hearings are improper. [21] Any objections challenging the constitutionality of civil commitment fail **[*54]** as a matter of law. See *Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997)* (upholding constitutionality of indefinite civil commitment). The remaining objections simply misapprehend the scope of this case. This case is limited to the quantum and quality of mental health treatment at the STU. It does not involve commitment to the STU or what happened to individual class members prior to commitment. Thus, these objections do not weigh against approval of the settlement. See, e.g., *D.M. v. Terhune, 67 F. Supp. 2d 401, 406 (D.N.J. 1999)* (objections based on issues not involved in the case are futile).

---

[20] For example, class member Joseph Aruanno seeks "significant monetary and punitive damages." See Objection of Joseph Aruanno [CM/ECF No. 177-5 at 17]. Likewise, class member John Banda asks for "$25 million dollars from each listed defendant in their personal and individual capacities." See Objection of John Banda [CM/ECF No. 177-5 at 91].

[21] See, e.g., Objection of Walter Harrell [CM/ECF No. 177-4]; Objection of Daniel Goodman [CM/ECF No. 177-5]; Objection of Santos Rivera [CM/ECF No. 177-7 at 112]; Objection of Bharat Malde [CM/ECF No. 176-6 at 141]; Objection of David Carson [CM/ECF No. 177-5 at 145-46].

c. Objections Seeking Halfway House Community

A number of objections seek the use of a halfway house system, or the implementation of outpatient sex offender treatment, as opposed to the in-patient STU facility. See, e.g., Objection of Michael Hasher [CM/ECF No. 177-6 at 66-85.] However, the creation of a halfway house system is not required **[*55]** under Youngberg. See, e.g., *Fournier, 2007 U.S. Dist. LEXIS 54110, 2007 WL 2159584, at *8*. And the Supreme Court has already approved the use of inpatient facilities like the STU. See *Kansas, 521 U.S. at 370*. Thus, these objections do not weigh against approval of the settlement.

d. Objections Seeking Release

A number of objectors seek immediate release or release from the STU at a certain age or after a certain period of confinement. [22] However, the Supreme Court has already approved indefinite civil confinement of sexually violent predators. See *Kansas, 521 U.S. at 346*. Thus, these objections are futile.

e. Objections Based on Department of Corrections Issues

A large number of objections are focused on the physical facilities at the STU and on the presence and activities of DOC personnel. [23] These objections do not bear on the fairness of the settlement because the DOC and its personnel are not parties to this case. See, e.g., *D.M, 67 F. Supp. 2d at 406*. To the extent appropriate, these claims **[*56]** may be pursued as individual actions.

f. Objections Based on Individual Claims

A number of objections have been filed that are based on individual issues or the perception that the settlement will eliminate a resident's individual claims, including objections focused on the "prison like" conditions at the facility; the food served; the housing conditions; [24] and other similar, individual issues. These objections also do not bear on the fairness of the settlement because the Settlement Agreement does not address or extinguish these claims. Stated differently, any complaints based on issues that are beyond the scope of the Second Amended Complaint are not part of this settlement. The objections received show tremendous confusion on this subject so it bears repeating: To the extent claims are not part of the Second Amended Complaint and are otherwise cognizable, residents can attempt to pursue these claims independently. See Settlement Agreement § Section IX. [25]

g. Objections to the Class Representatives

A number of objectors, including one of the more prominent form objection letters, object to Plaintiffs' class representatives. Although the reasons are not entirely clear, some objectors suggest the class representatives

---

[22] See, e.g., Objection of Tyrone Hill [CM/ECF No. 177-6 at 88]; Objection of Stephen Jaffe [CM/ECF No. 177-6 at 103]; Objection of David Haggerty [CM/ECF No. 177-6 at 58]; Objection of Victor Moody [CM/ECF No. 177-7 at 47].

[23] See, e.g., Objection of Mark King [CM/ECF No. 177-6 at 113]; Objection of Benjamin Hudson [CM/ECF No. 177-6 at 95]; Objection of Paul Winthrop [CM/ECF No. 177-8 at 82].

[24] See, e.g., Objection of Richard Bagarozy [CM/ECF No. 177-5 **[*57]** at 22-31].

[25] A letter from Jack Furlong, Esq., dated May 14, 2012, suggests that his clients, William Moore and Maryann Hysler, object to the settlement to the extent it impacts their claims regarding religious liberty and the right to marry. As discussed at the Fairness Hearing, the settlement does not impact these claims. (See Tr. 38:8-40-23.)

are subject to different treatment regimes and that this creates a conflict. [26] Others suggest that the representatives were either misled or engaged in collusion.

For *Rule 23* purposes, lead plaintiffs are typical of the class they represent if there is a strong similarly in legal theories alleged and the claims arise from the same course of conduct. See **[*58]** *In re Prudential Ins. Co. Sales Practice Litig., 148 F.3d 283, 311-12 (3d Cir. 1998)* ("Prudential II"); *Grasty v. Amalgamated Clothing & Textile Workers Union, 828 F.2d 123 (3d Cir. 1987)*. Lead plaintiffs are considered adequate representatives if they do not have interests antagonistic to those of the class. See *Prudential II, 148 F.3d at 312*; *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630 (3d Cir. 1996)*, aff'd sub nom. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

Here, there is no conflict between the class representatives and class members because, regardless of why each class member is confined in the STU, they are all subject to the same general mental health program and, therefore, its alleged inadequacies impacts all of them. The lead plaintiffs seek a mental health program that offers them a reasonable prospect of being successfully treated for the mental abnormality that led to their confinement. This goal does not and could not conflict with any other class member because no class member has an interest in an inadequate treatment program. Thus, regardless of any slight variance in treatment for individual class members, the Court is satisfied that the lead plaintiffs **[*59]** are adequate and typical class representatives.

h. Objections to Class Counsel

A number of objectors contend that Class Counsel suffers from a conflict of interest. In determining the adequacy of class counsel, the Court determines whether counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *New Directions Treatment Servs. v. City of Reading, 490 F.3d 293, 303 (3d Cir. 2007)*. These objectors contend that the Seton Hall Law School Center for Social Justice has a conflict and cannot represent the Plaintiffs in this case because, in 1999, certain professors at the law school supported passage of the NJSVPA. [27] This objection is frivolous.

First, none of the professors that supposedly create this conflict have ever represented Defendants. Second, none have ever been part of the Center for Social Justice, let alone worked on this case. (Azmy Decl. ¶ 3.) Third, this Court has already twice before rejected requests to remove Class Counsel; **[*60]** the first in an Order dated September 6, 2012, and the second at the Fairness Hearing. (See Order dated September 6, 2012, at 6 ¶ 10; Tr. 12:8-21.) Class Counsel has done an exemplary job representing the Plaintiffs in this case, and any objections to the fairness of the settlement on this ground are rejected.

3. The Stage of the Proceedings and the Amount of Discovery Completed

The third Girsh factor requires that the Court consider the "degree of case development that Class Counsel have accomplished prior to Settlement," including the type and amount of discovery already undertaken. *In re General*

[26] See, e.g., Objection of Benjamin Hudson [CM/ECF No. 177-6 at 95]; Objection of Gilden Rivera [CM/ECF No. 177-7 at 106]; Objection of Edward Salerno [CM/ECF No. 177-7 at 123-24]; Objection of Rodney Roberts [CM/ECF No. 177-7 at 115].

[27] See, e.g., Objection of Eric Cruz [CM/ECF No. 177-5 at 168]; Objection of Benjamin Hudson [CM/ECF No. 177-6 at 95]; Objection of Daniel Richards [CM/ECF No. 177-7 at 97]; Objection of Mark Pepe [CM/ECF No. 177-7 at 73].

Motors, 55 F.3d at 813. Under this factor, the Court considers whether the amount of discovery completed in the case has permitted "counsel [to have] an adequate appreciation of the merits of the case before negotiating." *In re Schering- Plough/Merck Merger Litig., No. 09-1099, 2010 U.S. Dist. LEXIS 29121 at *30 (Mar. 26, 2010)*. The discovery analyzed encompasses both formal and "informal" discovery, including discovery from parallel proceedings, companion cases and even third parties, such as experts or witnesses. Id.

This factor weighs heavily in favor of settlement. The lead case in this **[*61]** consolidated action is a decade old. The parties engaged in years of formal discovery. They also engaged in a continual informal exchange of information during the settlement process. The Becker Report provided a form of searching discovery that likely exceeds any discovery permitted by the rules. Indeed, the existence of the Becker Report and the discovery prior to and after it makes clear that counsel was intimately familiar with the facts of this litigation. And if that wasn't enough, following consummation of the settlement, the parties engaged in "confirmatory discovery" on the merits of the settlement. Prior opinions have addressed how comprehensive the discovery process was in this case:

> The facts and merits of this case have been investigated, pored over, and discussed in depth for more than 10 years, including through STU facility changes and changes in administrations. There were at least three full years of formal fact discovery. In addition, in a searching and lengthy process supervised by the Court, a neutral expert approved by both sides did an unprecedented, and for the most part unlimited, investigation of the conditions and treatment programs at the STU. This involved **[*62]** numerous on-site visits, interviews with staff and residents, and the review of countless documents. During this process, the Court resolved any disputes on a real time basis, so that the investigation could proceed. This investigation resulted in a highly detailed, 27 page, single spaced report on the STU. The Court cannot imagine any "discovery" that would even approach this delving investigation and report, which certainly aided the contentious settlement process. Morever, during the arduous settlement negotiations, exhaustive information was exchanged and it was patently obvious to the Court that all counsel were apprised of the relevant facts. Indeed, adversary counsel argued strenuously over many specific and discrete issues that revealed a deep understanding of the issues in this case.
>
> In sum, this is not a case resolved on a scant record without discovery. Nor does class counsel lack an understanding of the facts and issues. Quite the opposite.

*Alves v. Main, No. 01-789, 2012 U.S. Dist. LEXIS 84761, 2012 WL 2339809, at *3-4 (D.N.J. June 19, 2012)*. This factor weighs in favor of settlement.

4 & 5. The Risk of Establishing Liability and Damages

The fourth and fifth Girsch factors are commonly analyzed together. **[*63]** See, e.g., *McCoy v. Healthnet, Inc., 569 F. Supp. 2d 448, 461 (D.N.J. 2008)*. These factors survey the "possible risks of litigation by balancing the likelihood of success . . . against the immediate benefits offered by settlement." *Prudential II, 148 F.3d at 319*. Where the risks of litigation are high, these factors weigh in favor of the settlement. See id. To properly weigh these considerations, the Court should rely to a certain extent on the estimation

provided by class counsel, who is experienced with the intricacies of the underlying case. See *Weber v. Gov't Empls. Ins. Co., 262 F.R.D. 431, 445 (D.N.J. 2009)* (quoting *Perry v. FleetBoston Fin. Corp., 229 F.R.D. 105, 115 (E.D. Pa. 2005)*).

When the risk of establishing liability in this case is balanced against the benefit resulting from the Settlement Agreement, it is clear these factors weigh heavily in favor of settlement. Certain Objectors to the settlement contend that, in light of the Becker Report, the risk of not establishing liability is very slight. Their view is that liability is a *fait accompli* and the only discussion should be about the scope of damages. This position is not realistic. Liability would be a strongly contested **[*64]** issue in this case.

As mentioned previously, the Youngberg standard controls the adequacy of treatment, not the Becker Report. And under Youngberg, Plaintiffs would have to establish that the present state of the STU is legally deficient. This would not necessarily be simple. This is demonstrated by the fact that class members, often proceeding *pro* se, have had tremendous difficulty successfully litigating the issue of their treatment. See, e.g, *Deavers, 243 Fed. Appx. at 722* (no violation of rights when placed in restricted activities program without opportunity to contest allegations against him); *Belton v. Singer, No. 10-6462, 2011 U.S. Dist. LEXIS 74550, 2011 WL 2690595 (D.N.J. July 8, 2011)* (dismissing case brought by class member and finding that rights were not violated when placed in prison facility with poor conditions and subjected to prison policies); *Bondurant v. Christie, No. 10-3005, 2010 U.S. Dist. LEXIS 123984, 2010 WL 4869094, at *6 (D.N.J. Nov. 22, 2010)* (dismissing claim of class member that his rights were violated when placed in South Unit and limited to "segregated activities"). [28]

Yet, the class members' lack of success is not for a lack of trying. A brief sampling of Third Circuit case law shows that, certain objectors, such as Joseph Aruanno, are prolific *pro se* litigators on the subjects of their confinement, treatment, and civil rights, having more than 20 cases reach the Third Circuit—all without success. [29] Likewise, at the Fairness Hearing, Class Counsel persuasively described the repeated inability of class members to establish liability and prevail on the merits in cases that were somewhat similar to this case. (Tr. 17:9-18:21.)

Class Counsel's oral presentation on prior cases underscores the considerable risk Plaintiffs would face if the settlement was rejected and Plaintiffs attempted to litigate the case to conclusion. In the face of all of this, some objectors still seem to think that liability can be easily established in light of the Becker Report, which they contend **[*66]** is the report of the State's "own expert." [30] This oversimplifies the liability issue in the case and ignores that the Becker Report does not utilize the Youngberg standard, wholly apart from the

---

[28] See also *Greenfield, 2011 U.S. Dist. LEXIS 154617, 2012 WL 1134917*; *Minatee, 2011 WL 5873055*; *Fornier, 2007 U.S. Dist. LEXIS 54110, 2007 WL 2159584*; and *Badu-Shabazz, 2012 U.S. Dist. LEXIS 171773, 2011 WL 1080521*, all discussed **[*65]** *supra*.

[29] See *Aruanno v. Velez, No. 12-152, 2012 U.S. Dist. LEXIS 51446, 2012 WL 1232415 (D.N.J. Apr. 12, 2012)* (noting, "[s]ince 2005, Mr. Aruanno has filed over 28 civil cases in this Court and 27 appeals in the United States Court of Appeals for the Third Circuit"), aff'd *2012 WL 4748193 (3d Cir. Oct. 5, 2012)*.

[30] This is a highly misleading description. It is true that Dr. Becker was one of several experts suggested by Defendants when the parties were considering various individuals to evaluate the STU for settlement purposes. But, this does not make Dr. Becker "Defendants' expert," and Defendants never adopted Dr. Becker's opinions. And, were the case to proceed, it would seem certain that Defendants would, in fact, retain a different expert.

fact that there are serious issues regarding whether the Becker Report would even be admissible at a trial. [31] In reality, as Class Counsel notes, this settlement would be the first time that a federal court has mandated change to the STU and would achieve more for the residents in one action then has been accomplished in more than a decade of *pro se* litigation. (See Moses Decl. ¶¶ 40-42.) With no track record of prior success, Plaintiffs' ability to establish liability in this case is questionable.

Moreover, even if Plaintiffs were successful and *prevailed* on the merits of the case (which, again, has apparently never happened in this district), there is the further risk that the relief they would obtain following a trial would be *less* or the same as what has already been negotiated in the parties' Settlement Agreement. In other words, contrary to what many objectors seem to think, prevailing on the merits of the case does not mean that the entire Becker Report would be automatically implemented. Thus, the Court believes the risk that Plaintiff would not establish liability at trial weighs in favor of settlement.

In stark contrast to the serious risk associated with liability, the benefits of settlement are obvious. As the papers and objections received make clear, one of the primary complaints of the residents at the STU is how long they have been confined to the facility. Professor Moses has expressed the opinion that the Settlement **[*68]** Agreement provides real change in the near future and that she believes the best and most effective way for class members to regain their liberty is to pursue increased treatment and eschew further litigation. (Moses Decl. ¶ 47.) Thus, this factor weighs in favor of approving the settlement.

6. The Risk of Maintaining the Class Through Trial

The sixth Girsch factor "measures the likelihood of obtaining and keeping class certification if the action were to proceed to trial." *In re Warfain, 391 F.3d at 538*. This case was certified as a class action regardless of whether the settlement was approved. This was not a settlement class. Cf. *In re Cmty Bank of N. Va., 418 F.3d 277, 299 (3d Cir. 2005)* (discussing concept of "settlement only" classes). Thus, there is no real risk that this action would not proceed to trial as a class action. Nevertheless, it should be noted that this consolidated class action is comprised of many individual *pro se* complaints from confined residents, which presents practical problems. In addition, class certification can always be modified at any time before final judgment. *Fed.R. Civ. P. 23(c)(1)(C)*. All in all, the risk of decertification is small. Yet, should **[*69]** this case proceed to trial, there remains the possibility that the class could be decertified or procedural problems managing the class could arise. This factor is neutral.

7. The Ability of Defendants to Withstand a Greater Judgment

The seventh Girsch factor is "concerned with whether the defendants could withstand a judgment for an amount significantly greater than the settlement." *In re Cendant, 264 F.3d 201, 244 (3d Cir. 2001)*. Since the individual defendants are state employees, it would be the State of New Jersey that bears ultimate responsibility for satisfying any judgment, as well as funding any additional litigation, trials, and appeals. Presumably the State can fund any judgment that could be received, thus this

---

[31] There is some disagreement among the parties as to whether **[*67]** Dr. Becker's report was to be considered for settlement purposes only pursuant to *Federal Rule of Evidence 408*. The relevant procedural history suggests that the Becker Report was for settlement purposes only and would not be properly admissible at trial.

factor is neutral. However, it should be noted that these are difficult economic times. And the negotiations in this case were not isolated from the economic reality affecting the State of New Jersey. (Azmy Decl. ¶ 55.) While New Jersey would be able to fund a judgment in this case following a trial, it is more preferable to have a settlement that Defendants consider a funding priority, as opposed to the potential for an unfunded judicial mandate following a trial **[*70]** and appeals years from now.

8 & 9. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and the Risks of Litigation

The final two Girsch factors collectively "evaluate whether the settlement represents a good value for a weak case or a poor value for a strong case." *In re Warfarin, 391 F.3d at 538*. To make this determination, the Court analyzes the reasonableness of the settlement against the best possible recovery and the risks the parties would face if the case went to trial. *Prudential II, 148 F.3d at 322*.

Here, continued litigation involves considerable risk that the Plaintiffs would lose the merits of the case. Moreover, even if Plaintiffs prevailed, the relief obtained could be less than is provided for in the Settlement Agreement. The best possible recovery is hard to quantify in a case like this. See *Canupp, 2009 U.S. Dist. LEXIS 113488, 2009 WL 4042928, at *11* (noting in, SVP case, that [i]t is difficult to gauge the range of possible recovery in an injunctive case for an area of the law that is not well litigated"). It appears that few comparable cases have actually been tried, and when they have, the results have not been good for plaintiffs. See generally *Strutton, 668 F.3d at 557* **[*71]** (affirming complete denial of relief and finding no treatment is required). The only case that has been identified where civilly committed sexually violent predators prevailed following a trial is *Turay v. Richards, No. 07-35309, 2012 U.S. Dist. LEXIS 171773, 2009 WL 229838 (9th Cir. Jan. 29, 2009)*. And Turay is not necessarily encouraging for Plaintiffs. In Turay, while the plaintiffs were successful at trial in showing that the State of Washington's SVP treatment program was constitutionally deficient, after appeals, the involvement of a special master and many court proceedings, it took seven years for plaintiffs to secure any relief. [32]

In contrast, the Settlement Agreement here mandates material improvements to the treatment program at the STU within 6 months. (Moses Decl. ¶ 43.) The reforms address most of the issues in the second amended complaint **[*72]** and do so quickly and with some degree of certainty. The settlement yields substantial and immediate benefits, and it is reasonable in light of the best possible recovery and the attendant risks of litigation—little or no recovery at all. Thus, the Court finds these factors weigh in favor of settlement.

10. Additional Considerations

(i) Class Counsel

In addition to the Girsch factors, courts in this Circuit traditionally "attribute significant weight to the belief of experienced counsel that settlement is in the best interest of the class." *Austin, 876 F. Supp. at 1472*. As the Third Circuit has noted, "[c]lass counsel's duty to the class as a whole frequently diverges from the

---

[32] While the Turay plaintiffs did secure the right to be discharged to halfway house-like communities as sought by some objectors in this case, there is a crucial distinction between the Washington program and the NJSVPA. In particular, the Washington SVP program expressly contemplates the use of less restrictive facilities; the NJSVPA does not. (Moses Decl. ¶ 44.)

opinion of either the named plaintiff or other objectors." *Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 964 (3d Cir. 1983)* (affirming district court decision denying named plaintiff's motion to dismiss class counsel, denying motion to appoint additional counsel for objectors, and approving settlement over objections from named plaintiff).

Here, Class Counsel are highly skilled attorneys, especially in this area of the law. Their opinions carry persuasive weight. See *Prudential I, 962 F. Supp. at 543* ("the Court **[*73]** credits the judgment of Plaintiff's counsel, all of whom are active, respected, and accomplished in this type of litigation"). Professor Moses represents that class counsel has "reviewed all of the objections and have spoken to a large number of Class Members about the Settlement, both in person and via telephone," and that "[counsel] continue to sincerely believe . . . that the Settlement is in the best interest of the Class as a whole." (Joint Br. 29.) Moreover, Professor Moses states that "while the settlement does not guarantee release for any class member, class counsel believes that the bargained for improvements to the quantity and quality of the mental health treatment offered at the STU—overseen by an independent monitor—will enable the Class Members to progress more rapidly and regain their freedom more quickly." (Moses Decl. ¶ 47.) Class Counsel's recommendation provides further support for approving the settlement.

(ii) The Settlement Negotiations Were Overseen by a Magistrate Judge

In this case, the parties also benefitted from the involvement of a magistrate judge in mediating the Settlement. [33] The participation of an independent mediator in settlement negotiations "virtually **[*74]** insures that the negotiations were conducted at arm's length and without collusion between the parties." *Bredbenner v. Liberty Travel, Inc., 09-905, 2011 U.S. Dist. LEXIS 38663, 2011 WL 1344745, at *10 (D.N.J. Apr. 8, 2011)*; *Kolar v. Rite Aid Corp., No. 01-cv-1229, 2003 U.S. Dist. LEXIS 3646, 2003 WL 1257272, at *3 (E.D. Pa. Mar. 11, 2003)* (noting that involvement of magistrate judge in settlement process "provides a great deal of comfort at the threshold of our fairness consideration").

(iii) The Settlement Agreement Requires a Court Appointed Monitor

The Settlement Agreement also calls for the Court to appoint a monitor to ensure compliance with the agreement's terms. While the appointment of a monitor may not fit neatly within any of the traditional Girsch factors, the presence of an observer specifically **[*75]** delegated the task of ensuring compliance with the agreement is an additional safeguard that the settlement reforms are real, will be implemented, and will provide the class with the increased treatment that they have bargained for.

VI. SUMMARY

To the extent the future of the STU residents depends largely on mental health treatment, this Court finds that the Settlement Agreement does an excellent job of increasing the quantum and quality of available care. This should provide each resident with an increased opportunity to show that he has successfully treated his mental abnormality

[33] The Court would be remiss if it did not recognize Magistrate Judge Falk for his outstanding effort in bringing this matter to a joint conclusion. During the course of this litigation, he shepherded this matter through numerous pretrial obstacles and played a major role in bringing both sides together in final settlement. Quite simply, but not for his significant involvement over a period of ten years, no resolution would be in sight.

and should be considered for a conditional discharge. The Agreement may not provide every class member with every aspect of treatment that they desire. But, the settlement does more for the treatment of sexually violent predators than any case has been able to accomplish in more than a decade of *pro se* litigation since the NJSVPA was passed into law.

The Settlement Agreement easily satisfies the *Girsch* factors. The settlement is eminently fair and the negotiation process was unassailable. The Court has no hesitation in concluding that the majority (if not all) of the Girsch factors, and several additional considerations, **[*76]** strongly favor approval. The settlement provides a significant benefit to all class members, which is substantiated by the generally positive response from the class. The settlement was also recommended by two groups of experienced class counsel, who truly advocated for the best interests of their clients. For all of the reasons stated above, the settlement is fair, reasonable and adequate. The Settlement Agreement is **approved**.

VII. ATTORNEY'S FEES

The Settlement Agreement also provides that Defendants agree to pay Plaintiffs' class counsel, the Seton Hall Center for Social Justice, $78,000 in attorney's fees as part of the settlement. See Settlement Agreement XII.A. In any *Section 1983* action, like this one, the Court may determine that a prevailing party is entitled to attorney's fees. See *42 U.S.C. § 1988*. A reasonable fee is generally calculated by application of the lodestar method, which requires multiplying the hours reasonably expended by a reasonable hourly rate. See *City of Riverside v. Rivera, 477 U.S. 561, 568, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986)* (citing *Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*).

There is no need for a full lodestar analysis in this case. The Court finds that the comparatively *de* **[*77]** *minimus* attorney's fee award agreed to by the parties in this case is *per se* reasonable in this decade old case. Professor Moses represents that she personally spent more than 400 hours on this litigation, and that her usual billing rate is $375.00 per hour. (Moses Decl. ¶¶ 48-49.) Professor Azmy represents that he spent nearly 1,500 hours working on the case at $375.00 per hour for a total of more than $560,000 in attorney's fees. (Moses Decl. ¶ 50; Azmy Decl. ¶ 59.) Seton Hall Law School students also spent more than a 1,000 hours working on this litigation. (Moses Decl. ¶ 48.) Co-class counsel at Gibbons, Lawrence Lustberg, Esq. and other attorneys, spent nearly 700 hours working on the case—in addition to incurring nearly $40,000 in expenses. (Moses Decl. ¶ 51.) In total, the attorney's fees expended in this case appear to be close to $2 million. In light of this, the minimal fee award of $78,000 is clearly "reasonable" under the circumstances. *Hensley, 462 U.S. at 433*.

VIII. MONITOR

The Settlement Agreement also calls for the Court to appoint a monitor to facilitate the implementation of the Settlement Agreement and render determinations as to whether DMHAS is in compliance. See **[*78]** generally Settlement Agreement § VII. The monitor will be appointed by separate order following further conference with counsel.

IX. CONCLUSION

Based on all of the reasons set forth above, the party's motion for joint approval of settlement [CM/ECF No. 193] is **GRANTED**.

The Court hereby **approves** the parties Settlement Agreement and **grants** Class Counsel's request for $78,000 in attorney's fees.

An appropriate Order will be entered.

/s/ Dennis M. Cavanaugh

DENNIS M. CAVANAUGH

UNITED STATES DISTRICT JUDGE

DATED: December 4, 2012

End of Document

Exhibit 7

Canupp v. Sheldon

United States District Court for the Middle District of Florida, Fort Myers Division

November 23, 2009, Decided

Case No. 2:04-cv-260-FTM-99DNF

Reporter

2009 U.S. Dist. LEXIS 113488 *; 75 Fed. R. Serv. 3d (Callaghan) 112

ROGER CANUPP, JACOB MYERS, LAWRENCE MCGEE, HUBERT DAVIDSON, TYWAUN JACKSON, and CHARLES DURDEN, individually, and on behalf of a Class of all persons similarly situated, Plaintiffs, vs. GEORGE SHELDON, in his official capacity as Secretary of the Department of Children and Families, Defendant.

Subsequent History: Decision reached on appeal by *Canupp v. Liberty Behavioral Health Corp., 417 Fed. Appx. 843, 2011 U.S. App. LEXIS 4516 (11th Cir. Fla., 2011)*

Affirmed by *Canupp v. Liberty Behavioral Healthcare Corp., 2011 U.S. App. LEXIS 23999 (11th Cir. Fla., Dec. 1, 2011)*

Prior History: *Canupp v. Butterworth, 2008 U.S. Dist. LEXIS 75381 (M.D. Fla., Sept. 11, 2008)*

Counsel: **[*1]** For Roger G. Canupp, individually and on behalf of a Class of all persons similarly situated, Jacob Myers, individually and on behalf of a Class of all persons similarly situated, Lawrence McGee, in need of a next friend and individually and on behalf of a Class of all persons similarly situated, Hubert Davidson, individually and on behalf of a Class of all persons similarly situated, Tywaun Jackson, individually and on behalf of a Class of all persons similarly situated, Charles Durden, individually and behalf of a Class of all persons similarly situated, Daniel Fabian, individually and on behalf of a Class of all persons similarly situated, Bruce Kramer, individually and on behalf of a Class of all persons similarly situated, Plaintiffs: Alice K. Nelson, LEAD ATTORNEY, Southern Legal Counsel, Inc., Gainesville, FL; Cassandra Capobianco, Christopher Michael Jones, Kristen Cooley Lentz, LEAD ATTORNEYS, Florida Institutional Legal Services, Gainesville, FL; Peter Prescott Sleasman, LEAD ATTORNEY, Florida Institutional Legal Services, Inc., Newberry, FL.

For Liberty Behavioral Healthcare Corp., Defendant: Barbara C. Fromm, John W. Jolly, Jr., LEAD ATTORNEYS, Jolly & Peterson, PA, Tallahassee, **[*2]** FL.

For Jerry Regier, in his official capacity as Secretary of the Department of Children and Families, Defendant: Chesterfield Smith, Jr., LEAD ATTORNEY, Office of the Attorney General *, State Program Litigation, Tallahassee, FL.

For Lucy Hadi, Secretary of the Department of Children and Families, Defendant: Caryl Kilinski, LEAD ATTORNEY, Attorney General's Office*, The Capitol PL-01, Tallahassee, FL; Chesterfield Smith, Jr., LEAD ATTORNEY, Office of the Attorney General *, State Program Litigation, Tallahassee, FL; Susan A. Maher, LEAD ATTORNEY, Office of the Attorney General*, PL-01 - The Capitol, Tallahassee, FL.

For George H. Sheldon, Secretary of the Department of Children and Families, Defendant: Susan A. Maher, LEAD

ATTORNEY, Office of the Attorney General*, PL-01 - The Capitol, Tallahassee, FL.

For Timothy Budz, Movant: Gregory A. Kummerlen, LEAD ATTORNEY, Wiederhold, Moses & Rubin, PA*, West Palm Beach, FL; Gwendolyn Palmer Adkins, LEAD ATTORNEY, Coppins Monroe Adkins Dincman & Spellman, PA, Tallahassee, FL; Jennifer Ann Sullivan Davis, LEAD ATTORNEY, Kubicki Draper, Tallahassee, FL.

For Dr. Angela Garrido, Movant: Gwendolyn Palmer Adkins, LEAD ATTORNEY, Coppins Monroe Adkins **[*3]** Dincman & Spellman, PA, Tallahassee, FL; Jennifer Ann Sullivan Davis, LEAD ATTORNEY, Kubicki Draper, Tallahassee, FL.

Joseph W. Finfrock, Movant, Pro se, Arcadia, FL.

Judges: JOHN E. STEELE, United States District Judge.

Opinion by: JOHN E. STEELE

Opinion

OPINION AND ORDER

This matter comes before the Court on the Joint Motion for Approval of Settlement and Dismissal of the Case (Doc. # 302) filed on November 3, 2009. Plaintiffs and Defendant, pursuant to *Rule 23(e)* and *Rule 41(a)(2), Fed. R. Civ. P.*, have jointly moved the Court to approve the terms of the resolution of this action and to enter an order dismissing this action. The Court heard testimony and the argument of counsel at a hearing on November 17, 2009. For the reasons set forth below, the joint motion will be granted.

I. Procedural History

Plaintiffs are current or former residents of the Florida Civil Commitment Center (hereinafter "FCCC"). [1] On May 7, 2004, plaintiffs filed a Class Action Complaint (Doc. # 1) on behalf of themselves and a class of similarly situated persons. Plaintiffs and all putative class members had been involuntarily confined to the care and custody of the State of Florida, Department of Children and Families (hereinafter "DCF"), **[*4]** and confined at the FCCC, pursuant to The Sexually Violent Predator Act (hereinafter the "SVPA"), *§§ 394.910-394.931, Fla. Stat.* (2003). The original Defendants were the Secretary of the Department of Children and Families in his official capacity and Liberty Behavioral Healthcare Corporation (hereinafter "Liberty"), the vendor to whom DCF awarded the contract to operate and manage FCCC and its programs. Doc. # 1.

Plaintiffs' Complaint alleged that the Defendants violated Plaintiffs' constitutional and federally protected rights by: (1) failing to provide Plaintiffs with an effective sex offender treatment program that would allow them a realistic opportunity to meet the statutory requirements for release from confinement, in violation of the *Fourteenth Amendment to the United States Constitution* (Doc. # 1, PP 157-158); (2) failing to provide Plaintiffs with appropriate mental health services that would give them an opportunity to participate in sex offender treatment **[*5]** and thereby be able to be released from confinement, in violation of the *Fourteenth Amendment* (Doc. # 1, PP 159-160); (3) failing to accommodate Plaintiffs with qualified disabilities so as to permit them to participate or receive benefits of the services, programs or activities at FCCC, in violation of the Americans with Disabilities Act, *42 U.S.C.*

[1] Plaintiffs Roger Canupp, Jacob Myers, Lawrence McGee and Hubert Davidson are still confined in the FCCC. Plaintiffs Charles Durden and Tywaun Jackson were released from the FCCC during the pendency of this litigation.

§ 12131 et. seq. (hereinafter "ADA") (Doc. # 1, PP 161-164); and (4) failing to provide appropriate procedural protections for the use of punitive confinement in violation of the Fourteenth Amendment's guarantee of procedural due process. (Doc. # 1, P 165.) Plaintiffs requested declaratory and injunctive relief. (Doc. # 1, p. 31.)

In March 2005, the Court certified the following two subclasses of plaintiffs:

> (1) residents of the FCCC who (a) have been civilly committed to custody pursuant to § 394.917, Fla. Stat., that they are sexually violent predators; or (b) have been detained to custody pursuant to § 394.915 as probable cause sexually violent predators; and (c) who have consented to sex offender treatment, and are not receiving adequate sex offender treatment, and
>
> (2) residents of the FCCC who (a) have been civilly committed to custody **[*6]** pursuant to § 394.917, Fla. Stat., that they are sexually violent predators; or (b) have been detained to custody pursuant to § 394.915 as probable cause sexually violent predators; and (c) who have been diagnosed by a treating professional with a mental illness as defined by DSM-IV, and who are not receiving adequate treatment for their mental illness.

(Doc. # 66 at 9-10.)

The parties actively engaged in extensive discovery in 2005 and 2006. Plaintiffs retained two psychiatrists: one with expertise in sex offender treatment and the other with expertise in treatment of individuals in institutions with severe and persistent mental illness. Defendants retained a psychologist with expertise in sex offender treatment, and a psychiatrist with expertise in treating persons with severe and persistent mental illness. In 2006, Plaintiffs' experts conducted a multi-day visit to FCCC which included a tour of the facility, interviews with class members, and reviews of class member records. (Doc. # 110.) Plaintiffs also conducted depositions of DCF officials and Liberty staff.

On July 1, 2006, DCF awarded the contract to operate and manage FCCC and its programs to the GEO Group, Inc. (hereinafter "GEO"), **[*7]** on an interim basis. As of January 1, 2007, the contract with GEO was extended to a five-year term.

Plaintiffs moved to join GEO as a Defendant (Doc. # 172), and this motion was granted. (Doc. # 192.) Because of the delays that would have resulted from GEO's full participation as a party, Plaintiffs filed a notice of voluntary dismissal as to GEO. (Doc. # 198.) GEO was dismissed without prejudice on June 4, 2007. (Doc. # 202.) As a result, George Sheldon in his capacity as Secretary of the DCF is the only Defendant in the case. GEO continues to operate FCCC under contract with DCF.

Plaintiffs' experts toured FCCC for the second time in 2007, after GEO assumed operation of the facility. After a new Case Management Report and Scheduling Order was entered on October 23, 2008 (Doc. # 210), the parties once again actively engaged in discovery. After receiving leave of court, Plaintiffs conducted 24 depositions in late 2008 and early 2009. The depositions included key DCF staff responsible for the oversight of FCCC, the FCCC director and clinical director, FCCC psychiatrists, FCCC treatment team leaders, and an FCCC contract consultant who specialized in the area of sex offender treatment.

Plaintiffs **[*8]** also conducted extensive document discovery. Plaintiffs' counsel and their experts reviewed the FCCC treatment records of over 200 class members. Plaintiffs counsel reviewed all of the FCCC's operating policies since 2001, including the complete

revision by FCCC of those policies in 2009; the reports of FCCC's Treatment Advisory Board and GEO's internal auditing reports of FCCC; all of DCF's contract monitoring reports of FCCC; and other DCF internal documents relating to FCCC.

Plaintiffs' experts visited FCCC for a third time in 2009. This visit lasted about three days and included a tour of the new facility that was in the final stages of completion, [2] the existing facility, interviews of more than 20 residents by each expert, and reviews of treatment records. At the conclusion of the tour, the experts issued supplemental expert reports. Both Plaintiffs and Defendant filed pre-trial motions seeking to limit or exclude certain areas of expert testimony.

The parties report that in early June 2009 they began discussions to resolve this case. These discussions included several detailed conference calls, an extensive in-person meeting, **[*9]** and written exchanges. Following these discussions, the parties filed a motion seeking extension of all pre-trial deadlines and a continuance of the trial date. (Doc. # 266.) The motion included a letter of commitment from Defendant Sheldon and the proposed final action plan. (Id.)

The Court granted the motion, removed the case from the trial calendar, and gave the parties 60 days to file a motion seeking approval of a settlement. (Doc. # 269.) The parties subsequently filed a joint motion seeking the Court's approval of a proposed plan to notify the class, provide for objections, and to set a fairness hearing on the proposed resolution. (Doc. # 272.) The Court granted the motion and ordered notice to the class by September 15, 2009. (Doc. # 273.) The Court also set a deadline of October 15, 2009, for objections and set a deadline of November 2, 2009, for the parties to file a motion for approval of the settlement. (Id.)

The parties report that a copy of the notice and the settlement agreement was provided by FCCC staff to every resident of the facility by September 15, 2009. (Doc. # 291, Exh. A.) In addition, a copy of the notice and the plan was posted on the bulletin board of each **[*10]** living unit at FCCC. Further, although not required by the Court's order, a Spanish translation of the notice and the plan was provided to each resident who speaks Spanish as a first or second language at FCCC. (Id.)

Twenty-one objections to the settlement were filed by 37 residents at FCCC. (Docs. # 275-# 290, # 292-# 296.) Many of the objections express concern about the lack of a federal monitor or court oversight for implementation of the settlement plan. Other objections seek additional relief, such as state certified vocational programs.

II. Legal Principles

Rule 23(e) of the Federal Rules of Civil Procedure requires that a settlement, voluntary dismissal, or compromise of a certified class action be approved by the district court. *Fed. R. Civ. P. 23(e)*. Before granting approval "the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)*. [3] This determination is left to the sound discretion of the district court. *In re Healthsouth Corp. Sec. Litig., 572 F.3d 854, 859 (11th Cir. 2009)*; *In re United States Oil & Gas Litig., 967 F.2d 489,*

[2] The new facility for the FCCC opened in April 2009.

[3] In **[*12]** *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

493 (11th Cir. 1992); **[*11]** Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984). As the Eleventh Circuit recently stated,

> [t]he district court reviews a class action settlement to determine whether it is fair, reasonable and adequate. See Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984). The court considers these relevant factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. Id. at 986.

In re CP Ships Ltd. Sec. Litig., 578 F.3d 1306, 1314-15 (11th Cir. 2009). See also Leverso v. Southtrust Bank, 18 F.3d 1527, 1530 (11th Cir. 1994). A court also should consider the judgment of experienced counsel for plaintiff class. In re Dennis Greenman Sec. Litig., 622 F. Supp. 1430, 1438 (S.D. Fla. 1985), rev'd on other grounds, 829 F.2d 1539 (11th Cir. 1987). "Public policy strongly favors the pretrial settlement of class action lawsuits." In re U.S. Oil & Gas Litig., 967 F.2d 489, 493 (11th Cir. 1992).

The principles set forth in Cotton continue to apply:

> A threshold requirement is that the trial judge undertake an analysis of the facts and the law relevant to the proposed compromise. A "mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law" will not suffice. [ ]
>
> In addition to undertaking such an analysis, it is essential that the trial judge support his conclusions by memorandum opinion or otherwise in the record. An appellate court, in the event of an appeal, must have a basis for judging the exercise of the trial judge's discretion. [ ]
>
> In determining the fairness, adequacy and reasonableness of the proposed compromise, the inquiry should focus upon the terms of the settlement. The settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case. [ ] The relief sought in the complaint may be helpful to establish **[*13]** a benchmark by which to compare the settlement terms. [ ]
>
> . . .
>
> Yet, in evaluating the terms of the compromise in relation to the likely benefits of a successful trial, the trial judge ought not try the case in the settlement hearings. [ ]
>
> It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. [ ]
>
> Neither should it be forgotten that compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." [ ]
>
> In performing this balancing task, the trial court is entitled to rely upon the judgment of experienced counsel for the parties. [ ]

Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel. [ ]

In addition to examining the merits of a proposed settlement and ascertaining **[*14]** the views of counsel, the Court should consider other factors.

Practical considerations may be taken into account. It is often said that litigants should be encouraged to determine their respective rights between themselves. [ ] Particularly in class action suits, there is an overriding public interest in favor of settlement. [ ] It is common knowledge that class action suits have a well deserved reputation as being most complex. The requirement that counsel for the class be experienced attests to the complexity of the class action. [ ]

. . .

In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources.

. . .

When, during the course of the litigation, it becomes known to the Court that a portion of the class objects to the proposed settlement, the trial judge must assume additional responsibilities. The trial court must extend to the objectors leave to be heard. [ ] However, this is not to say that the trial judge is required to open to question and debate every provision of the proposed compromise.

The growing rule is that the trial court may limit its proceeding to whatever is necessary **[*15]** to aid it in reaching an informed, just and reasoned decision.

> The Court should examine the settlement in light of the objections raised and set forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response. [ ]
>
> In assessing the fairness of the proposed compromise, the number of objectors is a factor to be considered but is not controlling. [ ] A settlement can be fair notwithstanding a large number of class members who oppose it.
>
> The trial judge must then make a determination as to whether or not to approve the settlement, or he may make suggestions to the parties for modifications of the proposal. Approval must then be given or withheld.

Cotton, 559 F.2d at 1330-32 (internal citations omitted).

"*Federal Rule of Civil Procedure 23(e)(1)(B)* requires the court to provide direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement]. Notice must 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.'" *In re CP Ships, 578 F.3d at 1317* (quoting *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*). **[*16]** This requires "that the notice apprise class members of the terms of the settlement agreement in a manner that allows class members to make their own determination regarding whether the settlement serves their interests." *United States v. Alabama, 271 Fed. Appx. 896, 901 (11th Cir. 2008)*. The right to adequate notice is also a component of the *Due Process Clause of the United States Constitution*. *Id. at 901*.

III. The Final Action Plan

The proposed resolution of this case is in the form of a Final Action Plan (Doc. # 302, Appendix 5). The parties agree that during the pendency of this case, Defendant made numerous improvements to the treatment program at FCCC, as reflected in the current contract requirements between DCF and GEO. (Doc. # 302, App. 4.) In addition to those improvements, the Final Action Plan includes improvements to the oversight and staffing of the inpatient mental health unit, the implementation of policies addressing the screening and referral process for the use of anti-androgens, comprehensive discharge planning for Phase IV residents, modifications to the special needs treatment track, and additional training for clinical staff and housing staff.

Specifically, the **[*17]** Final Action Plan identifies twenty-one "Focus Areas," describes the actions to be taken by the FCCC to address each Focus Area, identifies the title of the DCF/FCCC person responsible for accomplishing the action, identifies a target date by which the action is to be completed, identifies the date the action was or will be completed, and provides miscellaneous comments relating to each focus area. With two exceptions, all of the actions identified for the Focus Areas have been completed; the two remaining areas will be completed by February, 2010.

The parties have agreed that nothing in the Final Action Plan, or any other written document, should be construed as any type of judicially enforceable settlement agreement, injunctive order, or any other type of prospective relief or interpreted as an intent of the parties that there should be continuing jurisdiction of this Court. It is the intent of the parties that approval of the Final Action Plan and dismissal of the case with prejudice will terminate further jurisdiction of this Court.

The Complaint set forth thirteen areas which plaintiffs alleged constituted constitutional violations. The Final Action Plan addresses twelve of these **[*18]** alleged constitutional violations. A comparison of the Complaint allegations and the Final Action Plan treatment of those matters is as follows:

(1) Allegation: Defendant does not have all four stages of the treatment program design in place, functioning, and available to all residents. (Doc. # 1 at P 141.)

> **Final Action Plan**: Defendant and GEO now have all four phases of the treatment program in operation. (See FCCC Policy and Procedure Manual CL-1, at 13, Doc. # 302, App. 6.) The parties represent that there are currently seven residents in Phase IV, with additional residents scheduled to move up from Phase III to Phase IV in January 2010. (Doc. # 302, App. 1, Budz Declaration.) In addition, since GEO assumed the FCCC contract, 27 residents in Phase IV of treatment have been released by the SVP committing courts. (Id. at App. 1.) FCCC has filed reports on two additional residents who reached maximum therapeutic benefit from the program (completion of all treatment phases) and who are awaiting court action. Defendant also implemented a policy for comprehensive discharge planning for residents and a training program for discharge planning for residents nearing release from the facility. **[*19]** (Doc. # 302, App. 7.) Additionally, Defendant implemented a policy outlining expected time frames for progressing through the sex offender treatment program. (Doc. # 302, App. 6.)

(2) Allegation: Defendant does not provide adequate treatment plans for non-participating

residents that address the goal of engaging those residents in treatment. (Doc. # 1 at P 142.)

> **Final Action Plan**: This is not addressed in the plan. FCCC has adopted and implemented a policy specifically addressing the issue of engaging those residents who refuse treatment activities. (Doc. # 302, App. 8.) Plaintiffs' counsel determined by review of resident records that this was occurring at FCCC and at the time of settlement negotiations was not an issue.

(3) Allegation: Defendant does not have adequate customs, policies and practices for identifying and assessing residents with developmental disabilities or mental illnesses that impair the effective participation in sex offender treatment. (Doc. # 1 at P 143.)

> **Final Action Plan**: Defendant implemented a policy to identify or assess class members for disabilities that could impact their participation in sex offender treatment. (Doc. # 302, App. 9.) In addition, Defendant **[*20]** currently notifies the SVP Act committing court of jurisdiction regarding those residents who, because of the severity of their mental illness, may not be able to meaningfully participate in sex offender treatment programs. (Doc. # 302, App. 10.)

(4) Allegation: Defendant does not have a specialized sex offender treatment program in place for residents with developmental disabilities, learning disabilities, or major mental illnesses which effectively prevent meaningful access and participation in treatment. (Doc. # 1 at P 144.)

> **Final Action Plan**: Defendant implemented a specialized sex offender treatment program (Special Needs Treatment Track) to accommodate the needs of class members with developmental disabilities and mental illness whose cognitive impairments hinder their participation in a conventional sex offender treatment program. (Doc. # 302, App. 11.) Defendant's contractor has worked with nationally-renowned experts James Haaven and Gerry Blasingame in developing and implementing this special program. (App. 1.)
>
> Additionally, Defendant's policy limits the number of residents in each special track treatment group to no more than 8-10 residents per group with two co-facilitators. **[*21]** (Doc. # 302, App. 6 at 30.) Defendant provides training and supervision of clinical and housing staff regarding the specific needs of the special track population. (Doc. # 302, Focus Area # 19.) And, although not an issue in the instant case, Defendant provides specialized services for persons with hearing impairments that do not isolate them with the special track population. (Doc. # 302, Focus Area # 8; App. 11; ADM-6 attached as App. 12.)

(5) Allegation: Defendant does not offer pharmaceutical treatment modalities such as anti-androgens or selective serotonin reuptake inhibitors in the treatment program. (Doc. # 1 at P 145.)

> **Final Action Plan**: Defendant implemented a policy for screening and assessing all residents for referral for therapeutic sex drive reduction medication, including anti-androgens, and developed training for psychiatrists and clinical staff regarding the screening, assessment and integration of medications, particularly anti-androgens, as a component of treatment. (Doc. # 302, Focus Areas ## 6, 20; PRG-5 attached as App. 9; HLTH-52 & 53 attached as Apps. 13 & 14.)

(6) Allegation: Defendant failed to make adequate provisions for family involvement in treatment rehabilitative **[*22]** efforts. (Doc. # 1 at P 146.)

> **Final Action Plan**: Defendant's sex offender treatment plan incorporates a program that promotes family involvement at appropriate points in treatment. (Doc. # 302, Focus Area # 11; App. 4 at 176; App. 6 at 8.)

(7) Allegation: Defendant failed to provide an adequate number of properly trained and certified treatment staff and number of hours in treatment each week. (Doc. # 1 at P 147.)

> **Final Action Plan**: Defendant developed training to improve communication between clinical staff and housing staff to provide a continuum of care on housing units. (Doc. # 302, Focus Area # 18.) Additionally, Defendant's contract with GEO provides for 10 hours of treatment per week. (App. 4 at 100.) Based on expert deposition testimony in this case, the 10 hours of treatment is in line with what other similar sex offender treatment programs around the country are providing.

(8) Allegation: Defendant is simply warehousing residents, and has not recommended one resident for discharge from the facility based on completion of the treatment program. (Doc. # 1 at P 148.)

> **Final Action Plan**: The parties report that since GEO assumed operation of FCCC, it has filed 17 formal reports for **[*23]** residents having reached maximum therapeutic benefit from the program (completion of all treatment phases). Fifteen of those residents were released by the SVP committing courts and two are awaiting court action. (Doc. # 302, App. 1.) Additionally, Defendant adopted policies for identifying and notifying the SVP committing courts with jurisdiction about residents who may have difficulty meaningfully participating in the sex offender treatment program, including residents who (a) are incompetent to proceed in the SVP case and are unlikely to be restored to competency; (b) are so severely mentally ill that they cannot participate in the sex offender treatment program as a result of their mental illness; or (c) are terminally ill. (Doc. # 302, Focus Areas ## 3, 4, 12; App. 10; ADM-13 attached as App. 15; HLTH-98 attached as App. 16.)

(9) Allegation: Defendant does not provide adequate individualized service plans for residents. (Doc. # 1 at P 149.)

> **Final Action Plan**: FCCC has adopted and revised specific policies regarding the development of individual comprehensive care plans for residents receiving treatment. (Doc. # 302, App. 10.) In addition, Defendant provides training to FCCC staff **[*24]** to improve individual service plans to include regular updates, more individualized content, and clear objective and measurable goals. (Doc. # 302, Focus Area # 17; App. 10.)

(10) Allegation: Defendant does not employ an adequate number of psychiatric staff to handle the specialized needs of residents with severe mental illness. (Doc. # 1 at P 150.)

> **Final Action Plan**: Defendant added one additional part-time psychiatrist to its staffing plan for residents with severe and persistent mental illness. (Doc. # 302, Focus Area # 14; App. 4 at 83.)

(11) Allegation: Defendant does not have sufficient staff to address the daily needs of residents with serious mental illness. (Doc. # 1 at P 151.)

Final Action Plan: In addition to increasing the psychiatrist staffing noted above, Defendant now provides a full-time psychiatric nurse on the residential mental health unit. (Doc. # 302, Focus Area # 16; App. 4 at 83.) Additionally, Defendant provides training to enhance communication between clinical staff and housing staff for continuum of care. (Doc. # 302, Focus Area # 18.)

(12) Allegation: Defendant failed to provide mental health services of adequate frequency, duration, and substance to meet the **[*25]** needs of residents with severe mental illness. (Doc. # 1 at P 152.)

Final Action Plan: As noted above, Defendant has increased the level of staffing on the mental health unit by adding a psychiatric nurse and an additional half-time psychiatrist. (Doc. # 302, Focus Areas ## 14, 16; App. 4 at 83.) Defendant requires GEO to attain full accreditation or outside oversight of the inpatient unit. (Doc. # 302, Focus Area # 2; App. 4 at 28, 41, 144; CL-10 attached as App. 17.) Additionally, Defendant implemented a policy by which outside consultants review the records of any resident who has been on the inpatient living unit for more than one year. (See Focus Area # 1; App. 17.)

(13) Allegation: Defendant does not provide sufficient staff to address the needs of residents with developmental disabilities. (Doc. # 1 at P 153.)

Final Action Plan: As noted above, Defendant and FCCC have developed and staffed a Special Needs Treatment Track to accommodate the needs of class members with developmental disabilities whose cognitive impairments hinder their participation in a conventional sex offender treatment program. (Doc. # 302, App. 6 at 29; App. 11.) In addition, Defendant limits the number of residents **[*26]** in each special track treatment group to no more than 8-10 residents per group with two co-facilitators, (see Focus Area # 7; App. 6 at 30), and provides training and supervision of FCCC clinical and housing staff regarding the specific needs of the special track population (Doc. # 302, Focus Area # 19.)

The Final Action Plan also addresses additional items that were not raised in the Complaint. These include the provision of vocational and work programs, (Doc. # 302, Focus Area # 10; App. 6), and a process for informing state committing courts of jurisdiction regarding those residents who are terminally ill and may be appropriate for release from FCCC, (see Focus Area # 12; App. 16).

IV. Application of Principles for Approval of Settlement

With the terms of the Final Action Plan in mind, the Court will apply the legal principles governing whether it should approve the settlement and voluntary dismissal.

(A) Fraud or Collusion

The threshold issue is the presence or absence of fraud or collusion between the parties. In determining whether there was fraud or collusion, the court examines whether the settlement was achieved in good faith through arms-length negotiations, whether it was the **[*27]** product of collusion between the parties and/or their attorneys, and whether there was any evidence of unethical behavior or want of skill or lack of zeal on the part of class counsel. *Bennett, 737 F.2d at 987 n.9*.

In the instant case, the Court finds that there have been arms-length negotiations and no collusion between the parties and their attorneys. There has been neither unethical

behavior nor a want of skill or lack of zeal. The parties negotiated the Final Action Plan after five years of litigation over a five-week period. The negotiations took place by in-person meetings, written correspondence, and conference calls. Plaintiffs consulted their experts throughout the negotiation process. The monies paid to Plaintiffs' attorneys represent reimbursement of out-of-pocket expenses only, and no attorney fees are being paid as part of the settlement. This is further evidence of a lack of collusion. Thus, the Court finds the threshold requirement has been satisfied.

(B) Fairness, Adequacy and Reasonableness of Settlement

In evaluating the fairness, adequacy, and reasonableness of the settlement, the Court looks to a non-exclusive list of six basic factors: (1) likelihood of success at **[*28]** trial; (2) range of possible recovery; (3) point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) complexity, expense and duration of litigation; (5) stage of proceedings at which the settlement was achieved; and (6) substance and amount of opposition to the settlement. *Bennett, 737 F.2d at 986*. The Court finds that all factors favor approval of the settlement.

(1) Likelihood of Success at Trial

Courts judge the fairness of a proposed compromise by weighing the plaintiffs' likelihood of success on the merits against the amount and form of the relief achieved in the settlement. Newberg on Class Actions, at 11-90 (3d ed. 1992). However, courts are not to decide the merits of the case or resolve unsettled legal questions. Id.; see also *Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir. 1982)* (stating "[i]n examining a proposed compromise . . . the court does not try the case. The very purpose of the compromise is to avoid the delay and expense of such a trial" [citation omitted]). See also *Cotton, 559 F.2d at 1330* (stating appropriate analysis is of facts and law relevant to compromise; court should not try the case nor should court order **[*29]** a proponent of a proposed settlement to "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes" (citation omitted)). Indeed, a trial court in approving class action settlements has neither the duty nor even the right to reach any ultimate conclusions on the issues of fact and law which underlay the merits of the dispute. *Id. at 1330*.

Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), is the leading case on the rights of persons confined to institutions. The Court concluded that an institutionalized mental incompetent "enjoy[ed] constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Id. at 324*. There is no doubt that persons involuntarily in institutions have a substantive due process right to minimally adequate treatment. That treatment is defined as that which "may be reasonable in light of [a person's] liberty interests in safety and freedom from unreasonable restraints." *Id. at 322*. In determining reasonableness, **[*30]** courts are required to show deference to a decision made by a professional judgment, and

> liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323.

The Constitution does not require, however, that residents at FCCC receive optimal treatment and mental health services. *Id. at 323*. Minimal levels of care are sufficient. Id. Under the professional judgment standard decisions made by trained professionals are entitled to a presumption of correctness, and constitutional violations only exist if there is a substantial departure from accepted professional judgment, practice or standards. Id. Courts can only make certain that professional judgment in fact was exercised and are prohibited from specifying which of several professionally accepted choices should be made. *Id. at 321*. Consequently, to prove a constitutional violation, Plaintiffs must demonstrate that FCCC's practices and administrative or clinical decisions pertaining to confinement and treatment are such a substantial departure **[*31]** from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment. *Id. at 323*.

The impetus for the litigation arose from Plaintiffs' allegations of constitutionally inadequate conditions at FCCC. Plaintiffs sought to improve the mental health and sex offender treatment to the level required by the professional judgment standard. The evidence clearly establishes that the treatment provided at FCCC has changed and improved since the case was filed in 2004.

In light of the minimal constitutional standards, Plaintiffs had a genuine concern about proving that the current treatment at FCCC fell below professional judgment standards. For example, a recent court decision in a case against an Illinois sex offender commitment facility found that a similar treatment program did not violate constitutional standards even though the treatment there was not "optimal." See *Hargett v. Adams, No. 02-C-1456, 2005 U.S. Dist. LEXIS 6240, 2005 WL 399300, *19-20 (N.D. Ill., Jan. 13, 2005)*. In addition, after reviewing the expert reports and depositions, Plaintiffs were concerned that the Court might regard Plaintiffs' expert testimony as simply creating **[*32]** a dispute between well-qualified experts over how care should be best provided. See *Youngberg, 457 U.S. at 321* (noting that it is "not appropriate for the courts to specify which of several professionally acceptable choices should have been made.").

Thus, the Court finds that the first factor weighs in favor of approval of the parties' settlement plan.

(2) Range of Possible Recovery

(3) Point on or Below Range of Recovery that Settlement is Fair, Adequate and Reasonable

These two factors can be addressed together for the purposes of applying the standard for approving settlement. See *Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 541 (S.D. Fla. 1988)*(noting the second and third prongs of Bennett are easily combined). The range of possible recovery at trial is determined by what Plaintiffs could prove is the constitutional minimum for the provision of sex offender treatment and mental health treatment at FCCC. It is difficult to gauge the range of possible recovery in an injunctive case for an area of law that is not well-litigated, but the range is limited by *Youngberg*. Thus, Plaintiffs reasonably believe Defendant has implemented improvements that are beyond what the Court may have **[*33]** ordered as injunctive relief based on the evidence available at trial. In the Court's view, this belief is well-founded and reasonable. Therefore, these two factors support approval of the settlement.

(4) Complexity, Expense and Duration of

Case

This factor requires a court to make an educated estimate of the complexity, expense, and likely duration of the trial. *Miller v. Republic Nat'l Life Ins. Co., 559 F.2d 426, 428 (5th Cir. 1977)*. The Court ordered this case to follow Track Three, *Local Rule 3.05(b)(3)*(M.D. Fla.), for complex cases. Most class actions are complex, and this case has the added complexity resulting from a class of involuntarily institutionalized persons some of whom have mental health issues and all of whom have been alleged or found to have sex offender issues. In addition to its complexity, this case is an expensive one. In preparing the case, Plaintiffs' counsel alone has spent over $ 250,000 in costs and expenses to cover three multi-day site visits for their experts, taking 24 depositions around the state and country, and producing tens of thousands of class member records and other documents over the course of litigation. Trial was scheduled to last 10 days. **[*34]** (Doc. # 210.) The expense at trial would be further increased because of the number of experts involved on both sides. There is no question that the trial in this case would have been complex, would have required significant expense to the parties, and would have required substantial judicial labor. Therefore, this factor also weighs in favor of approval of the settlement.

(5) Stage of Proceedings at which Resolution Achieved

The parties agreed on the Final Action Plan more than five years after the filing of the Complaint in the case. This was not a rushed agreement reached in the initial stages of a lawsuit. The parties completed exhaustive discovery over a period of years, both parties were fully prepared for trial, and the settlement is a reasoned resolution of differences. Therefore, the Court finds that this factor weighs in favor of approval of the settlement.

(6) Substance and Amount of Opposition

There are approximately 700 residents at FCCC. While the number of class members fluctuates, over 350-400 of the 700 residents at the facility are class members. Of that number, only 21 objections from a total of 37 residents were filed during the objection period. Moreover, out of the **[*35]** number of residents filing objections, only 23 are in fact members of the class. (Doc. # 314, Exh. 3.)

At the outset, one objection alleged inadequate notice to the class members of the proposed settlement. [4] Doc. # 285, P5. As previously discussed, *Fed. R. Civ. P. 23(e)* requires that the Court direct notice to all class members in a "reasonable" manner. *Alabama, 271 Fed. Appx. at 900* (citations omitted). The notice must reach the affected parties and convey the required information. *Id. at 901* (citations omitted). In reviewing a notice of proposed settlement to determine compliance with the *Due Process Clause*, the Court should look "solely to the language of the notices and the manner of their distribution." *Id. at 900* (citations omitted). The notice of settlement reached every FCCC resident by hand delivery and postings in the dorms at the FCCC, and contained clear language advising all parties of the proposed settlement. See supra at 6-7 (discussing method of providing notice in this case). Thus, the Court finds the notice provided in this case was reasonable.

The most substantive objection **[*36]** concerned the lack of a federal monitor or court oversight. (See Docs. # 280, P2; # 282; # 283; # 284; # 296, P6.) The Court finds there are sufficient means of monitoring the quality of care provided at FCCC to compensate for the lack of federal or court oversight. First, Defendant requires GEO to

---

[4] The objector raising the issue of notice is not a member of the class action. Doc. # 314, Exh. B.

achieve full accreditation and oversight of the inpatient unit through CARF accreditation. (Doc. # 302, Focus Areas ## 1 & 2.) The Commission on Accreditation of Rehabilitation Facilities (hereinafter "CARF") is an independent organization that inspects and accredits treatment facilities. To be accredited, the facility must meet CARF standards and pass a site inspection by surveyors. Second, the Defendant actively engages in contract monitoring with GEO. (Doc. # 302, App. 4 at 28, 38-9.) Second, all aspects of the program are subject to all state contractual monitoring requirements. Third, GEO contracts with the TAB and other expert consultants. These individuals, nationally-renowned sex offender treatment providers, review policies and procedures, visit the facility, provide training to staff members, and provide suggestions for improved treatment modalities. (Doc. # 302, App. 1.) Fourth, **[*37]** for residents with severe and persistent mental illnesses, the Defendant requires the review of any resident housed for more than a year on FCCC's mental health unit by an outside clinical team. (See Focus Area # 1; App. 17.) Finally, Plaintiffs' counsel continues to monitor the provision of services at the facility. As recently as September 29, 2009, Plaintiffs' counsel visited the facility where they interviewed residents and reviewed treatment records. Any time Plaintiffs' counsel alerted to any treatment-related issues, counsel contacted counsel for Defendant and Defendant's counsel then relayed the information to Defendant and GEO. Plaintiffs' counsel received a swift response from both Defendant and GEO regarding any issues brought to their attention.

Some of the objections were overly vague, such as, requesting "more meaningful or adequate treatment." (Doc. # 275.) Other objections pertained to matters unrelated to the Complaint. (Doc. # 288 (complaining, *inter alia*, about being included as a class member).) At least one of the objections contained allegations more appropriate for filing in a petition for writ of habeas corpus. (Doc. # 288.)

Finally, some objectors want more relief **[*38]** than was encompassed by the allegations in the Complaint. (See Doc. # 277 (complaining of conditions of confinement at the new facility).). Those objections are outside the scope of the constitutional violations alleged in the Complaint or are outside the scope of what Plaintiffs' attorneys thought they could establish as a constitutional minimum at trial. Their general dissatisfaction with the resolution of the case does not mean the resolution is not fair, adequate, and reasonable under the circumstances. See *Perez v. Asurion Corp., 501 F. Supp. 2d 1360, 1382 (S.D. Fla. 2007)* (holding objectors wanting a "better deal" than provided in the settlement did not warrant rejecting the final settlement plan when weighed against the Bennett factors and the judgment of class counsel).

(C) Judgment of Experienced Class Counsel

Attorneys for both Plaintiffs and Defendant have decades of class action litigation experience. Under such circumstances, both sides can evaluate the case in light of a complete understanding of the strengths and weaknesses of their side. A court "should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation, **[*39]** and a presumption of correctness is said to attach to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery." Manual for Complex Litig., § 30.41 (2d Ed. 1985); see also *Cotton, 559 F.2d at 1330*; *Lelsz v. Kavanagh, 783 F. Supp. 286 (N.D. Tex. 1991)*, aff'd, *983 F.2d 1061 (5th Cir.)*.

The parties have actively litigated this case for

more than five years. After carefully considering the claims, the state of the law, and the evidence, all counsel believe that this agreement represents a fair and reasonable resolution to Plaintiffs' claims. These opinions should be considered in light of their "length of involvement in the litigation, competence, experience in the particular type of litigation, and the amount of discovery completed." Newberg on Class Actions, P 11.47 (1992 Supp.).

Over the five-year course of this litigation, Plaintiffs' attorneys expended nearly one million dollars of compensable attorney time and litigation expenses. Defendant agreed to pay Plaintiffs' counsel $ 249,000.00 as payment of Plaintiffs' out-of-pocket litigation expenses. This amount includes items such as the payment of experts, deposition costs, **[*40]** and other costs associated with the prosecution of the case. This amount is the only compensation to be paid to Plaintiffs' counsel and they have agreed not to seek an award of fees and costs from the court.

ACCORDINGLY, it is hereby

ORDERED:

1. The Joint Motion for Approval of Settlement and Dismissal of the Case (Doc. # 302) filed by Plaintiffs and Defendant is **GRANTED**. This case is dismissed with prejudice.

2. Defendant **must** provide notice to the FCCC residents regarding approval of the settlement and dismissal of this action **on or before December 2, 2009**, by utilizing the same methods previously ordered by the Court in its September 14, 2009 Order. On or before **December 7, 2009**, an FCCC official shall file an affidavit confirming that every resident at the facility was given notice of the approval of the settlement and dismissal of this action.

3. The Clerk of Court shall enter judgment accordingly, terminate any pending motions, and close this case.

DONE AND ORDERED in Fort Myers, Florida, on this 23rd day of November, 2009.

/s/ John E. Steele

JOHN E. STEELE

United States District Judge

End of Document

Exhibit 8

Gurriere v. Bloomfield Condo. Assocs., LLC

Superior Court of New Jersey, Chancery Division, Essex County

July 20, 2015, Hearing Held; August 28, 2015, Decided

DOCKET NO.: ESX-C-101-15

Reporter
2015 N.J. Super. Unpub. LEXIS 2137 *

CHRISTINE GURRIERE, et al., on Behalf of themselves and all others Similarly situated, Plaintiff vs. BLOOMFIELD CONDOMINIUM ASSOCIATES, LLC, BLOOMFIELD ASSOCIATES, ALEX BISTRICER, DAVID BISTRICER, ELSA BISTRICER, BROOKDALE GARDENS CONDOMINIUM ASSOCIATION, INC., BLOOMFIELD MANAGEMENT COMPANY, Defendants

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Counsel: [*1] Laurence H. Olive, Esq., Attorney for Plaintiffs.

Philip R. Sellinger, Esq. & Aaron Van Nostrand, Esq. (Greenberg Traurig, LLP), Attorneys for Defendants Bloomfield Condominium Associates, LLC, Bloomfield Associates, Alex Bistricer, David Bistricer, Morris Bistricer, Elsa Bistricer and Bloomfield Management Company.

E. Richard Kennedy, Esq. (Kennedy, Wronko, Kennedy), Attorney for Defendant Brookedale Gardens Condominium Association, Inc.

Dennis J. Drasco, Esq. (Lum, Drasco and Positan), Special Fiscal Agent.

Judges: Hon. David B. Katz, P.J.F.P.[14]

Opinion by: Hon. David B. Katz

Opinion

FACTUAL BACKGROUND

The present application in the above matter is intended to resolve a complex litigation that has spanned at least 15 years. Indeed, the underlying case, Docket No. ESX-C-143-00, is the oldest case in Essex County, New Jersey.

In the instant matter, the parties, after years of extensive litigation and negotiation, agreed among themselves to settle the underlying case by way of a class action settlement. As such, the parties filed the present class action complaint under Docket No. ESX-C-141-15 for the **[*2]** purpose of settlement only.

The Court is now being asked to grant final approval of a proposed class action settlement on behalf of themselves and a class of all current and former non-sponsor unit owners ("Class Members") at Brookdale Gardens Condominium Complex ("Brookdale Gardens"), located at 935 Broad Street in Bloomfield, New Jersey. The putative class, consisting of 75 Class Members, was certified and the proposed settlement agreement was preliminarily approved on May 6, 2015 following a hearing. Of the 75 Class Members, 59 unit owners are class representatives.

[14] The undersigned has continued to preside over this matter subsequent to appointment as Presiding Judge of the Family Part.

The Court conducted a lengthy final approval hearing on July 20, 2015. Two experts testified at the hearing and were available for cross-examination. The objecting Class Members were given an opportunity to verbally place their objections on the record at the hearing, and four objectors elected to do so. They too were subjected to cross-examination.

Briefly, and as will be discussed at length below, the proposed settlement provides that, in consideration for dismissing the lawsuit and releasing Defendants from the claims alleged therein, each Class Member who currently owns a unit or units at Brookdale Gardens may convey **[*3]** its unit(s) to Bloomfield Condominium Associates, LLC, the developer of Brookdale Gardens (the "Sponsor") in exchange for a specific amount set forth in the agreement. The specified amount is based on the number of rooms in the particular unit.[1] Significantly, and at issue, the proposed settlement also provides that upon final approval, control over the Board and the Association will vest in the Sponsor, and the Sponsor will not be obligated to sell any additional units in Brookdale Gardens.

The terms of the proposed settlement reflect a compromise on various issues in the instant litigation, which has been ongoing for the past 15 years and which is characterized by a complex, contentious and protracted history. The Court has been advised that the instant litigation is the oldest pending case in Essex County. For purposes of context and completeness, the Court will provide a brief overview of the substantive issues of the underlying suit as well as the significant **[*4]** procedural events that led to the instant proposed class action settlement.

On August 28, 1987, a Public Offering Statement ("POS") was issued for a 400-unit development known as Brookdale Gardens. Originally, an entity known as River Broad Corporation planned to convert the development into a condominium pursuant to *N.J.S.A. 46:8B-1*. The POS contained several terms relating to governance of the condominium. At some point, Brookdale Gardens was sold to Defendant Bloomfield Condominium Associates, LLC, whose members consist of Defendants Alex Bistricer, David Bistricer, Morris Bistricer and Elsa Bistricer.[2] The conversion of Brookdale Gardens began on January 12, 1989 with the filing of a Master Deed establishing the condominium. Defendant Brookdale Gardens Condominium Association, Inc. (the "Association"), a non-profit corporation, governs Brookdale Gardens and is responsible for the administration, management, and operation of the complex. The Association was to be governed by an elected Board of Trustees ("the Board").

The POS set forth a detailed plan for the governance of Brookdale Gardens as required by *N.J.S.A. 46:8B-12.1*. Specifically, in the event that 25% of the units are sold, non-sponsor unit owners shall elect no less than 25% of the Board of Trustees. In the event that 50% of the units are sold, no less than 40% of the members of the Board of Trustees shall be elected by non-sponsor unit owners. Finally, in the event that 75% of the units are sold, non-sponsor unit owners may elect the entire Board of Trustees, except that the Sponsor may retain one member on the Board of Trustees as long as any units remain unsold in the regular course of business.

---

[1] Units at Brookdale Gardens consist of 2.5 rooms, 3.5 rooms, 4 rooms or 5 rooms. The settlement monies are as follows: $127,500; $136,500; $141,500 and $170,000, respectively. Any unit that has a garage will receive an extra $5,000.

[2] The partnership previously operated under the name Bloomfield Associates. Bloomfield Associates stopped doing business and was replaced by Defendant Bloomfield Condominium Associates, **[*5]** LLC.

At all relevant times, Bloomfield Condominium Associates has owned 310 out of the 392 units in the condominium, roughly 80%, with the balance being sold to third parties acquiring their units from the Sponsor. Thus, Bloomfield Condominium Associates had complete control of the Board of Trustees since its inception because it did not convey 25% or more of the units. Through its control of the Board, Bloomfield Condominium Associates hired Bloomfield Management Company, a company owned by the Bistricers, to manage and operate the complex. Bloomfield **[*6]** Management Company was later removed by a Special Fiscal Agent appointed by the Court to oversee the finances and operation of Brookdale Gardens. Bloomfield Management Company is no longer in existence.

In addition to the POS, the New Jersey Condominium Act ("Condominium Act") or ("the Act") itself contains provisions requiring turnover of board control to non-sponsor unit owners in certain circumstances. The relevant statute, *N.J.S.A. 46:8B-12.1* sets forth the same governance scheme as provided by the POS, but also provides in pertinent part that "when some units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration." *N.J.S.A. 46:8B-12.1(a)*.

On April 24, 2000, 34 non-sponsor unit owners filed a Complaint and Order to Show Cause under Docket No. C-143-00, alleging that Bloomfield Condominium Associates violated multiple provisions of the Condominium Act, as well as claims based on negligence, breach of contract and fraud. Specifically, the Plaintiffs alleged **[*7]** that the Association was not being operated in their best interest and that the property was in a state of disrepair. This case was related to two earlier cases initiated by non-sponsor unit owners against Bloomfield Associates, Bloomfield Condominium Associates, and the Bistricers filed in 1990 and 1995.[3]

After unsuccessfully attempting mediation on several occasions, the parties continued litigation over several years. On February 16, 2007, the Court appointed Dennis Drasco, Esq., of Lum Drasco and Positan, as Special Fiscal Agent ("SFA") for the Association. Mr. Drasco was appointed to facilitate litigation to which the Association was a party, as well as to report to the Court any improprieties found in the operations and financial affairs of the Association and to take any other actions deemed appropriate. **[*8]** The SFA recommended the removal of Bloomfield Management Company and the appointment of a professional management firm to operate, manage and maintain the condominium.

After several years of ongoing litigation, on July 6, 2012, the Court granted Plaintiffs' motion for partial summary judgment, thus granting them control of the Board of the Trustees of the Association. The main thrust of Plaintiffs' motion was that after selling units to Plaintiffs, Defendants intentionally failed to offer any additional units for sale to the public in the ordinary course of business for the previous 20 years in order to maintain control over the Board. In support of its allegation that Defendants failed to offer units for sale in the ordinary course of business, Plaintiffs offered evidence that individuals made many offers to purchase units from the sponsor which went ignored. Those individuals alleged that they

---

[3] The Docket Numbers of those cases were C-200-90 and C-21-95, respectively. Those complaints, however, were not made available to the Court, and the parties at times have argued that the matters were consolidated and that the instant case is related to the earlier filings. As such, the parties have represented that the issues at Brookdale Gardens date back to 1990, some 25 years ago.

eventually purchased their units from non-sponsor unit owners.

Plaintiffs asserted that Defendants also executed a blanket mortgage on sponsor-owned units in contravention of the Condominium Act, making it impossible for Plaintiffs to sell their units. Specifically, Plaintiffs claimed that the **[*9]** *N.J.S.A. 46:8B-23* prohibits blanket mortgages unless individual unit owners can obtain releases of their particular units from the mortgage upon payment to the mortgagee of their respective proportionate share of the then outstanding balance of unpaid principal, accrued interest and any other charges then due and unpaid.

Plaintiffs also argued that under Defendants' improper control, the complex had fallen out of compliance with various municipal code requirements and suffered numerous Bureau of Housing Inspection violations. Plaintiffs also alleged that Defendants failed to properly maintain the property and refused to raise the maintenance fees because they would have had to pay 80% of those fees by virtue of their ownership of the units, and that Defendants did not properly reserve funds for maintenance and upkeep.

In resolving Plaintiffs' summary judgment motion, the Court held that after selling some units, Defendants intentionally took action that prevented the sale of additional units in the ordinary course of business, and as such, Plaintiffs were entitled to elect all members of the board pursuant to *N.J.S.A. 46:8B-12.1(a)*. In reaching its decision, the Court set forth many sources that indicated **[*10]** that "the overriding legislative concern was to address problems associated with continued developer control over condominium complexes long after some units were sold." July 6, 2012 Opinion, at p. 14. The Court found that the blanket mortgage executed on approximately 80% of the units in the complex made it impossible for Defendants to sell sponsor-owned units in the ordinary course of business. Because the Sponsor would not sell its units, the non-sponsor unit owners were deprived of any control over the condominium, contrary to the legislature's intent in enacting the Condominium Act. In order to effectuate the legislative goal to allow non-sponsor unit owners to play a meaningful role in the governance of their condominiums, the Court divested the Sponsor of all voting rights until they conveyed ownership of additional units such that non-sponsor unit owners would own 75% of all units. In other words, Plaintiffs were given full control over the Board of Trustees by the Court's July 6, 2012 decision. The non-Sponsor unit owners were elected to serve as members of the Board in December 2012 for the first time since the creation of the condominium in 1989.[4]

Plaintiffs then filed another summary judgment motion on April 24, 2013. There were several significant aspects to this motion. First, Plaintiffs were concerned that Defendants were still able to technically "control" the Condominium complex, notwithstanding the Court's order of July 6, 2012. Second, Plaintiffs sought to compel Defendants to sell their units so that the complex would returned to Condominium-like development, with more than the 20% private ownership so that Plaintiffs could eventually have a market for the sale of their units. Third, Plaintiffs sought an Order precluding the Sponsor from continual rental of its units.

With respect to the issue that the Sponsor may retain "control" despite the Court's July 6, 2012 Order, Plaintiffs reasoned that the Condominium's bylaws set forth a number of

---

[4] The July 6, 2012 Order was **[*11]** a significant partial and temporary victory for the Plaintiffs. Because the Plaintiffs had asserted causes of action against the Defendant Association, the Association subsequently amended its pleadings to assert direct claims against the Defendants.

actions that require a two-thirds majority vote of all "members" who are voting, which the Master Deed defines as the owner or co-owner **[*12]** of a unit. Plaintiffs feared that Defendants could still frustrate their attempts to pass proposals requiring a two-thirds majority because 51% of the members must be present before a meeting can be held and a vote can be taken. Because the Bylaws define "member" only as owner or co-owner of a unit, arguably, according to Plaintiffs, even a member without voting rights (such as the Sponsor) "counts" for the purposes of the percentage of members needed to hold a meeting. In light of Plaintiffs concerns over the potential frustration of the remedy fashioned by the Court in July 2012, the Court held that meetings may be held so long as 51% of the *non-sponsor unit owners* are present. *See* August 30, 2013 Order.

While the Court did craft a remedy to prevent the Sponsor from frustrating the divestiture of its voting rights, it denied the principal other relief requested by Plaintiffs. Specifically, the Court refused to enter a mandatory injunction compelling the Sponsor to sell the units it owns because such relief would require an inappropriate level of court supervision. Finally, the Court refused to enjoin Defendants from leasing any of its remaining units because the Master Deed contained **[*13]** no restrictions upon the leasing of any Unit and the Condominium Act required those types of restrictions to be specified in the Master Deed. *Id.*

Litigation remained ongoing for several months following the August 30, 2013 Order. On October 29, 2013, the Association filed a motion for leave to amend its Answer to Plaintiffs' Fourth Amended Complaint and intervene as Plaintiff in the action or file a cross-claim against the Sponsor. The Association argued that its Answer to the first three Complaints denied Plaintiffs' allegations against the Sponsor, its Co-Defendant, because at that time the Association was controlled by the Sponsor. Because the Sponsor was stripped of that control by virtue of the Court's July 2012 Order, the Association, then controlled by non-Sponsor unit owners, wished to support Plaintiffs' allegations against the Sponsor and assert claims of its own against the Sponsor. Thus, the Association alleged violations of the New Jersey Condominium Act, the Planned Real Estate Development Full Disclosure Act, and the Consumer Fraud Act. The Court granted the Association's request to amend its Answer to the Fourth Amended Complaint and to assert a Cross Claim against the **[*14]** Sponsor on December 19, 2013.

On February 11, 2014, the Sponsor filed a motion to dismiss the Association's Cross-Claims against the Sponsor, arguing that the Association failed to adequately plead any cause of action under the Consumer Fraud Act, the Condominium Act and the Planned Real Estate Development Full Disclosure Act. The motion hearing took place on March 20, 2014, at which time the Court granted the Association permission to amend the Cross-Claim. The Association filed a Second Amended Cross-Claim on April 5, 2014, and Defendant's motion to dismiss the Second Amended Cross-Claim was denied on May 2, 2014. Defendants thereafter filed an Answer denying all allegation in the Second Amended Cross-Claim.

The parties then continued in active mediation. The parties agreed amongst themselves that a fair resolution of the lawsuit would be for the non-sponsor unit owners to be bought out at above market rates, with control of the complex returning to the Defendants. The parties agreed amongst themselves that those settlement parameters were obtainable through a class action. As such, the Plaintiffs filed a class action complaint on May 1, 2015

under Docket No. C-101-15. The Court conducted **[*15]** an extensive preliminary approval hearing on May 4, 2015 and entered an Order on May 6, 2015 preliminarily approving the proposed class action settlement and directing that notice of the settlement in the form proposed by the parties be sent to all Class Members as set forth in the Settlement Agreement. In accordance with the Court's May 6, 2015 Order, the Class Notice was mailed to all 75 Class Members via first class mail. On May 11, 2015 the Class Notice was also placed under the doors of all 41 Class Members currently residing at Brookdale Gardens. On June 13, 2015 through June 16, 2015 the Class Notice was published in the Newark Star Ledger.

TERMS OF THE PROPOSED CLASS ACTION SETTLEMENT

Procedural Terms

The Settlement Agreement provides several options for Class Members regarding their participation in the proposed settlement. In order to avail themselves of the settlement benefits (i.e., be bought out by the Sponsor), Class Members were required to submit a claim form by July 3, 2015. Class Members who leased any of their units to tenants were directed to submit copies of any leases with their claim forms. If the outstanding term of any lease exceeds a year or if the lease is more **[*16]** than 10% below certain monthly rent amounts, the claim may be rejected. The specific threshold rent amounts set forth in the proposed settlement are (1) $1,430 for 5 rooms; (2) $1,250 for 4 rooms; (3) $1,220 for 3.5 rooms; and (4) $1,010 for 2.5 rooms.

Class Members who submit a claim form will, if the settlement is approved, each receive a notice advising that the Class Member has six months to find alternate housing, and once the Class Member has found alternate housing, the Class Member will have 60 days to close on the sale of their unit in Brookdale Gardens to the Sponsor.

Class Members who wished to "opt-out" so as not to participate in the settlement, and preserve only their right to pursue damage claims based on an alleged diminution of value of their units due to Defendants' conduct, were required to submit an opt-out form by June 11, 2015. Any Class Member who neither submitted a claim nor submitted a formal opt-out letter in accordance with the settlement terms waives his or her right to convey his or her unit to the Sponsor, but will be bound by all other terms of the settlement. The proposed settlement also gave Class Members an opportunity to object to the terms of the **[*17]** settlement by sending a letter to all attorneys and filing that letter with the Clerk of Court by June 11, 2015. Those who submitted an affirmative opt-out letter were not permitted to object because by opting out they were no longer a party to the settlement. In other words, only those who submitted claim forms or did nothing were afforded an opportunity to object.

Substantive Terms

The settlement agreement is 46 pages long and contains 30 provisions, with many provisions containing subparts. The Court will elaborate only on those provisions that are at issue in the final approval hearing.

Pursuant to the proposed settlement, Class Members who timely submit a claim form will be entitled to receive the following amount for each unit owned by that Class Member upon conveyance to the Sponsor: (1) $127,500 per unit for a 2.5 room unit; (2) $136,500 per unit for a 3.5 room unit; (3) $141,500 per unit for a 4 room unit; (4) $170,000 per unit for a 5 room unit; (5) $5,000 per unit for each garage unit;

and (6) $105,000 for unit 84A. The settlement agreement provides that the Sponsor will pay the fee for obtaining the certificate of occupancy and the realty transfer fee associated with the conveyance, **[*18]** with the Class Member being responsible for performing all repairs required by the Township for issuance of a certificate of occupancy.

Also at issue are those provisions that change the governance of Brookdale Gardens. Section 1(b)(i) provides that control of Brookdale Gardens, the Association and the Board shall be turned over to the Sponsor, with the governance structure reverting to the structure in place immediately prior to the July 6, 2012 Order, with the Sponsor having the right to appoint each member of the Board of the Association. As such, any remaining non-sponsor unit owners will have no representation on the Board, and all Class Members, as well as those who opt out of the class and remain in the complex, will have no right to object to the Sponsor's control of the Board. Section 1(b)(ii) provides that the Sponsor has no obligation to sell any of their units at Brookdale Gardens. Should the Sponsor decide to sell any of its units, it must comply with the progressive statutory turnover of control to non-sponsor unit owners provided by *N.J.S.A. 46:8B-21*.

In its many submissions to the Court, the Sponsor represents that while any remaining unit owners may not challenge the Sponsor's control of the Association in **[*19]** and of itself, they may challenge any acts that are contrary to the Condominium Act. The Sponsor asserts that the release in the proposed Settlement Agreement only applies to claims based on acts or omissions of the Sponsor that predate the Settlement Agreement such that Class Members reserve their right to sue the Sponsor for any future improper or unlawful acts. In other words, should the Sponsor fail to properly maintain the community areas of the condominium, the remaining unit owners may sue for those violations. In addition, those who opt-out will be able to maintain an action for any alleged diminution in value of their unit(s) due to Defendant's prior conduct relative to their control of Brookdale Gardens. Significantly, the opt-outs do not preserve their right to sue over the Sponsor's current control over the complex.

CLASS REACTION TO SETTLEMENT

Out of the 75 total Class Members, 41 submitted claims, 18 objected[5], and two opted out. Of the 18 objections, 11 are "form" objections in that they are identical. Each objection challenges the amount of the settlement benefits and/or the turnover of control to the sponsor. The Court will identify each of those objections and provide **[*20]** a brief overview of the substance of each one.

1. Zef Lulgjuraj

Mr. Lulgjuraj owns Units 38D, 3D and 39C, residing in 38D and renting 3D and 39D to tenants. All three units owned by Mr. Lulgjuraj are five rooms and have been valued at $170,000 by the settlement agreement. Mr. Lulgjuraj also owns garages 28 and 46 which have been valued at $5,000 each. Mr. Lulgjuraj asserts that if he sold his units to the Sponsor in accordance with the settlement, he would not receive fair value in exchange. Mr. Lulgjuraj attaches an appraisal report performed in February 2015 by a licensed real estate appraiser which appraises unit 3D at $178,000.

Mr. Lulgjuraj attaches MLS listings of similar units within a five mile radius of Brookdale Gardens, many of which list for well over the

[5] As explained below, the Court originally received 19 objections but it was later determined that one of those objections was received in error.

amount offered under the settlement agreement.

Mr. Lulgjuraj argues that the Sponsor should buy the units at a higher price because the Sponsor will be able to rent the units for well over the $1,800/month Mr. Lulgjuraj currently charges his tenants. Mr. Lulgjuraj also claims that he **[*21]** has spent approximately $30,000 in renovations for each of the units he owns. As such, Mr. Lulgjuraj proposes an increase of at least $30,000 for each unit, and an increase of $2,000 for each garage. That is, Mr. Lulgjuraj would like to receive $200,000 for each of his units and $7,000 for each garage.

2. Valentina Gumenyuk and Oleg Korzyukov

Ms. Gumenyuk and Mr. Korzyukov purchased Unit 74A, a four room unit, in October 2014 while the instant lawsuit was ongoing. Their first objection to the settlement agreement is that they would be unable to buy a comparable unit in the same area for the amount of money offered by the settlement agreement. They also object to the Sponsor having total control over the Association and Board as well as the non-Sponsor unit owners having no control despite paying association fees and taxes.

3. Therese Anglin

Ms. Anglin reports that she has owned Unit 87A since February 1989, which comprises of 4 rooms. Ms. Anglin takes issue with the fact that the sale price offered by the settlement is "across the board" for all class members and does not account for improvements that some owners have made to their units. Ms. Anglin claims that she has installed new windows, **[*22]** replaced the entire kitchen, including appliances, installed a new hardwood floor in the living room due to damage from a steam leak, replaced the toilet and sink in the bathroom, renovated two hallway closets into one large closet, installed crown molding in the living room, and planted a garden. Ms. Anglin argues that she should receive a higher price for her Unit based on these improvements because they will save the Sponsor time and money and allow them to obtain a higher rent once it assumes ownership over her unit. In addition to submitting her written objection, Ms. Anglin testified at the fairness hearing about the value of improvements made to certain units.

4. Linda Grotenstein and Jessica Grotenstein

The Grotensteins report that they purchased unit 14D in December 2007 for $188,000. The Grotensteins allege that the Sponsor will likely sell the property for millions of dollars for development once it regains control. To bolster their theory regarding the Sponsor's intentions, the Grotensteins attach several judicial decisions involving the Bistricers as defendants in cases where they allegedly acted wrongfully in certain real estate or finance transactions. The Grotenstein's **[*23]** also attach articles portraying David Bistricer as the "worst city landlord" in Brooklyn and noting his presence of then-Public Advocate Bill de Blasio's Worst Landlord Watchlist.

In light of the profit the Sponsor stands to gain through its alleged plans to sell the entire property, the Grotensteins assert that in exchange for the sale of their unit, they should receive fair market value as established in other condominium communities in and around Bloomfield. Like many of the other objectors, the Grotensteins have submitted listings in Bloomfield currently on the market to illustrate the alleged discrepancy between the sale price under the settlement agreement and the fair market value.

In addition to submitting a written objection, Linda Grotenstein testified at the fairness hearing regarding her improvements and her concerns about the Sponsor regaining control over the condominium.

5. Kathleen Karcher

Ms. Karcher disagrees with the settlement offer for two reasons. First, she argues that the prices being offered for the units under the settlement agreement are less than current selling prices of similar units in less desirable locations. Specifically, Ms. Karcher asserts that: a 2.5 **[*24]** room unit, offered for $127,500 under the settlement agreement sells for between $135,000 and $149,000; a 3.5 room unit, offered for $136,500 under the settlement agreement, sells for between $149,000 and $169,000; a 4 room unit, offered for $141,500 under the settlement agreement, sells for between $169,000 and $239,000; and that a 5 room unit, offered for $170,000 under the settlement agreement, sells for between $195,000 and $245,000. Ms. Karcher argues that not only are the comparable units offered for higher sales prices, but such comparable units are in much less desirable locations than Brookdale Gardens. Ms. Karcher also argues that garages should be valued higher than $5,000, which Ms. Karcher asserts was the original purchase price in 1989, because they are currently in high demand due to limited parking.

In addition to the alleged disparities between the prices offered under the settlement and the asking prices for comparable units, Ms. Karcher also objects to the governance structure proposed under the settlement. Particularly, Ms. Karcher asserts that the Sponsor's main objective is "to maxim[ize] rental income at the expense of proper management and maintenance." As such, Ms. Karcher **[*25]** alleges that all improvements made by the non-Sponsor unit owners when they regained control of the Board will be undone. Specifically, Ms. Karcher claims that "the living conditions will quickly become unhealthy and unsanitary for everyone who lives in this complex" because the Sponsor will fail to pay for maintenance. In light of these concerns, Ms. Karcher proposes that the Board should be equally comprised of both Sponsor and non-Sponsor unit owners, notwithstanding that non-sponsor unit owners will be the smallest minority if the settlement is approved.

The following individuals submitted identical objections to Ms. Karcher's objection, which were submitted together with Ms. Karcher's objections: Malgorzata Jaroszczyk[6], Joseph Spera, Jr.[7], Michael Gatton, Shahid Liaqat, Michael Cucolo, Fabian Araujo, Patricia Dunn, Bella Broberg, John Lauvo III, Gloria Rafiq, Gustavo Villafuerte, Yolanta Lubinska, Santiago R. Vinueza and Tim Kelly. These "form" objections echo Ms. Karcher's concerns, namely that the purchase price offered under the settlement is lower than the current multiple listing prices for comparable sized units within a five mile radius of Brookdale Gardens, and that the Sponsor **[*26]** should not have sole control over the Board. These objections parrot Ms. Karcher's fear that the Sponsor will erase the progress and improvements made to the condominium achieved when the non-Sponsor unit owners regained control of the Board.

EXPERT RESPONSES TO THE PROPOSED CLASS ACTION SETTLEMENT

Defendants submitted two expert reports to address the two principal concerns raised by the objections, namely the sale price for the units and the turnover of control over the Board to the Sponsor. These experts testified at the fairness hearing and were available for

---

[6] The Court is unable to ascertain the correct spelling of this class member's name, as her name is handwritten on the objection form and is somewhat illegible.

[7] On July 17, 2015, the Court was advised of an e-mail exchange between Mr. Van Nostrand, attorney for the Sponsor, and Martha M. Spera, Mr. Spera's wife, in which Martha Spera denied that she or her husband never intended to object to the settlement, and confirmed that they had in fact submitted a signed claim form agreeing to sell their unit.

cross-examination.

Jon P. Brody, President of Appraisal Consultants Corporation, prepared an analysis addressing the reasonableness **[*27]** of the Sponsor's offered purchase price for the units. Mr. Brody is a state certified General Appraiser and is a Senior Residential Appraiser, Counselor of Real Estate and Member of the Appraisal Institute. In his report, Mr. Brody explains that he inspected the exterior of Brookdale Gardens and researched sales of comparable individual units in Bloomfield taking place between 2010 through 2015. Mr. Brody concludes that overall, the settlement agreement values exceed the overall average sales price per square foot.

Mr. Brody specifically addressed the appraisal report submitted by Mr. Lulgjuraj and testified that the report actually further supports that the settlement amounts are more than fair market value. Mr. Lulgjuraj's appraiser's report values one of his units at $178,000, and the settlement values his unit at $170,000. Mr. Brody explains that, in a typical transaction, the seller would be responsible for a brokerage free, traditionally 5%. As such, the seller would net only $169,100 in a typical sale at a $178,000 sale price.

As to the assertion by some Class Members that the settlement value did not take into consideration certain improvements made to particular units, Mr. Brody **[*28]** acknowledged that no one unit was perfectly comparable to any Class Member's unit. However, Mr. Brody explained that his pool of sales data included a diverse range of units that included both units that had been improved and upgraded as well as older units with no upgrades. As such, on average, his analysis reflected the breakdown of units at Brookdale Gardens.

As to the multiple listings submitted with many of the objection letters, Mr. Brody asserts that multiple listings are not evidence of a market value transaction.

Defendants' other expert, J. David Ramsey, Esq., addressed the objections regarding the return of control of the governing board of the Association to the appointees of the Sponsor. Mr. Ramsey is an attorney with Becker & Poliakoff, LLP and specializes in condominium law. Mr. Ramsey concludes that Class Members may waive the statutory provision under the Condominium Act which requires the Sponsor to sell units in the ordinary course of business and the right to contest the Sponsor's control, because courts have held that statutory rights, albeit under other legislative acts, may be waived if the waiver is clear and explicit. Mr. Ramsey asserts that no case in New Jersey **[*29]** has addressed a waiver of rights under the New Jersey Condominium Act, but cites *Scully v. Tillery, 456 Mass. 758, 926 N.E.2d 154 (2010)*, a case out of the Supreme Court of Massachusetts, for the proposition that provisions of the Condominium Act may be waived.

At the fairness hearing, Mr. Ramsey testified that the Condominium Act is an enabling statute rather than a remedial statute. In other words, the purpose of the Condominium Act is to set forth the parameters for establishing a condominium, but does not contain provisions intended to address wrongdoing or impropriety of the developer with regard to the Act. With this concept of the Condominium Act, Mr. Ramsey explained that the provision turning control over to the non-sponsor unit owners when the Sponsor fails to sell additional units is an optional provision. That is, according to Mr. Ramsey, the statute does not automatically transfer control to non-sponsor unit owners. Instead, the non-sponsor unit owners must choose whether they wish to control the Board or simply leave the Sponsor in control despite its failure to sell additional units. According to Mr. Ramsey, this elective turnover of control distinguishes New Jersey's

Condominium Act from the Uniform Act, under which control **[*30]** automatically reverts to the non-sponsor unit owners in the event the Sponsor fails to offer additional units for sale. Mr. Ramsey opined that by accepting the settlement agreement, the Class Members are declining to exercise their statutory "option" to seize control back from the Sponsor. Thus, in Mr. Ramsey's opinion, the Class Members are in reality not "waiving" any statutory provisions, but are instead choosing a course of action permitted under the statute. In either event, according to Mr. Ramsey, voluntarily returning control to the Sponsor is not against the public policy of this state.

Mr. Ramsey also points out that under the settlement agreement, the Sponsor only maintains its control over the condominium unless and until it sells sufficient units to trigger the statutory gradual transfer of control of the governing board. In other words, while the Sponsor is not *obligated* to sell any additional units, if it chooses to do so, it must comply with the statutory provisions of N.J.S.A. 46:8B-12.1.

As noted, Class Members were given the opportunity to cross-examine both experts.

DISCUSSION

I. Laws and Regulations Governing Condominiums

Brookdale Gardens is a condominium complex. In New Jersey, **[*31]** the creation and operation of condominiums are primarily governed by the Condominium Act, N.J.S.A. 46:8B-1 et seq.[8] The term "condominium" is defined under the Condominium Act as a form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in the common elements appurtenant to each unit. N.J.S.A. 46:8B-3(h). A unit owner therefore "has a fee simple title to and enjoys exclusive ownership of his or her individual unit while retaining an undivided interest as a tenant in common in the facilities used by all of the other unit owners." Fox v. Kings Grant Maint. Ass'n, 167 N.J. 208, 219, 770 A.2d 707 (1999) (citing Siller v. Hartz Mountain Assoc., 93 N.J. 370, 375, 461 A.2d 568, *cert. denied*, *464 U.S. 961, 104 S. Ct. 395, 78 L. Ed. 2d 337 (1983)*).

A. Creation of Condominiums

The Condominium Act provides that a condominium is created and established by "recording in the office of the county recording officer of the county wherein the land is located a master deed". N.J.S.A. 46:8B-8. Among other things, the master deed must include by-laws, the voting rights of unit members, and the name of the association. N.J.S.A. 46:8B-9. The master deed must also include "such other provisions, **[*32]** not inconsistent with this act, as may be desired but not limited to restrictions or limitations upon the use, occupancy, transfer, leasing or other disposition of any unit (provided any such restriction or limitation shall be otherwise permitted by law) and limitations upon the use of common elements." N.J.S.A. 46:8B-9(m). The Act provides that the association may be either a corporation or other business entity recognized in New Jersey, and "shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12.

[8] The Condominium Act became effective January 7, 1970. The predecessor to the Condominium Act was the Horizontal Property Act, N.J.S.A. 46:8A-1.

The Planned Real Estate Development Full Disclosure Act ("PREDFDA"), N.J.S.A. 45:22A-21 et seq., places additional requirements on a developer who seeks to construct a condominium or convert an existing form of real estate into a planned development, as is expressly made applicable to condominiums. N.J.S.A. 45:22A-23(h). Pursuant to PREDFDA, a developer of a condominium project may not offer or dispose of any interest in the project until the project is registered with the Division of Codes and Standards of the State Department of Community Affairs. N.J.S.A. 45:22A-26(a)(1); N.J.A.C. 5:26-2.1 **[*33]** ; N.J.S.A. 45:22A-24.

The PREDFDA also requires that a developer submit for approval along with the registration application a public offering statement or prospectus, describing the characteristics of the development. N.J.S.A. 45:22A-28. The purpose of the public offering statement is to disclose fully and accurately exactly what is being sold, and to state to prospective purchasers "all unusual or material circumstances or features" of the development. N.J.S.A. 45:22A-28(a). The statute also directs the developer to clearly and understandably set forth the "totality of rights, privileges, obligations and restrictions, comprehended under the proposed plan of development." N.J.S.A. 45:22A-28(d). Where a developer seeks to convert property into a condominium, the developer must serve upon all tenants in the building being converted a copy of the proposed public offering statement simultaneously with the filing of an application for registration with the Department of Community Affairs. N.J.A.C. 5:26-9.3(a). Further, the developer may not dispose of any lot, parcel, unit or interest in a planned real estate development without providing the purchaser with a current public offering statement on or before the contract date. N.J.A.C. 5:26-4.1(a).

The Public **[*34]** Offering Statement ("POS") for Brookdale Gardens was issued in August 1987. At that time, the sponsor was River Broad Corporation. Among other things, the POS advised prospective unit purchasers that control of the condominium would gradually turn over to the Sponsor depending on the amount of units owned and sold by the Sponsor. Specifically, it provided that in the event that 25% of the units are sold, non-sponsor unit owners shall elect no less than 25% of the Board of Trustees. In the event that 50% of the units are sold, no less than 40% of the members of the Board of Trustees shall be elected by non-sponsor unit owners. Finally, in the event that 75% of the units are sold, non-sponsor unit owners may elect the entire Board of Trustees, except that the Sponsor may retain one member on the Board of Trustees as long as any units remain unsold in the regular course of business.

B. Governance of Condominiums

The Condominium Act sets forth a comprehensive governance scheme for condominiums and their associations. The Condominium Act provides for the creation of a condominium association which "shall be responsible for the administration and management of the condominium and condominium **[*35]** property, including but not limited to the conduct of all activities of common interest to the unit owners." N.J.S.A. 46:8B-12.

The association is charged with the maintenance of the common elements and the "assessment and collection of funds for common expenses and the payment thereof," along with various other duties set forth in N.J.S.A. 46:8B-14(b). The condominium association carries out these functions through its elected officers and governing board. N.J.S.A. 46:8B-12.1 sets forth a

comprehensive system for the composition of the Board, designed to "prevent a developer from having lingering control over an association." *Fox, 167 N.J. at 221*. The control of the association's governing body is initially vested in the Sponsor, but the Condominium Act mandates a gradual relinquishment of this control at a rate based on sales of the units. Under N.J.S.A. 46:8B-12.1(a):

> [w]hen unit owners other than the developer own 25% or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect not less than 25% of the members of the governing board or other form of administration of the association. Unit owners other than the developer shall be entitled to elect not less **[*36]** than 40% of the members of the governing board or other form of administration upon the conveyance of 50% of the units in a condominium. Unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration upon the conveyance of 75% of the units in a condominium. *However, when some of the units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration*.
>
> Notwithstanding any of the provisions of subsection a of this section, the developer shall be entitled to elect at least one member of the governing board or other form of administration of an association *as long as the developer holds for sale in the ordinary course of business one or more units in a condominium operated by the association*.

N.J.S.A. 46:8B-12.1(a) (emphasis added). By way of this provision, "the [Condominium Act] phases out the developer's representation on the association's governing board". *Fox, 167 N.J. at 221*. The Condominium Act also **[*37]** prohibits developers from entering into long-term employment, service or maintenance contracts before unit owners take control of the association's board. N.J.S.A. 46:8B-12.1. These provisions demonstrate the Legislature's intent to "ensure that the *unit owners*—not the developer—exercise control over their condominium boards, and by extension their common elements." *Fox, 167 N.J. at 225* (emphasis in original). As stated by the Supreme Court of New Jersey, "in a condominium unit, the unit owners' interests take precedence over any outside interest, [and] any governance scheme that conflicts with the recognition of that interest is inconsistent with and in violation of the [Condominium] Act." *Id. at 227*. As discussed above, the Court therefore ordered that non-sponsor unit owners were entitled to elect all members of the governing board in accordance with N.J.S.A. 46:8B-12.1(a) due to the fact that the Sponsor prevented the sale of additional units. *See* July 6, 2012 Opinion.

Under the proposed settlement agreement, the Sponsor must buy out any unit owner who wishes to sell its unit(s), as many owners claimed they were "stuck" in Brookdale Gardens because the Sponsor's control diminished the value of their units and because no banks would **[*38]** provide financing for a purchase in Brookdale Gardens due to the fact that 80% of the units were owned by the Sponsor. However, as a *quid-pro-quo* for the right to be bought out, the Class Members agree to essentially vacate the Court's July 6, 2012 Order by allowing the Sponsor to maintain full control over the Board, despite its failure to offer any additional

units for sale in contravention of N.J.S.A. 46:8B-12.1. Thus, the Court is faced with the significant legal questions of whether the Condominium Act's progressive governance scheme is waivable such that Class Members and future owners may lawfully agree to subject themselves to the full control of the Sponsor despite the Sponor's failure to sell units.

Neither the Appellate Division nor the Supreme Court of this state have ruled on the threshold issue of whether the provisions of the Condominium Act are waivable. However, in Amir v. D'Agostino, 328 N.J. Super. 141, 744 A.2d 1233 (Law Div. 1998), the court suggested that a waiver of the statutory provisions of the Condominium Act was possible. In Amir, the court held that where a condominium developer elected to impose certain use restrictions, it was mandatory to include those restrictions in the master deed in accordance with N.J.S.A. 46:8B-9. Id. at 151. Because the master **[*39]** deed failed to set forth the restrictions, the court held they were unenforceable against the other units. *Id.*

After deciding that the restrictions were not enforceable, the court analyzed whether the defendants, by enjoying the benefits extended by the deeds, nevertheless waived the statutory protection to have the restrictions placed in the master deed and were thus estopped from resisting the effort to enforce them. Id. at 159-60. The court explained that for waiver to apply, the "plaintiff would have to show that the [defendants] knew that there was a statutory protection available and then elected to waive it." Id. at 160. In other words, a waiver of the Condominium Act, like that of other statutory provisions, would have to be knowing and voluntary. *See e.g.,* Knorr v. Smeal, 178 N.J. 169, 177, 836 A.2d 794 (2003) ("An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.") While the court in *Amir* ultimately found that the plaintiff made no such showing, it suggested that such a waiver was at least possible.

Here, based on the notice distributed to the class, the Court finds that the Class Members knew there was a statutory protection available and elected to waive it. Further, the statutory **[*40]** provision relating to the Sponsor's control of the complex was the basis of several motions and court decisions in the earlier stages of this case. For example, the Court's July 6, 2012 and August 30, 2013 Opinions were decided on the basis of N.J.S.A. 46:8B-12.1(a), which entitles non-Sponsor unit owners to maintain control of the complex under certain circumstances. Thus, the parties to this case are familiar with the statutory protection ensuring them representation on the Board in the event the Sponsor sells units, and have voluntarily given up that protection by agreeing to be part of the settlement.

As to those Class Members that were not parties to the litigation before it became a class action, they received notice upon preliminary approval of the settlement advising them that by accepting the settlement, they are giving up their legal right to challenge the changes to the governance structure at Brookdale. *See* Notice, p. 5.

As to future owners, the Court is satisfied that they may be bound by the control provisions of the settlement, so long as the Master Deed is amended to clearly advise prospective purchasers that per the instant settlement agreement, the Sponsor maintains full control **[*41]** of the complex. However, at the same time, if the Sponsor elects to sell at least 25% of the Units, then the progressive control provision of N.J.S.A. 46:8B-12.1(a) is triggered. In Amir, the court held that where a condominium developer elected to impose certain use restrictions, it was mandatory to

include those restrictions in the master deed in accordance with N.J.S.A. 46:8B-9. Amir, 328 N.J. Super. at 151. Because the master deed failed to set forth the restrictions in that case, the court held they were unenforceable against the other units. *Id.*

The Court finds the concepts illustrated and alluded to in Amir are applicable to this case. That is, a master deed must refer to any limitation or alteration of the rights and obligations of a unit owner. So long as the master deed provides notice of the provision, any party purchasing that unit is bound by it. The Court finds no reasoned basis to treat a restriction on use and occupancy of a unit differently than a restriction on a unit owner's participation in governance of the complex. Moreover, N.J.S.A. 46:8B-9(m) appears to be a "catch all" by providing that the master deed must include "such other provisions, not inconsistent with this act, *as may be desired*". *Id.* (emphasis added). The statute **[*42]** does not limit the types of "provisions" that "may be desired" by a Sponsor except for requiring that they not be inconsistent with the Condominium Act.[9] Presumably then, the Sponsor may modify the governance of the complex as long as it places a provision to that effect in the master deed, and such a provision is not inconsistent with the Condominium Act. Under N.J.S.A. 46:8B-11, "[t]he master deed may be amended or supplemented in the manner set forth therein."

The Court finds that, based on an analysis of the precise language used in N.J.S.A. 46:8B-12.1(a), it is not inconsistent with the Condominium Act in and of itself, without challenge by the unit owners, to vest control of the Association in the Sponsor notwithstanding its failure to offer for sale any of its units in the complex. That is, while the Court previously held in its July 6, 2012 Opinion that control of the Association should equitably be turned over to the Plaintiffs based on their challenge to the Sponsor's failure to offer units for sale, it does not necessarily follow that the Sponsor's failure to offer units *automatically* results in a violation **[*43]** of the statute unless challenged by the non-Sponsor unit owners. N.J.S.A. 46:8B-12.1(a) provides, in relevant part, that "when some units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be *entitled* to elect all of the members of the governing board or other form of administration." *Id.* (emphasis added). Significantly, N.J.S.A. 46:8B-12.1(a) does *not* provide that the unit owners *shall* elect all the members of the Board when the Sponsor fails to offer units for sale in the ordinary course of business. The Legislature's placement of "be entitled to" after "shall" suggests that the transfer of control to non-sponsor unit owners does not happen automatically, and that the non-sponsor unit owners must voluntarily elect to exercise their entitlement to elect the members of the Board. Thus, the class members who accept the modified deed detailing the Sponsor's exclusive control over the complex are in essence exercising their right not to elect members of the Board consistent with the Condominium Act.

Further supporting this interpretation is the Uniform **[*44]** Condominium Act.[10] Section 3-103 of the Uniform Condominium Act relates to the Association's control of a condominium complex and the manner in which the Board

---

[9] Similarly, *N.J.S.A.* 46:2B-7 provides that "[a]ny agreement contrary to the provisions of this act shall be void."

[10] As of 2003, the Uniform Condominium Act had been adopted by Alabama, Arizona, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia and Washington. The District of Columbia, Louisiana, Michigan and Wisconsin have enacted fragmented portions of the Uniform Condominium Act. Powell on Real Property § 54A.02

members are elected. Subsection (d) of that provision relates to the phasing out of Sponsor control and provides in relevant part that "a period of [Sponsor] control terminates no later than the earlier of: (i) [60] days after conveyance of [75] percent of the units which may be created to unit owners other than a [Sponsor]; (ii) [2] years after all [Sponsors] have ceased to offer units for sale in the ordinary course of business; or (iii) [2] years after any development right to add new units was last exercised." Uniform Condominium Act § 3-103. Notably absent from this provision is the "shall be *entitled*" language found in N.J.S.A. 46:8B-12.1, which suggests that the shift of control from the Sponsor to the unit owners occurs automatically under the Uniform Condominium Act. New Jersey has not adopted the Condominium Act, suggesting that the Legislature prefers to retain the "shall be entitled" language enacted in its Condominium Act. Thus, because it is not inconsistent with the Condominium Act to allow the Sponsor to control to Board, the Court finds that as long as the **[*45]** Sponsor amends the Master Deed of Brookdale Gardens to reflect the changes to its governance structure, Class Members who currently own a unit in Brookdale and future purchasers of a unit may be bound by those changes.

The Court must also resolve whether unit owners who affirmatively opt out of the proposed settlement agreement, and thus elect to remain in Brookdale Gardens and not submit a claim under the settlement, may nevertheless be bound to the governance provisions of the settlement agreement. The Court has undertaken extensive research on this issue and has found that, under certain unique circumstances, courts have found it appropriate to bind opt-outs to limited provisions of the settlement agreement. For example, the Third Circuit has approved a settlement where class members were given an opportunity to opt-out **[*46]** after the initial opt-out period expired based on factors such as, by way of example, a concern that there would be no funds left in the settlement trust to pay their claims.[11] *See In re Diet Drugs Prods. Liab. Litig., 275 F.3d 34 (3d Cir. 2001)*; *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 369 F.3d 293, 317 (3d Cir. 2004)*. Those who exercised this "back-end" opt-out right were not given the same unlimited right to sue the defendant in the tort system as were the initial opt-outs. Instead, those who exercised the back-end opt-out right were restricted from seeking certain types of relief, such as punitive, exemplary, or multiple damages. *See Diet Drugs II, 369 F.3d at 296*. The Third Circuit characterized the treatment of the back-end opt-outs as follows:

> The settlement approved and supervised by the District Court in this case is a landmark effort to reconcile the rights of millions of individual plaintiffs with the efficiencies and fairness of a class-based settlement. Critical to this effort was the allowance of downstream opt-outs, so that potential class members were not faced with an all-or-nothing decision at the threshold. To make this allowance meaningful, the settlement had to protect Wyeth against its largest fear, potentially ruinous punitive damage awards. At the same time, it had to allow intermediate opt-out plaintiffs **[*47]** to have a fair chance to litigate their claims and obtain those damages that were expressly preserved.

Id. at 318. Professor Rhonda Wasserman, who published a scholarly article particularly on the

---

[11] This unique type of opt-out was referred to by the district court and Third Circuit as a "downstream" or "back-end" opt-out right, which connotes a delayed or second opportunity to opt-out. *See* Rhonda Wasserman, *The Curious Complications with Back-end Opt-out Rights*, *49 Wm. & Mary L. Rev. 373, 377* (2007).

restrictions placed upon opt-outs in the series of cases generated from the above diet drug litigation, explained that "it is fair to say that the entire settlement was predicated on the class action court's ability to bind those who declined to opt out initially by the restrictions built into the Settlement Agreement." Wasserman, *49 Wm. & Mary L. Rev., at 410* (2007).

The Court finds that the instant matter presents similarly unique circumstances that justify and warrant limiting those who opt-out from asserting claims against the Sponsor regarding its exclusive control over the Board after the effective date of the settlement. In other words, the opt-outs in this case, while permitted to pursue their initial claims for diminution of value against the Sponsor, are not given the same unlimited **[*48]** ability to sue that an opt-out typically has. Specifically, opt-outs will be limitedly bound to only those provisions regarding control of the complex returning to the Sponsor. The instant settlement agreement can be characterized as a herculean effort to reconcile a case that has been pending in the Superior Court for *at least* 15 years with barely any progress as to a settlement agreement, until now. Crucial and integral to this settlement agreement was the Sponsor's ability to maintain exclusive control over the Board in exchange for its obligation to buy out any unit owners who wished to leave Brookdale Gardens.

Without this provision and the concomitant assurance its control would not be challenged, the Sponsor would be unwilling to make such a commitment. In other words, obtaining full control over the Board is the foundation and lynchpin of the settlement agreement. If the two opt-outs were given free rein to challenge this provision, which is the product of extensive and lengthy negotiation, the Sponsor would not receive the benefit of the bargain in agreeing to the settlement. Thus, like the defendant in the diet drugs litigation, in providing the opt-outs with the ability to **[*49]** litigate their initial claims and receive damages, the Sponsor seeks to protect itself against "its largest fear," which is the loss of control over the Board of the complex. In order to strike this balance, the settlement agreement removes only one type of claim the opt-outs may bring against the Sponsor, while allowing them to preserve any and all other claims.

In addition, the opt-outs are receiving a benefit which justifies the limited restriction on the right to challenge control of the complex. By concluding the instant litigation, which otherwise does not have an end in sight, the Association, and thus the unit owners, will no longer have to devote funds to the litigation. Thus, in light of the unique, complex, and long-contested circumstances and issues in this case, the Court finds it fair and reasonable to place certain restrictions on the claims the opt-outs may pursue against the Sponsor.

Finally, an additional rationale exists for the limited restrictions on the opt-outs to challenge the control provision. Specifically, the settlement agreement, as a whole, based on the various competing interests and the inherent difficulties in otherwise achieving justice for the Class **[*50]** Members, is fair and equitable. The Court's equitable powers are warranted to limitedly bind the opt-outs to the control provisions, as the Court has "broad discretionary power to adapt equitable remedies to the particular circumstances of a given case." *Marioni v. Roxy Garments Delivery Co., 417 N.J. Super. 269, 275, 9 A.3d 607 (App. Div. 2010)*. Indeed:

> Equitable remedies 'are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules, which govern their use. There is in fact no limit to their variety and application; the court of equity has the

> power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex regulations of all the parties.'

Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 411-12, 1 A.2d 425 (1938) (*quoting* Pomeroy's Equity Jurisprudence, sec. 109). In light of the unique circumstances of the instant matter and the Court's broad equitable powers to shape an appropriate remedy tailored to such circumstances, the Court finds it fair, reasonable and equitable to limit those who opt-out from contesting the Sponsor's control over the Board granted by the settlement agreement.

Class Action Law

In addition to the Condominium Act and the PREDFDA, the Court must also consider class action jurisprudence, as the matter has been converted into **[*51]** a class action. A class action is a litigation device that "permits one or more individuals to act as plaintiff or plaintiffs in representing the interests of a larger group of persons with similar claims." *Lee v. Carter-Reed Co., L.L.C., 203 N.J. 496, 517, 4 A.3d 561 (2010)*. Class actions are a means through which many litigants with similar claims who otherwise would not have the resources to seek legal redress through the judicial system can band together against a "corporate entity that wields enormous economic power." *Id. at 518*. For this and other reasons, class actions are looked upon favorably by courts in New Jersey. "Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants." *Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 104, 922 A.2d 710 (2007)*. The end result of a class action is that "[m]embers of the represented class are bound by the results of the litigation, for better or worse, unless they opt out of the class-action lawsuit." *Lee, 203 N.J. at 518 n.9*.

The class action device in New Jersey is authorized by *New Jersey Court Rule 4:32-1* and *-2*, which set forth the requirements for maintaining a **[*52]** class action. While courts in New Jersey have held that the class action rule should be liberally construed in favor of certifying a class action, parties seeking to proceed as a class must nevertheless meet certain requirements. Specifically, plaintiffs requesting to proceed as a class action must establish the threshold requirements of numerosity, commonality, typicality and adequacy of representation set forth in *R. 4:32-1(a)*. Once the threshold requirements have been met, plaintiffs also must satisfy one of the three alternative requirements set forth in *R. 4:32-1(b)*. Before approving a class action settlement, a court must first determine whether the requirements of *R. 4:32-1(a)* and *(b)* have been satisfied. *In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 341 (3d Cir. 2010)*.[12] When deciding certification, the court must not make a preliminary decision on the merits of the claim. *Delgozzo v. Kenny, 266 N.J. Super. 169, 180-81, 628 A.2d 1080 (App. Div. 1993)*.

I. Requirements of 4:32-1(a) and (b)

---

[12] Because New Jersey's class action rule is modeled after *Federal Rule of Civil Procedure 23*, New Jersey courts often use federal precedent as guidance for class action issues. *See Delgozzo v. Kenny, 266 N.J.Super. 169, 189, 628 A.2d 1080 (App. Div. 1993)*. However, New Jersey courts have interpreted *R. 4:32-1* more liberally than the federal rule, often holding that a class *must* be certified unless there is a "clear showing that it is improper or inappropriate." *Gross v. Johnson & Johnson-Merck Consumer Pharms. Co., 303 N.J. Super. 336, 341, 696 A.2d 793 (Law Div. 1997)*.

A. R. 4:32-1(a)

1. Numerosity **[*53]**

Rule 4:32-1(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." In the instant matter, there are 75 putative class members. "There is no precise number that distinguishes between a class that satisfies the condition of numerosity and one that does not." *Fink v. Ricoh Corp., 365 N.J. Super. 520, 557, 839 A.2d 942 (Law Div. 2003)*. In *Saldana v. City of Camden, 252 N.J. Super. 188, 193, 599 A.2d 582 (App. Div. 1991)*, the court found that a class comprised of 81 property owners seeking relief against a city for property damage caused by failure to implement a policy regarding City-owned abandoned buildings was "sufficiently large" to meet the numerosity requirement. The Court finds that the putative class of 75 members meets the numerosity requirement.

2. Commonality

Rule 4:32-1(a)(2) requires that there be "questions of law or fact common to the class." New Jersey has followed the approach under the Federal Rule which holds that "'a single common question is sufficient.'" *Delgozzo, 266 N.J. Super. at 185* (quoting *In re Asbestos School Litigation, 104 F.R.D. 422, 429 (E.D.Pa.1984)*, *aff'd in part and vacated in part sub nom, In re School Asbestos Litigation, 789 F.2d 996 (3d Cir.)*, *cert. den.*, *479 U.S. 852, 107 S. Ct. 182, 93 L. Ed. 2d 117 (1986)*).

Plaintiffs have put forth questions of both law and fact that are common to all proposed class members. That is, Plaintiffs present the legitimate factual question of whether the actions of the Sponsor caused a diminution of value in condominium units in Brookdale Gardens and whether the **[*54]** Sponsor's ownership of 80% of the units in Brookdale Gardens prohibits non-sponsor unit owners from selling their units. Plaintiffs also present the legal question of whether the Sponsor is required to sell units in the ordinary course of business under the Condominium Act. Both of these questions are common to all proposed class members and thus the Court is satisfied that Plaintiffs have met the commonality requirement.

3. Typicality

The claims of a putative class representative are typical if they "have the essential characteristics common to the claims of the class." *In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 425, 461 A.2d 736 (1983)* (quoting 3B James W. Moore et al., *Moore's Federal Practice* § 23.06-2 (2d ed. 1982)). The purpose behind the typicality requirement is "to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998)*; *see also Goasdone v. Am. Cyanamid Corp., 354 N.J. Super. 519, 530, 808 A.2d 159 (Law Div. 2002)* ("The expectation is a harmony of interest between the class action representatives and the class members, so that the class representatives by furthering their own goals are also furthering the goals of the class.") At the same time, "'typical' is not identical." *Osgood v. Harrah's Entm't, Inc., 202 F.R.D. 115, 124 (D.N.J. 2001)* (quoting *Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985)*, *cert. denied sub* ***[*55]*** *nom., Wasserstrom v. Eisenberg, 474 U.S. 946, 106 S. Ct. 342, 88 L. Ed. 2d 290 (1985)*). Thus, "factual differences . . . 'will not render a claim atypical if the claims arises from the same event or practice or course of conduct that gives rise to the claims of the class members'". *Id.* (quoting *Baby Neal For and By Kanter v. Casey, 43 F.3d 48, 58 (3d Cir. 1994)*).

The Court finds that the Plaintiffs' claims are typical and aligned with the interests of the rest

of the class. Specifically, the claims of the Plaintiffs and of the class arise from the same alleged wrongful course of conduct by the Sponsor, i.e., failing to sell additional units in the complex and improperly managing and maintaining the complex while in control thereof. While Plaintiffs and Class Members may have bought their respective units at different times, and for different prices, and with different conditions, they all seek to challenge the legality of the Sponsor's decision not to sell any additional units in the complex on the grounds that such conduct violated the Condominium Act, prevented unit owners from selling their units, and caused units to decrease in value. Thus, Plaintiffs' claims "have the essential characteristics common to the claims of the class" and thus satisfy the typicality requirement. *In re Cadillac, supra, 93 N.J. at 425*.

4. Adequacy of Representation

Rule 4:32-1(a)(4) mandates that **[*56]** "the representative parties will fairly and adequately protect the interests of the class." *R. 4:32-1(a)(4)*. New Jersey has followed the Federal approach to determining adequacy in representation by requiring two factors be established: "'(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.'" *Delgozzo, 266 N.J. Super. at 188* (quoting *In re Asbestos Sch. Litig., 104 F.R.D. 422, 430 (E.D. Pa. 1984)*).

As to the adequacy of counsel, the Plaintiffs are represented by Laurence H. Olive, Esq. Mr. Olive has represented Plaintiffs for the past 15 years in this matter and is therefore highly familiar and experienced regarding the particular facts of the case, including its strengths and weaknesses, and is also familiar with Plaintiffs' complaints, concerns and desired outcomes. Mr. Olive is being assisted by Arthur C. Hopkins, Jr., Esq. It is clear that Mr. Olive is fully able and competent in conducting the proposed litigation, as he has obtained favorable outcomes for Plaintiffs in the past, namely the July 6, 2012 Order. The Association, which is aligned with Plaintiffs, is represented by E. Richard Kennedy, Esq., an attorney with Kennedy Wronko and Kennedy **[*57]** and who has approximately 40 years' experience in all aspects of condominium management and control.

As to the alignment of interests between the Plaintiffs and the proposed class members, the Court finds that Plaintiffs' interests are identical, not antagonistic, to those of the proposed class members. Plaintiffs are similarly situated to the proposed class members in that they seek to prove that their units diminished in value as a direct result of the Sponsor's alleged wrongful conduct. The Court has not been made aware of any reason why the proposed class members could possibly be disadvantaged by Plaintiffs attempt to show that their units have decreased in value as a result of the Sponsor's conduct and that they have been unable to sell their units for the same reason. For example, there is no reason why the proposed class members would have a more difficult time showing that the value of their units diminished by reason of Plaintiffs' attempt to prove same.

The Court acknowledges that the objectors' argument that the settlement price per unit fails to take into account improvements made to the unit could possibly be viewed as a weakness in the adequacy of representation. In other **[*58]** words, because some of the Plaintiffs may not have made improvements to their units, they do not have the incentive to advocate for a higher sale price per unit. However, the Court does not, on balance and considering the entirety of the settlement, find it problematic that some of the Plaintiffs may have made improvements to their units, while others may not have, because the interests of

the class representative and the absentee class members need not be identical. *Moore's Federal Practice § 23.25[2][b][i]* (Matthew Bender 3d Ed.). Instead, "the named plaintiff need only be an 'adequate' representative." *Id.*

Because there is no foreseeable conflict of interest and Plaintiffs and proposed class members share the same goal, the Court finds that the Plaintiffs' interests are not antagonistic to those of the proposed class members.

B. R. 4:32-1(b)

A class action is maintainable only if it falls within at least one of the following three categories authorized by *R. 4:32-1(b)*:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk either of:
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct **[*59]** for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:
>
> > (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> >
> > (C) the desirability or undesirability in concentrating the litigation of the claims in the particular **[*60]** forum; and
> >
> > (D) the difficulties likely to be encountered in the management of a class action.

The parties have relied on *(b)(3)* to certify the class. That is, the parties assert that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Members of a class certified under *(b)(3)* are afforded the opportunity to "opt-out" of the class. Members of a *(b)(3)* class "are automatically included and remain so unless they make a timely election to opt-out." *Sperling v. Hoffmann-La Roche, Inc., 24 F.3d 463, 470 (3d Cir. 1994)*. Thus, a class member who does not come forward to opt-out is bound by any final judgment or settlement, even if that class member did nothing affirmative to "opt in." *See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250 (3d Cir. 1975)* (explaining that all members of a *(b)(3)* class who have not opted

out, as well as all members of a (b)(2) class, are "bound by the res judicata effect of the judgment.").

Plaintiffs seeking to certify a class under (b)(3) must show that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and **[*61]** that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." R. 4:32-1(b)(3). Thus, under (b)(3), plaintiffs must demonstrate two separate requirements: (1) "predominance" of the common issues and (2) the "superiority" of a class action over other available trial techniques.

In analyzing the predominance requirement, the court must "weigh the common issues against the individual issues." Goasdone, 354 N.J.Super. at 539. The court must also conduct a "close analysis of the facts and law." In re Cadillac, 93 N.J. at 434. The predominance prong does not require that all class members have identical issues, but instead requires a "common nucleus of facts." *Id.* (citing Saldana v. City of Camden, 252 N.J. Super. 188, 197, 599 A.2d 582 (App.Div.1991)). The presence of individual issues does not preclude certification under (b)(3), and class members need not be affected "in precisely the same manner." *Iliadis, 191 N.J. at 108-09*.

In *Iliadis*, the Court found that the plaintiffs satisfied the predominance requirement. The proposed class in *Iliadis*, current and former employees of defendant Wal-Mart, alleged that defendant regularly denied its employees earned rest and meal breaks in contravention of its corporate policies. Based on this alleged conduct, the plaintiffs asserted claims for breach of contract, breach **[*62]** of the implied covenant of good faith and fair dealing, and violations of the Wage and Hour Law. The trial court found that the plaintiffs did not satisfy the predominance requirement based on the individual issues raised by Wal-Mart, and the appellate court affirmed.

In reversing the judgment of the appellate court, the Court explained that "[t]he core of the present dispute is whether Wal-Mart engaged in a systematic and widespread practice of disregarding its contractual, statutory, and regulatory obligations." *Id. at 111*. The Court found that the presence of some individual issues, such as whether particular employees voluntarily missed rest and meal breaks, how much time was worked off-the-clock, and whether and the amount of damages suffered, did not preclude class certification. *Id. at 112*.

As in *Iliadis*, Defendants in this class action are alleged to have disregarded a statutory obligation to the detriment of the class. Specifically, the common factual and legal thread is whether the Sponsor acted wrongfully in failing to sell its units and in its management and governance of the complex. The class members also have in common the alleged detriment arising from this course of conduct, which is that **[*63]** they have been unable to sell their units and the units have diminished in value. It has been held that "in cases where it is alleged that the defendant . . . engaged in a common course of conduct, courts have found that conduct to satisfy the commonality and predominance requirements." Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 231 (D.N.J. 2005). The Court acknowledges that the units owned by each class member may vary in price, which affects the potential amount of damages suffered by each class member. However, "[t]he need to make individual determinations on the question of damages will not necessarily defeat (b)(3) certification." Goasdone, 354 N.J.Super. at 539 (citing Delgozzo, 266 N.J.Super. at 190). Further,

courts are far more inclined to find that common issues predominate over individual issues in the context of a proposed settlement. *Sullivan v. DB Invs., Inc., 667 F.3d 273, 304 (3d Cir. 2011)*.

Indeed, "[e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement" despite the generally wide variation in damages. *Amchem Prods. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. The proposed class in this case is far more cohesive than that in *Amchem*, where the Court found that the class did not satisfy the predominance requirement. In that case, the U.S. Supreme Court held that the proposed settlement class consisting of asbestos victims failed **[*64]** to meet the predominance requirement because the proposed class members were exposed to the different asbestos products of over twenty companies during a variety of different activities. *Id. at 597*. In contrast, the proposed class in this case does not involve such wide variation in each class member's particular circumstances, as the alleged harm stems from specific prolonged conduct of a particular actor, the Sponsor. Thus, the Court finds that Plaintiffs have established that common questions of law and fact predominate over individual questions.

In order to certify the class under *(b)(3)*, the court must also find that the class-action vehicle is superior to other methods of adjudication. The court rule identifies the following factors to consider in deciding whether a class action is the superior method:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
>
> (D) the difficulties likely to be encountered **[*65]** in the management of a class action.

R. 4:32-1(b)(3)(A)-(D).

However, "[i]n settlement situations, the superiority requirement arguably translates into the question whether the settlement is a more desirable outcome for the class than individualized litigation, and may assure that the settlement has not grossly undervalued plaintiffs' interests." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 796 (3d Cir. 1995)*. Further, "a [ ] court need not inquire whether the case, if tried, would present intractable management problems, see *Fed. Rule Civ. Proc. 23(b)(3)(D)*, for the proposal is that there be no trial." *Amchem, 521 U.S. at 620*.

The proposed settlement allows unit owners to sell their units to the Sponsor for an amount set forth by the settlement agreement. Specifically, the settlement offers the following: (1) $127,500 per unit for a 2.5 room unit; (2) $136,500 per unit for a 3.5 room unit; (3) $141,500 per unit for a 4 room unit; (4) $170,000 per unit for a 5 room unit; (5) $5,000 per unit for each garage unit; and (6) $105,000 for unit 84A. The Association's expert, Jon Brody, submitted a report and testified at the fairness hearing that not only are the settlement offers reasonable, but they are in fact above fair market value. The Court deems him credible. He was not impeached. Mr. Brody testified in a straightforward **[*66]** and understandable manner. Mr. Brody reached his conclusion by researching sales of other individual condominium units in the same municipality between 2012 through 2015 and

finding that, on average, the settlement values proposed by the Sponsor are "significantly higher than the average price per square foot for condominium sales in Bloomfield." Brody Report, p. 7.

Several class members raised concerns that the settlement values are unfairly low in light of certain improvements and renovations made in particular units. Mr. Brody specifically addressed this issue in his report:

> [L]ike the sales within the subject development, the sales considered in the other developments ranged, from a physical standpoint in the same manner as the settlement group that is, some had been improved/upgraded while others were older with no upgrades. By employing the large population of sales data we included all types of sales, upgraded and not upgraded, and on average, the settlement prices still exceeded the highest comparable square foot values, which included upgraded units.

Brody Report, p. 19. In addition to his report, Mr. Brody testified at the fairness hearing that the settlement values for *unimproved* ***[*67]*** units still exceeded the sale price of a comparable unit with upgrades. As noted, the Court credits the expert opinion of Mr. Brody, an active licensed real estate appraiser with decades of experience, and finds that the settlement does not grossly undervalue Plaintiffs' interests. Thus, the plaintiffs have satisfied both the predominance and superiority requirements for class certification under *(b)(3)*.

II. Settlement Approval Factors

Settlements of class actions are treated differently than traditional settlements. While an individual action can typically be settled without involvement of the court, *Pascarella v. Bruck, 190 N.J. Super. 118, 124, 462 A.2d 186 (App. Div. 1983)*, *Rule 4:32-4* provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." *Rule 4:32-4*.

The approval of a class action settlement occurs in five stages. First, the proposed settlement is presented to the court so that it can make a preliminary determination whether the proposed agreement has merit to justify further consideration. *Morris Cnty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 369, 484 A.2d 1302 (Law Div. 1984)*. This Court completed the preliminary approval proceeding and entered an Order preliminarily approving **[*68]** the proposed class action settlement on May 4, 2015.

Second, assuming the court preliminarily approves the proposed class action settlement, a court-approved settlement notice must be distributed to class members advising them of the general terms of the settlement, their right to object and the date and location of the final approval hearing. *Id.* Mr. Van Nostrand has certified that the Court-approved notice was properly disseminated to all class members describing the settlement terms and advising Class Members of their options vis-à-vis the settlement. Thus, step two has been completed.

Third, a sufficient period of time is provided to allow Class Members and other interested parties to prepare and submit objections and other materials related to the proposed settlement. *Id.* The Class Members were given over two months to submit their objections and comments, and the Court has received 18 objections.

Fourth, after receiving objections, the Court conducts a "fairness hearing." *Id.* The fairness

hearing in this matter was held on July 20, 2015. Finally, the court must determine whether the settlement is "fair and reasonable" to the members of the class as a whole. *Id.* "A settlement of **[*69]** a class action may be approved even in the face of a majority vote by members of the class to disapprove the settlement." *Chattin v. Cape May Greene, 216 N.J. Super. 618, 627, 524 A.2d 841 (App. Div. 1987)*. In analyzing whether a proposed class settlement is "fair and reasonable," New Jersey courts have adopted a list of factors set forth by the Third Circuit in *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*. *See* *Sutter v. Horizon Blue Cross Blue Shield of New Jersey, 406 N.J.Super. 86, 966 A.2d 508 (App. Div. 2009)*. Those factors are:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
>
> (7) the ability of the defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 157. The *Girsh* factors "are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enters., 256 B.R. 377, 418 (D.N.J. 2000)*.

The proponents of the settlement bear the burden of proving that the factors weigh in favor of approval. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)*. While a fairness hearing is not **[*70]** a plenary trial, a court has discretion to determine the nature and extent of the hearing required to determine whether a proposed settlement is "fair and reasonable." *Morris Cnty. Fair Hous. Council, 197 N.J. Super. at 370*. When the parties offer an independent evaluation of a settlement proposal, "'[t]he Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.'" *Id.* (quoting *Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 315 (7th Cir. 1980)*). In *Sutter v. Horizon Blue Cross Blue Shield of New Jersey, 406 N.J.Super. 86, 966 A.2d 508 (App. Div. 2009)*, the court held that the trial court erred by denying certain objectors' requests to cross-examine the plaintiffs' economic expert who provided valuation of the settlement. *Id. at 102*. The court explained that the court would be better able to examine whether the settlement was fair and reasonable if the expert's report were tested by cross-examination. As such, the court remanded for a "testimonial fairness hearing." *Id.* Here, all witnesses were subjected to cross-examination.

The Court will examine each of the "fair and reasonable" factors separately and determine whether the proposed settlement agreement satisfies each factor.

1. Complexity, Expense and Likely Duration of the Litigation

As stated **[*71]** throughout this Opinion, this litigation has been ongoing for 15 years without any final resolution. As such, Plaintiffs

have been in a state of uncertainty with regard to their legal rights for well over a decade and have not yet been able to obtain full relief for the alleged wrongful conduct of Defendants. Obviously, proceeding with further litigation would prolong the already protracted period Plaintiffs have had to wait to resolve their claims and would further delay any potential relief to which they are entitled. At trial, Plaintiffs would have the difficult task of proving that the value of their units in Brookdale Gardens decreased as a direct result of the Sponsor's allegedly wrongful control over the complex and failure to sell additional units, and not as a result of some other factor or factors. Plaintiffs would also have to show that the Sponsor's conduct was the direct cause of their inability to sell their units to third parties. In order to prove this, Plaintiffs would likely have to introduce experts and Defendants would likely do the same to rebut Plaintiffs' assertion. The retention of experts by both sides and the extensive and exhaustive discovery would make the **[*72]** trial extremely costly and both sides have presumably already expended large sums throughout the 15 years of this litigation separate and apart from trial. Aside from the likely expense, proving these points would be difficult given the number of Plaintiffs involved and the varying circumstances of each Plaintiff. In addition, it is significant to note that the parties have not even commenced discovery as to damages. At a minimum, in addition to the expense, the parties are facing significant delays due to the inevitable motion practice that would be involved with damages discovery.

Plaintiffs would also have to show that Defendants had a statutory obligation under the Condominium Act to sell units. While the Court previously ruled that Defendants violated the Condominium Act by remaining in control of the complex while not selling any additional units, it did not necessarily hold that Defendants have an affirmative obligation to sell units. That is, Defendants could conceivably not sell units without violating the statute so long as the Sponsor did not attempt to maintain control. However, this legal issue has not yet been decided by any appellate court in New Jersey and thus the Plaintiffs **[*73]** would have to persuade the Court to adopt their interpretation of the statute. Given the complexity of the legal and factual issues in the case, the Court is satisfied that the trial would neither be a short nor inexpensive one. As such, the Court finds that this *Girsh* factor weighs strongly in favor of approving the settlement.

2. Reaction of the Class to the Settlement

"This factor attempts to gauge whether members of the class support the settlement." *Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 318 (3d Cir. 1998)*. Only two out of the total 75 class members opted not to convey their units to the Sponsor and to remain in the complex. Out of the 41 class members who submitted claims, 18 objected. In other words, the number of non-objecting claimants exceeds the number of objectors. Of the 18 objections, 11 appear to be "form" or boilerplate objections in that they are wholly identical and do not contain any individualized concerns.[13] The form objections put forth two concerns: (1) inadequacy of the purchase prices offered for the units and (2) the Sponsor's control over the complex. "[A]n apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large." *Manual for Complex Litig.* § 21.631, p. 318 (4th **[*74]** ed.). The relatively low number of objections, combined with the fact that more than half of the objections were not written personally by class members, suggests that the Class

[13] An additional three objectors submitted form objections as well as a separate individual objection.

Members generally support the terms of the proposed settlement. Further, in light of the fact that the class members have been given an opportunity to hear the testimony of the experts and pose questions to the experts, it is possible that there may even be less objections after the 30 day period following approval of the settlement should the Court approve it. Thus, this *Girsh* factor weighs in favor of approving the settlement.

3. Stage of the Proceedings and Amount of Discovery Completed

The third *Girsh* factor "'captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *In re Cendant Corp. Litig., 264 F.3d 201, 235 (3d Cir. 2001)* (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 813 (3d Cir. 1995)*). The instant case has been pending in Essex County for a decade and a half and the parties have engaged in numerous motions, some dispositive. As such, "this **[*75]** is most certainly not a case that is settling in the early stages of litigation." *Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 238 (D.N.J. 2005)*. Through the various motions filed throughout the years this case has been pending, the Court is satisfied that counsel has most certainly gained an adequate understanding of the merits of the case such that they were able to fairly decide to settle the matter.

4. Risks of Establishing Liability

A court considers this factor in order to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *GMC Pick-Up Truck, 55 F.3d at 814*. Where there is a high risk of establishing liability, this factor cuts in favor of settlement. In this case, in order to establish liability of the Sponsor, the Plaintiffs will have to prove that their alleged inability to sell their units and alleged diminution in value of their units were caused by the Sponsor's conduct and not some other factor, such as general market fluctuations or decline in the housing market as a whole. In other words, Plaintiffs must prove by more than mere speculation that the Sponsor's conduct caused them tangible harm.

Plaintiffs must also establish that if the Sponsor acted **[*76]** in violation of applicable statutes and regulations governing the complex, the proper remedy is to force the Sponsor to purchase the non-Sponsor-owned units. However, in its August 30, 2013 Order, the Court denied Plaintiffs' request for an Order forcing the Sponsor to sell its units, holding that ordering a sale of the units "would require an unwieldy level of court supervision." August 30, 2013 Order, p. 10. In light of that decision and the lack of clarity or precedent on the proper remedy for a violation of the Condominium Act and related statutes and regulations, the Court finds that Plaintiffs would encounter a significant risk in achieving its desired outcome. As such, this *Girsh* factor weighs in favor of settlement.

5. Risks of Establishing Damages

"Like the previous factor, this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 816 (3d Cir. 1995)*. In this case, the class would be required to prove not only that the conduct of the Sponsor diminished the value of the units in the complex, but would have to ascertain the dollar amount by which the units on average decreased in value. This would require expert evaluation and **[*77]** testimony and would involve experts from both Plaintiffs and Defendants. As such, the Court finds that

the risks and burden of establishing damages in this particular case is significant.

6. Risks of Maintaining the Class Action Through the Trial

New Jersey Court Rule 4:32-2 has been construed to give trial courts discretion to decertify a class after entering a certification order. The court can decertify a class if it finds that "the criteria for and goals of class certification are no longer being met." Muise v. GPU, Inc., 371 N.J. Super. 13, 34, 851 A.2d 799 (App. Div. 2004). A high risk of decertification supports approval of a settlement agreement. The Court has not been made aware of any reason why it would potentially decertify or modify the class. However, in Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 321 (3d Cir. 1998), the Third Circuit held that this factor adds little to the consideration of the fairness of the settlement in light of the U.S. Supreme Court's holding in *Amchem* that courts need not inquire into manageability where request for certification is for settlement-only purposes. Id. at 321. Thus, in a case such as this, where a class is approved for settlement purposes only, this factor is of "negligible importance" in deciding whether to approve a class action settlement. Weber v. Gov't Emples. Ins. Co., 262 F.R.D. 431, 446 (D.N.J. 2009). Thus, although there is no apparent **[*78]** risk of decertification, the court assigns this factor little weight based on the Third Circuit's holding in *Prudential*. *See* Erie Cnty. Retirees Ass'n v. Cnty. of Erie, 192 F. Supp. 2d 369, 375-76 (W.D. Pa. 2002).

7. Ability of Defendants to Withstand Greater Judgment

This factor examines whether the defendants could withstand a judgment for an amount significantly greater than the Settlement In re Cendant Corp. Litig., 264 F.3d 201, 240 (3d Cir. 2001). The Court has not been presented with any of Defendants' financial information, and thus it is unable to make an informed determination of whether Defendants could withstand greater judgment. For example, in In re Safety Components Int'l, 166 F. Supp. 2d 72, 91 (D.N.J. 2001), the Court was made aware that Defendants previously filed for Chapter 11 Bankruptcy and that the D&O policy which would fund the settlement may refuse to pay under the policy. Id. at 91. Because of this lack of information, this factor weighs neither for nor against settlement. *See* In re Cendant Corp. Litig., 264 F.3d at 240.

8. Range of Reasonableness of the Settlement in Light of Best Possible Recovery

After 15 years of contentious litigation, the parties have finally reached an agreement that benefits both the Class Members and the Sponsor. The settlement agreement allows class members to convey their units to the Sponsor for a fixed sum upon submitting a claim under **[*79]** the settlement agreement. In exchange for the Sponsor's obligation to purchase those units, the settlement agreement transfers exclusive and total control over the Board to the Sponsor, notwithstanding the Court's July 6, 2012 Order awarding control over the Board to the non-Sponsor unit owners. Class members who remain in the complex and opt not to sell their units to the Sponsor are barred from contesting the fact of the Sponsor's complete control over the Board, but are permitted to contest specific actions taken by the Sponsor in exercising that control. If, however, the Sponsor sells at least 25% of the units, then the Condominium Act's (and Public Offering Statement's) gradual turnover of control provisions are triggered, and the non-Sponsor unit owners may elect some members of the Board.

The Court finds that the remedy offered under the settlement agreement is appropriate, fair

and reasonable in light of the specific issues in the case. Specifically, the crux of this case is that the non-Sponsor unit owners at Brookdale Gardens have been unable to sell their units because banks will not offer financing due to the blanket mortgage and the fact that the Sponsor owns 80% of the **[*80]** complex, and therefore they claim that, for lack of a better term, they are "stuck" in Brookdale Gardens. Moreover, the non-Sponsor unit owners claim that the value of their units has diminished due to the Sponsor's alleged mismanagement of the complex over the years. Thus, the settlement agreement allows non-Sponsor unit owners to finally sell their units and leave the complex, as well as receive fair market value for their units.

Many objectors contested on the grounds that all units of the same size were given a universal offer despite any improvements or upgrades. Mr. Brody concluded that the settlement values are above market value, even for those units with improvements, based on his comparison of purchase prices of comparable units in the same locality. As explained in detail above, Mr. Brody's analysis took into account units without any upgrades and improvements, as well as units that have been upgraded and improved such that the average purchase price for comparable units consisted of a population of both upgraded and non-upgraded units, similar to the population at Brookdale Gardens. In other words, while units of the same size are purchased at a fixed price, that price reflects **[*81]** any improvements or upgrades because it was derived by comparing units with such upgrades.

At the fairness hearing, some objectors suggested that the Sponsor make individualized offers for each unit to take into account renovations and improvements. While this may be the *ideal* solution, it is neither efficient nor practical. One of the main advantages of a class action is that there is one universal recovery that is dispersed to class members, eliminating the need for individual trials on each claim. Were the sponsor to individually appraise each unit, the process would be cumbersome, as the unit owners would likely obtain their own independent appraisal of their unit which conflicts with that of the Sponsor. This process would further prolong the already 15-year-long lawsuit and further postpone relief to Plaintiffs.

Many objectors also took issue with the Sponsor's exclusive control over the Board under the settlement agreement, arguing that when the Sponsor was previously in control before the Court's July 5, 2012 Order, the complex fell into disrepair and was grievously mismanaged. It took the parties over 15 years to reach a settlement which they both deemed beneficial to their **[*82]** respective positions. The turnover of control to the Sponsor operates as a *quid pro quo* and an incentive for the Sponsor's agreement to buy out any unit owners who wish to leave the complex. Even assuming the Sponsor poorly runs the Board and manages the complex, nothing precludes the class members remaining in the complex from instituting a lawsuit to address any alleged improper or inadequate actions by the Sponsor. The class members are only precluded from bringing their *past* claims for damages under the existing lawsuit, and from claiming that the Sponsor's control over the Board is itself wrongful.

Moreover, the Sponsor loses its exclusive control over the Board if it decides to convey at least 25% of its units to non-Sponsors. In other words, the Sponsor's total and exclusive control over the Board is not indefinite and is still limited by the Condominium Act and the Public Offering Statement. The only provision of the Condominium Act/POS that is being "waived" is that the Sponsor must relinquish control over the Board if it fails to sell its units.

In light of the fact that non-Sponsor unit owners can still contest the Sponsor's actions on the Board and may still regain control **[*83]** over the Board, the Court finds this provision of the settlement a reasonable *quid-pro-quo* for the Sponsor's obligation to buy out non-Sponsor unit owners.

This provision is also fair to *future* purchasers of the units in the complex because the Master Deed will be amended to specify that the Sponsor has exclusive control over the Board even if it does not sell any additional units. Thus, future purchasers will be on notice to this governance scheme prior to purchasing a unit, and as to future owners, the Sponsor will be bound by *N.J.S.A. 46:8B-12.1* when at least 25% of the units are sold.

9. Range of Reasonableness in Light of Attendant Risks of Litigation

As discussed above, damages will be difficult to establish which is evidenced by the fact that the litigation has been ongoing for 15 years due to the hotly contested issues involved. Continuing with the litigation would require the parties to expend a tremendous amount of resources above and beyond what has already been invested, all without any guarantee of success for either party. For the class members especially, the settlement agreement allows them to convey their unit without selling it on the open market, which often involves a broker **[*84]** and other additional frustrations and contingencies. If the class members instead went to trial, they would not only have to prove that the Sponsor's conduct directly caused a diminution in value to their units, but also prove the *amount* of that diminution. By way of the settlement, the class members can receive above fair market value for their unit without having to present expert testimony or the like.

Another aspect of the settlement which demonstrates its reasonableness is the fact that class members are not precluded from bringing a subsequent action contesting action taken by the Board as controlled by the Sponsor. That is, while class members are precluded from challenging the Sponsor's control of the Board in and of itself, nothing in the proposed settlement prevents class members from alleging that certain actions taken by the Board are improper or unlawful.

The Court finds that the settlement is therefore reasonable in light of the attendant risks of litigation.

CONCLUSION

In light of the above analysis, the Court finds that the Condominium Act allows the Class Members to waive the gradual governance provisions of the Condominium Act and submit to the Sponsor's full control **[*85]** over the Board despite not selling any additional units. The Court also finds that the settlement is fair and reasonable in all aspects considering the equities of the litigation, and thus approves of the final settlement pursuant to *Rule 4:32-4*.

SO ORDERED.

Dated: August 28, 2015

Hon. David B. Katz, P.J.F.P.[14]

End of Document

[14] The undersigned has continued to preside over this matter subsequent to appointment as Presiding Judge of the Family Part.

Exhibit 9

Yedlowski v. Roka Bioscience, Inc.

United States District Court for the District of New Jersey

November 10, 2016, Decided; November 10, 2016, Filed

Case No. 14-CV-8020-FLW-TJB

Reporter
2016 U.S. Dist. LEXIS 155951 *

STANLEY YEDLOWSKI, etc., Plaintiffs, v. ROKA BIOSCIENCE, INC., et al., Defendants

Notice: NOT FOR PUBLICATION

Prior History: *Wei Ding v. Roka Bioscience, Inc., 2015 U.S. Dist. LEXIS 188652 (D.N.J., Apr. 21, 2015)*

Counsel: **[*1]** For Carole Kosla, Movant: EDUARD KORSINSKY, LEAD ATTORNEY, LEVI & KORSINSKY LLP, NEW YORK, NY.

For STANLEY YEDLOWSKI, Lead Plaintiff: LAURENCE M. ROSEN, LEAD ATTORNEY, THE ROSEN LAW FIRM, PA, SOUTH ORANGE, NJ.

For WEI DING, Individually and on behalf of all others similarly situated, Pratik Pitroda, Plaintiffs: LAURENCE M. ROSEN, LEAD ATTORNEY, THE ROSEN LAW FIRM, PA, SOUTH ORANGE, NJ.

For ROKA BIOSCIENCE, INC., PAUL G. THOMAS, STEVEN T. SOBIESKI, Defendants: ALYCHIA LYNN BUCHAN, EDNA DORIS GUERRASIO, LEAD ATTORNEYS, PROSKAUER ROSE LLP, NEWARK, NJ.

Judges: Honorable Freda L. Wolfson, United States District Judge.

Opinion by: Freda L. Wolfson

Opinion

WOLFSON, United States District Judge:

Before the Court are the motions for final approval of a proposed settlement and an award of attorneys' fees and reimbursement of expenses filed by Lead Plaintiff Stanley Yedlowski, through counsel the Rosen Law Firm, PA. This settlement will resolve all claims asserted against Defendants Roka Bioscience, Inc., Paul G. Thomas, and Steven T. Sobieski. Defendants, through counsel Proskauer Rose LLP, support the motions for final approval of settlement and take no position on the motion for an award of attorneys' fees and reimbursement **[*2]** of expenses.

For the reasons set forth below, Lead Plaintiff's motion for final approval of the parties' $3.275 million settlement is granted. Lead Counsel is awarded $982,500 in attorney's fees and $20,972.82 in costs. Lead Plaintiff is awarded the nominal sum of $3,000. All attorney's fees, costs, and nominal awards are payable from the settlement fund.

I. FACTUAL BACKGROUND

This case is a securities class action brought on behalf of investors who bought Roka common stock in, pursuant to, or traceable to, Roka's July 17, 2014 Initial Public Offering, including persons who bought Roka common stock between July 17, 2014 and March 26, 2015.

Defendant Roka sells tests to detect foodborne pathogens to large-scale food testers such as food manufacturers and commercial testing

labs. Roka's tests can only be run on its stand-alone, single purpose platform. In March 2014, shortly before the IPO, Roka discovered that with some customers, its test to detect *Listeria* (a foodborne pathogen) generated unacceptable levels of false positives, i.e., incorrect results showing that a testing sample contains *Listeria* when it does not. Roka implemented a change in the test protocol to reduce the chances **[*3]** of false positives.

Roka's IPO registration statement (the "IPO Registration Statement") disclosed that Roka's *Listeria* test had generated sporadic false positives. The IPO Registration Statement also represented that the change in the test protocol had adequately addressed customers' false positives problems. Roka held its IPO in July 2014, selling its stock at $12/share, raising $55.8 million.

The Complaint alleges that by the time of the IPO, Defendants already knew, but did not disclose, that (a) Roka's solution to the problem of false positives for *Listeria* had failed, and (b) Roka had begun to lose customers because of the *Listeria* false positives. The Complaint alleges that in the run up to the IPO, Roka received daily complaints of Listeria false positives and that five of Roka's testing platforms had been returned by dissatisfied customers. The Complaint also alleges that Roka received regular complaints from its customer Silliker, a testing lab which ran Roka's tests for food producer Hillshire Farm. The Complaint alleges that Hillshire Farm stopped using Roka's tests altogether before the IPO because it could not trust the *Listeria* test results.

In a November 6, 2014 conference **[*4]** call and press release, Roka announced that the *Listeria* false positives problem had caused its revenue growth to stall. Lead Plaintiff alleges that because of Roka's precarious financial condition, the stall dramatically increased the chance that Roka would ultimately fail. The next trading day, Roka's stock price fell from its previous close of $8.34 to close at $3.00. The Complaint alleges that the market only learned the true scope of the false positives problem when, on March 26, 2015, following another quarter of zero sales growth, Roka announced that its sales would not increase substantially until Roka replaced the *Listeria* tests. Roka's stock price fell from $4.01 to $3.13 over the next two trading days.

II. PROCEDURAL HISTORY

This Action was filed on December 24, 2014. In April 2015, the Court appointed Mr. Stanley Yedlowski as Lead Plaintiff and The Rosen Law Firm, P.A. as Lead Counsel. Lead Plaintiff and named plaintiff Pratik Pitroda ("Plaintiffs") timely filed their Complaint alleging violations of *Section 11* of the Securities Act of 1933 (the "Exchange Act") against Defendants Roka, Thomas, and Sobieski.

In July 2015, following appointment of Lead Plaintiff and Lead Counsel and filing **[*5]** of an Amended Complaint, Defendants filed a letter motion seeking to have the Court strike, discount, or otherwise limit consideration of facts the Amended Complaint attributed to confidential witnesses. After considering Defendants' letter, Plaintiffs' response, and Defendants' reply, the Court declined to award any of the relief sought in Defendants' letter motion.

In September 2015, Defendants filed a motion to dismiss the Amended Complaint. A month later, Plaintiffs filed their opposition. The Court then stayed further briefing on Defendants' motion to dismiss while the Parties explored settlement discussions. To facilitate settlement discussions, the Settling Parties retained a mediator, the Hon. Faith S. Hochberg, U.S.D.J. (Ret.). Prior to a formal mediation, the parties submitted confidential mediation

statements and replies.

The Settling Parties then held an all-day mediation before Judge Hochberg on December 15, 2015. Defendants' insurer also attended the mediation. There, the Parties signed a settlement term sheet, whose principal term was that the Action would be dismissed for a cash payment of $3.275 million.

The Parties then negotiated and drafted the Settlement Agreement. **[*6]** Plaintiffs filed for preliminary approval on May 20, 2016, and, on June 28, 2016, the Court granted Plaintiffs' motion; preliminarily approved the proposed settlement; certified the putative class for settlement purposes; approved the form and content of the proposed Individual Notice, Claim Form, and Summary Notice; authorized the mailing and publication of the notice materials; and scheduled a Fairness Hearing for November 9, 2016.

The Stipulation was conditioned on Lead Plaintiff's ability to conduct confirmatory discovery to determine whether the underlying facts were consistent with Lead Plaintiff's original understanding that the proposed settlement is fair, reasonable, and adequate. Defendants therefore made available to Lead Counsel some 8,074 documents, consisting of more than 377,000 pages.

The production consisted of documents from March 1 through August 31, 2014 that fit into at least one of the following categories: (*i*) documents that were generated by anyone on a list of Roka custodians who had been involved with the *Listeria* assay and that included at least one term on a list of search terms relating to the *Listeria* assay; (*ii*) minutes of meetings of Roka's Senior Management **[*7]** Team, and materials generated in preparation for those meetings; (*iii*) minutes of Roka's Board of Directors, and materials generated in preparation for those meetings; or (*iv*) Roka's complaint log during the relevant time period. Lead Counsel and defendants' counsel engaged in arm's-length negotiations to determine the lists of custodians and search terms used to generate the confirmatory discovery production.

Lead Counsel also interviewed three present or former Roka officials or employees, including Roka's former Chief Financial Officer and its Director of Product Marketing. After conducting their review, Lead Counsel and its clients have represented to the court that they continue to believe that the proposed settlement is fair, reasonable, and adequate and in the best interests of the Class.

On or before July 21, 2016, the Claims Administrator (Strategic Claims Services ("SCS")) mailed copies of the Court-approved Individual Notice and Claim Form by first-class mail to 49 potential Class Members for whom address information was available from Roka's transfer agent. SCS also mailed the notice materials to another 1,524 custodial banks and other institutions identified from SCS's proprietary **[*8]** databases. SCS later mailed the notice materials to an additional 2,582 potential Class Members identified by nominees or other individuals. Thus, SCS sent a total of 4,155 sets of notice materials to potential Class Members and Nominees. In addition, SCS sent the Individual Notice and Claim Form to the Depository Trust Company (the "DTC") for publication on the Legal Notice System. SCS also caused the Court-approved Summary Notice to be published once in *The Wall Street Journal* and in *Investor's Business Daily*, as well as on *Globe Newswire*. SCS also posted information and documents about the proposed settlement on its website.

The matter came before the Court for a Fairness Hearing on November 9, 2016. Counsel for the parties appeared. The parties did not appear. Lead Plaintiff's Counsel

represented on the record that given the number of eligible claims that had been received, the projected recovery for individual class members would be between 16% and 18.5% of their losses, depending upon the number of currently deficient claims that may later be cured. With neither party wishing to make any additional supplements to the record, the Court summarized its findings, to be set forth in **[*9]** the opinion to follow.

III. TERMS OF SETTLEMENT

On May 17, 2016, the parties' counsel executed a Stipulation setting forth the terms of the settlement. The proposed settlement agreement provides for a payment of $3.275 million in cash (the "Settlement Amount") into a settlement fund to resolve all claims in this action. The $3.275 million has been paid into an escrow account in accordance with the terms of the Stipulation.

The Stipulation also states that notice and administrative costs, as well as Lead Counsel's fees and expenses, will be paid from the settlement fund. The remainder of the fund will be distributed to eligible Class Members. The Stipulation does not specify an allocation between Plaintiff's counsel and the class, leaving that issue for Lead Plaintiff's application to this Court.

IV. JURISDICTION

This Court has subject-matter jurisdiction over Plaintiffs' claims under *§ 22* of the Securities Act, *15 U.S.C. § 77v*, as well as under the general federal-question statute, *28 U.S.C. § 1331*. The Court has personal jurisdiction over defendants, plaintiffs, and all other Class Members. "In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper **[*10]** notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 306 (3d Cir. 1998)*.

V. CLASS CERTIFICATION

The Third Circuit has consistently observed that "*Rule 23* is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests." *In re Comm. Bank of N. Va., 622 F.3d 275, 291 (3d Cir. 2010)* (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 799 (3d Cir. 1995)* (alterations omitted). In order to approve a class settlement agreement, "a district court must determine that the requirements for class certification under *Federal Rule of Civil Procedure 23(a)* and *(b)* are met and must determine that the settlement is fair to the class under *Federal Rule of Civil Procedure 23(e)*." *In re Insurance Brokerage Antitrust Litigation, 579 F.3d 241, 257-58 (3d Cir. 2009)*; *In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 341 (3d Cir. 2010)*. ("a district court first must determine that the requirements for class certification under *Rule 23(a)* and *(b)* are met.")

"The requirements of *[Rule 23] (a)* and *(b)* are designed to insure that a proposed class has 'sufficient unity so that absent class members can fairly be bound by decisions of class representatives.'" *In re Prudential Ins. Co., 148 F.3d at 309* (quoting *Amchem, 521 U.S. at 621*). Under *Rule 23(a)*, the prerequisites to class certification are:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact

common to the class;

(3) the claims or defenses **[*11]** of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class

Fed. R. Civ. P. 23(a); see also *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. "Upon finding each of these prerequisites satisfied, a district court must then determine that the proposed class fits within one of the categories of class actions enumerated in *Rule 23(b)*." *Sullivan v. DB Investments, Inc., 667 F.3d 273, 296 (3d Cir. 2011)*.

Certification pursuant to *Rule 23(b)(3)*, applicable in cases like the one presently before the Court in which Plaintiffs seek monetary compensation, is permitted where (1) "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed.R.Civ.P. 23(b)(3)*; see *Collins v. E.I. DuPont de Nemours & Co., 34 F.3d 172, 180 (3d Cir. 1994)*; *Amchem, 521 U.S. at 618* ("Among current applications of *Rule 23(b)(3)*, the 'settlement only' class has become a stock device"). The "factual determinations necessary to make *Rule 23* findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of *Rule 23*." *In re Insurance Brokerage, 579 F.3d at 258* (citations and internal quotations omitted). Accordingly, **[*12]** "[c]lass certification is proper only if the [] court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23* are met." Id. (internal quotation marks omitted).

"Even if it has satisfied the requirements for certification under *Rule 23*, a class action cannot be settled without the approval of the court and a determination that the proposed settlement is fair, reasonable and adequate." *In re Prudential Ins. Co., 148 F.3d at 316* (internal quotation marks omitted); see *Fed. R. Civ. P. 23(e)(2)* (stating that a district court may approve a proposed settlement "only after a hearing and on finding that it is fair, reasonable, and adequate"). In In re Insurance Brokerage the Third Circuit affirmed the applicability of nine factors, established in *Girsh v. Jepson 521 F.2d 153, 157 (3d Cir. 1975)*, which are to be considered when determining the fairness of a proposed settlement. "In cases of settlement classes, where district courts are certifying a class and approving a settlement in tandem, they should be 'even more scrupulous than usual when examining the fairness of the proposed settlement.'" *In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410, 436 (3d Cir. 2016)*, as amended (May 2, 2016) (quoting *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004))*.

Finally, as the Supreme Court has observed, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present **[*13]** intractable management problems, for the proposal is that there be no trial. But other specifications of [*Rule 23*] -- those designed to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the settlement context." *Amchem, 521 U.S. at 620* (citation omitted); see Id. "[I]f a fairness inquiry under *Rule 23(e)* controlled certification, eclipsing *Rule 23(a)* and *(b)*, and permitting class designation despite the impossibility of litigation, both class counsel and court would

be disarmed." *Id. at 621*. Thus, it is important to "apply[] the class certification requirements of *Rules 23(a)* and *(b)* separately from [the] fairness determination under *Rule 23(e)*." *In re Prudential Ins. Co., 148 F. 3d at 308*.

Plaintiffs move to certify a class of investors who bought Roka common stock in, pursuant to, or traceable to, Roka's July 17, 2014 Initial Public Offering, including persons who bought Roka common stock between July 17, 2014, and March 26, 2015.

A. *Rule 23(a)* Factors

The Court first determines whether Plaintiffs have satisfied the prerequisites for maintaining a class action as set forth in *Rule 23(a)*.

1. Numerosity

With respect to numerosity, a party need not precisely enumerate the class members to proceed as a class action. *In re Lucent Techs. Inc., Sec. Litig., 307 F. Supp. 2d 633, 640 (D.N.J. 2004)*. "No minimum **[*14]** number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Rule 23(a)* has been met." *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* (citing 5 James Wm. Moore et al., Moore's Federal Practice S 23.22[1][a] (Matthew Bender 3d ed. 1999).

Here, Roka's stock was listed on the NASDAQ, and more than 14 million of its shares were traded during the Class Period and 2,631 potential class members have been identified. The numerosity requirement has been met.

2. Commonality

Commonality requires that "there are questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. The threshold for establishing commonality is straightforward: "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 596-97 (3d Cir. 2009)* (quoting *Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994))* (emphasis added). Indeed, as the Third Circuit pointed out, "[i]t is well established that only one question of law or fact in common is necessary to satisfy the commonality requirement, despite the use of the plural 'questions' in the language of *Rule 23(a)(2)*." *In re Schering Plough, 589 F.3d at 597 n.10*. Thus, there is a low threshold for satisfying this requirement. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001)*; *In re Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)* (highlighting that the threshold **[*15]** of commonality is not high (quotations and citations omitted)).

Moreover, this requirement does not mandate that all putative class members share identical claims, see *Hassine v. Jeffes, 846 F.2d 169, 176-77 (3d Cir. 1988)*, and that "factual differences among the claims of the putative class members do not defeat certification." *Baby Neal, 43 F.3d at 56*. In that regard, class members can assert a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice. *Hassine, 846 F.2d at 177-78*. "Even where individual facts and circumstances do become important to the resolution, class treatment is not precluded." *Baby Neal, 43 F.3d at 56*.

Courts will usually find commonality if the plaintiffs charge defendants with a common course of misconduct - particularly where, like

here, the misrepresentations appeared in the Defendants' public statements that were disseminated to all investors. See, e.g., *In re Schering-Plough Corp./ENHANCE Sec. Litig., No. CIV.A. 8-397 DMC/JAD, 2012 U.S. Dist. LEXIS 138078, 2012 WL 4482032, at *4 (D.N.J. Sept. 25, 2012)*.

3. Typicality

Rule 23(a)(3) requires that the representative's claim be typical of those of the members because they focus on similar aspects of the alleged claims." *Newton, 259 F.3d at 182*. "Both criteria seek to assure that the action can be practically and efficiently maintained and that the interests of the **[*16]** absentees will be fairly and adequately represented." *Baby Neal, 43 F.3d at 56*; see *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*. Despite their similarity, commonality - like numerosity - evaluates the sufficiency of the class itself, and typicality - like adequacy of representation - evaluates the sufficiency of the named plaintiff. See *Hassine, 846 F.2d at 177 n.4*; *Weiss v. York Hosp., 745 F.2d 786, 810 (3d Cir. 1984)*, cert. denied, *470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985)*.

Specifically, *Rule 23(a)(3)* requires that "the claims . . . of the representative parties [be] typical of the claims of the class." See *Fed. R. Civ. P. 23(a)(3)*. Typicality acts as a bar to class certification only when "the legal theories of the named representatives potentially conflict with those of the absentees." *Georgine v. Amchem Prods., 83 F.3d 610, 631 (3d Cir. 1996)*; *Newton, 259 F.3d 183*. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Id. at 184*. In other words, the typicality requirement is satisfied as long as representatives and the class claims arise from the same event or practice or course of conduct and are based on the same legal theory. *Brosious v. Children's Place Retail Stores, 189 F.R.D. 138, 146 (D.N.J. 1999)*; *Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir.1992)* ("Factual differences will not render a claim atypical if the claim arises from the same event or practice of course of conduct that gives rise to the claims of the class members, and it is based on the same legal theory.").

Here, Lead Plaintiff's **[*17]** claims are similar to those of the other members of the Class. As evidenced by his sworn Certification, Lead Plaintiff bought Roka stock during the Class Period. Just like the other members of the proposed Class, Lead Plaintiff bought Roka stock in response to, or pursuant to or traceable to, Roka's Registration Statement, which allegedly contained false statements, and suffered damages when the false statements materialized. His claims stand or fall with those of the class. Accordingly, Lead Plaintiff's claims are typical.

4. Adequacy

A class may not be certified unless the representative class members "will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. "*Rule 23(a)*'s adequacy of representation requirement 'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" *In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 343 (3d Cir. 2010)* (quoting *Amchem, 521 U.S. at 625*). Class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." Id. (citation and internal quotation marks omitted).

This requirement has traditionally entailed a two-pronged inquiry: first, the named plaintiff's

interests must be sufficiently aligned with the interests of the absentees; and second the **[*18]** plaintiff's counsel must be qualified to represent the class. *General Motors, 55 F.3d at 800*; *Newton, 259 F.3d at 187* (same). A named plaintiff is "adequate" if his interests do not conflict with those of the Class. *In re Prudential Ins. Co., 148 F.3d at 312*. Pursuant to *Rule 23(g)*, adequacy of class counsel is considered separately from the determination of the adequacy of the class representatives. Both prongs of the adequacy requirement are satisfied here.

(i) Adequacy of the Proposed Class Representative

Lead Plaintiff has no interests that are antagonistic to those of the members of the proposed Class and has no unique defenses from the proposed Class. Lead Plaintiff purchased Roka stock traceable to the Registration Statement. Lead Plaintiff, on his own behalf and on behalf of all members, seeks to recover from Defendants damages caused by Defendants' alleged unlawful conduct. Lead Plaintiff's interests are congruent with and not antagonistic to other Class Members' interests.

(ii) *Rule 23(g)* Adequacy of the Proposed Class Counsel

Rule 23(g) requires a court to assess the adequacy of proposed class counsel. To that end, the court must consider the following: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience **[*19]** in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *Nafar v. Hollywood Tanning Sys., Inc., No. 06-CV-3826 DMC, 2008 U.S. Dist. LEXIS 61439, 2008 WL 3821776, at *7 (D.N.J. Aug. 12, 2008)*. Lead Counsel has successfully prosecuted securities class actions in courts throughout the country. In this action, Lead Counsel has devoted considerable time to, inter alia, researching and filing the initial and amended complaints, responding to Defendants' motion to dismiss, and reaching and negotiating the specific terms of the Settlement Agreement. Lead Counsel should be appointed as counsel to the Settlement Class.

B. *Rule 23(b)(3)* Factors: Common Questions Predominate and the Class Is Superior to Other Methods of Adjudication

After meeting the threshold requirements of *Rule 23(a)*, a plaintiff must establish that the proposed class meets the requirements of *Rule 23(b)(3)*. To certify a class under *Rule 23(b)(3)*, the Court must find that: [T]he questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of **[*20]** the controversy. *Rule 23(b)(3)* requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*. In this case, both considerations weigh in favor of class certification.

Here, Lead Plaintiff satisfies the predominance and superiority criteria of *Rule 23(b)(3)*. In determining whether common questions predominate, courts have focused on the claims of liability against defendants. See *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977)*. *Smith, 2007 U.S. Dist. LEXIS 30001, 2007 WL 1217980, at * 9* (citing cases)("The focus of the predominance inquiry is on liability, not damages."). When common

questions are a significant aspect of a case and they can be resolved in a single action, class certification is appropriate. See 7A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 1788, at 528 (1986).

Here, the existence of common questions and their predominance over individual issues are exemplified by the fact that if every class member were to bring an individual action, each plaintiff would be required to demonstrate the same omissions or misrepresentations to prove liability. Thus, this case is an example of the principle that the predominance requirement is "readily met" in many securities class actions. *Amchem, 521 U.S. at 625*. The Rule **[*21]** sets out several factors relevant to the superiority inquiry: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. Essentially, the 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 Ins. Co., 148 F.3d at 316* (internal citations and quotations omitted); *In re Warfarin, 391 F.3d at 532-33*. Many, if not most, of the Class members are individuals for whom prosecution of a costly damages action on their own behalf is not a realistic or efficient alternative. The District of New Jersey is an appropriate forum because all Defendants reside here.

As to *Rule 23(b)(3)(D)*, there will be no difficulties in managing this Settlement Class. This Court balances the fairness and efficiency of certifying a class against other possible methods of adjudication. Without **[*22]** a class action, investors who have been defrauded by securities law violations but whose losses do not run into several million dollars would likely have no practical recourse. See *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* ("[m]ost of the plaintiffs would have no realistic day in court if a class action were not available.") And if individuals do have the means to litigate their own action, absent a class action, this Court might have to try numerous lawsuits. *Good v. Nationwide Credit, Inc., 314 F.R.D. 141, 2016 WL 929368, at *8 (E.D. Pa. 2016)*; see also *Smilow, 323 F.3d at 41* ("The core purpose of *Rule 23(b)(3)* is to vindicate the claims of ... groups of people whose individual claims would be too small to warrant litigation"). Thus, a class action is the superior method of adjudication and satisfies *Rule 23(b)(3)*.

Moreover, solely for the purposes of settlement, Defendants do not dispute that the Class should be certified in accordance with *Rule 23(b)(3)*.

Finally, when confronted with a request for settlement-only class certification, the Court need "not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem, 521 U.S. at 620*.

As stated earlier, common legal and factual questions are shared amongst the class members and Plaintiffs in this action. Specifically, class **[*23]** members and Plaintiffs challenge the same alleged omissions or misrepresentations. Having weighed all the factors and considered all the requirements of class certification, the Court finds that it is appropriate to certify the class for settlement purposes.

VI. ADEQUACY OF NOTICE

The Court ruled in the Preliminary Approval Order that the class-notice materials and the proposed method of dissemination (by first-class mail and publication) met the requirements of due process, *Rule 23 of the Federal Rules of Civil Procedure*, and the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), "constitute[d] the best notice practicable under the circumstances, and constitute[d] due and sufficient notice to all persons entitled to such notice." Now that notice has been provided to the Class, the Court reaffirms its earlier findings concerning the adequacy of the Notice Program.

Where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action, the Court must consider *Fed. R. Civ. P. 23(c)(2)*'s notice requirements for class certification as well as *Rule 23(e)*'s notice requirements for settlement or dismissal. See, e.g., *In re Prudential Ins. Co., 148 F.3d at 326-27*.

For classes certified under *Fed. R. Civ. P. 23(b)(3)*, such as the Class in this action, *Rule 23(c)(2)(B)* requires "the best notice that is practicable under the circumstances, **[*24]** including individual notice to all members who can be identified through reasonable effort." The Rule also prescribes that the notice state "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under *Rule 23(c)(3)*." *Id.* *Rule 23(e)* is less specific, requiring only that notice of a proposed settlement be given "in a reasonable manner." Thus, if the notice satisfies *Rule 23(c)*, it will also satisfy *Rule 23(e)*. See, e.g ., *In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 448 (S.D.N.Y. 2004)*. The Constitution's *Due Process Clause* also imposes certain minimum notice requirements. As the Supreme Court has observed, however, the "'mandatory notice pursuant to [*Rule 23(c)(2)*] . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.'" *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-74, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)* (quoting *Fed. R. Civ. P. 23*, 1966 Amendment Advisory Comm. Note to *Subdiv. (d)(2)*). Due process considerations are therefore satisfied if the notice conforms to *Rule 23(c)(2)*.

Additionally, the Securities Act, in provisions added by the Private **[*25]** Securities Litigation Reform Act of 1995 ("PSLRA"), imposes certain notice requirements specifically for settlements of securities class actions. *See* *15 U.S.C. § 77z-1*. The PSLRA requires that the notice contain the following information:

- Statement of recovery — "[t]he amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis";

- Statement of potential outcome of case — the amount of damages per share recoverable if the plaintiffs were to prevail on every claim, but, if the parties are unable to agree on damages, "a statement from each settling party concerning the issue or issues on which the parties disagree";

- Statement of attorneys' fees — a statement of fees and costs to be applied for in the aggregate and on an average per-share basis;

- Identification of lawyers' representatives — the name, telephone number, and address of counsel available to answer

questions; and

• Reasons for settlement — "[a] brief statement explaining the reasons why the parties are proposing the settlement."

Id. The notice must also include a cover page summarizing all of these topics. *Id.*

A. Best Practicable Notice Methodology

The means by which **[*26]** notice was provided to potential Class Members met all applicable requirements for adequacy of notice and due process. The Individual Notice was sent by first class mail to all potential Class Members who could be identified through reasonable efforts — meaning all potential Class Members for whom names and addresses were available. In addition to mailing the Individual Notices to all potential Class Members for whom it had names and addresses, the Claims Administrator mailed the Individual Notices to thousands of nominees and other institutions that might have purchased Roka common stock beneficially owned by potential Class Members. The Claim Administrator also posted the Individual Notice (as well as other documents relating to the lawsuit and the settlement) on its website. The website and the notice materials provided telephone numbers (including a toll-free number) that potential Class Members could call if they had questions. The Claims Administrator also arranged for publication of the Court-approved Summary Notice in *The Wall Street Journal* and *Investor's Business Daily* as well as on wire services.

The Summary Notice contained pertinent information about the class action and **[*27]** settlement required by *Rules 23(c)(2)* and *23(e)* and by principles of due process.

These procedures fully satisfied *Rule 23(c)(2)*'s requirement of individual notice "to all members who can be identified through reasonable effort." See, e.g., *In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. at 449* (notice by first-class mail, publication of summary notice, posting on website, and toll-free number collectively satisfied *Rule 23(c)(2)*'s requirements).

B. Sufficient Content of the Notice

The potential Class Members will have received the "best notice that is practicable under the circumstances" as required by *Rule 23(c)(2)* if the notice "contain[s] sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re Nat'l Football League Players Concussion Injury Litig., 821 F.3d 410, 435 (3d Cir. 2016)* (internal quotations omitted). The notice in this case met that standard.

The notice materials informed potential Class Members of the relevant aspects of the claims in the Complaint and the terms of the proposed settlement, including:

• The nature of the case, a statement of the claims and defenses, and a statement about how the settlement fund will be allocated among eligible Class Members if the proposed settlement is approved;

• The right of potential **[*28]** Class Members to exclude themselves from the Class, to object to any aspect of the proposed settlement, or to appear at the Fairness Hearing — and the processes and deadlines for doing so;

• The date of the Fairness Hearing;

• The terms of the release of claims; and

- The binding effect of any judgment - whether favorable or not - on all persons who do not exclude themselves from the Class, and the impact on Class Members if the proposed settlement is approved.

The content of the notice thus complied with *Rule 23(c)(2)*. See, e.g., *In re Ins. Brokerage Antitrust Litig., 282 F.R.D. 92, 109-10 (D.N.J. 2012)* (approving settlement notices after finding that they included all essential elements to properly apprise class members of their rights). In addition, consistent with the requirements of the PSLRA, the Individual Notice:

- Set out the amount of the settlement on an aggregate and a per-share basis, as well as the proposed plan of distribution;

- Informed potential Class Members of the parties' disagreement regarding damages and explained each party's position on that issue;

- Stated the amount of attorneys' fees and expenses sought on an aggregate and a per-share basis;

- Provided potential Class Members with the name, address, and telephone number of Lead Counsel; and

- Explained **[*29]** why the parties proposed the settlement.

The Individual Notice thus met the PSLRA's requirements. See, e.g., *In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d 235, 254-55 (D.N.J. 2000)* (approving notice based on consideration of PSLRA factors), *aff'd*, *264 F.3d 201 (3d Cir. 2001)*.

Accordingly, the notice procedures and the contents of the Individual Notice and the Summary Notice satisfied all applicable requirements, including those of *Rules 23(c)(2)* and *23(e)*, the PSLRA, and the U.S. Constitution. See, e.g., *In re Prudential Ins. Co., 148 F.3d at 328*; *In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 119-20 (D.N.J. 2002)* (approving similar notice procedures and content). The Court therefore reaffirms its finding in the Preliminary Approval Order that the notices and notice methodology were the best practicable under the circumstances and met all applicable requirements and finds that the Notice Program was implemented as required by the Preliminary Approval Order.

VII. FINAL APPROVAL OF SETTLEMENT

At the outset, the Court expresses that the law encourages and favors settlement of civil actions in federal courts, particularly in complex class actions. *In re Warfarin, 391 F.3d at 535*; see *In re General Motors, 55 F.3d 768, 784 (3d Cir. 1995)*("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"). Accordingly, when a settlement is reached on terms agreeable to all parties, it is to be encouraged. **[*30]** *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1314 n.16 (3d Cir. 1993)*. The Third Circuit applies "an initial presumption of fairness in reviewing a class settlement when: (1) the negotiations occurred at arms [*sic*] 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 Nat'l Football League, 821 F.3d at 436* (internal quotations omitted). This presumption applies even where, as here, "the settlement negotiations preceded the actual certification of the class . . . ." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004)*.

This Court observes that Judge Hochberg has signed a Declaration (submitted with plaintiffs' motion papers) attesting to the integrity of the

mediation process and recommending the proposed settlement as "reasonable, hard-fought, arm's length, and fairly reflective of the risks and potential rewards of the claims being settled" [Hochberg Decl., ¶ 9]. The Court finds that the negotiations between the parties were at arm's length. As will be made clear in the Court's further analysis, the other relevant factors in this case indicate that the proposed settlement is entitled to an initial presumption of fairness.

Nevertheless, a class action settlement **[*31]** may not be approved under *Rule 23(e)* without a determination by this Court that the proposed settlement is "fair, reasonable and adequate." See *In re Cendant, 264 F.3d at 231*; see also *Fed. R. Civ. P. 23(e)(1)(A)*. The Third Circuit has on several occasions stressed the importance of *Rule 23(e)*, noting that "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members." *In re General Motors, 55 F.3d at 785* (citations and quotations omitted); see also *Amchem, 521 U.S. at 623* (noting that the *Rule 23(e)* inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise") (citations omitted). However, in cases such as this, where settlement negotiations precede class certification and approval for settlement and certification are sought simultaneously, the Third Circuit requires district courts to be even "more scrupulous than usual" when examining the fairness of the proposed settlement. See *In re General Motors, 55 F.3d at 805*. This heightened standard is intended to ensure that class counsel has engaged in sustained advocacy throughout the course of the proceedings, particularly in settlement negotiations, and has protected the interests **[*32]** of all class members. See *In re Prudential Ins. Co., 148 F.3d at 317*.

As this Court observed earlier, the Third Circuit has articulated a set of nine "Girsh factors" that courts should consider when determining the fairness of a proposed settlement:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
>
> (7) the ability of the defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and]
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (internal quotations omitted); see, e.g., *In re Johnson & Johnson Deriv. Litig., 900 F. Supp. 2d 467, 479-85 (D.N.J. 2012)* (reciting and applying the Girsh factors). "The settling parties bear the burden of proving that the Girsh factors weigh in favor of approval of the settlement." *In re Pet Food Prods., 629 F.3d at 350*. "A district court's findings under the Girsh test are those of fact." *In re Nat'l Football League, 821 F.3d at 437*, as amended (May 2, 2016).

Since Girsh, the Third Circuit has held that, "because of a 'sea-change **[*33]** in the nature

of class actions' after Girsh was decided thirty-five years ago, it may be helpful to expand the Girsh factors to include, when appropriate, the following non-exclusive factors":

> [1] [T]he maturity of the underlying substantive issues . . . ; [2] the existence and probable outcome of claims by other classes and subclasses; [3] the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved - or likely to be achieved - for other claimants; [4] whether class or subclass members are accorded the right to opt out of the settlement; [5] whether any provisions for attorneys' fees are reasonable; and [6] whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re Pet Food Prods., 629 F.3d at 350 (quoting *In re Prudential Ins. Co., 148 F.3d at 323*). "Unlike the Girsh factors, each of which the district court must consider before approving a class settlement, the Prudential considerations are just that, prudential." *In re Nat'l Football League Players, 821 F.3d at 437* (internal quotations omitted). The Girsh and Prudential factors are well established law and their continued application in the class settlement context has been reaffirmed by Third Circuit as recently as April of this year. See *In re Nat'l Football League Players, 821 F.3d at 437*.

The proposed **[*34]** settlement here satisfies the Girsh factors as well as the applicable Prudential considerations.

A. Complexity, Expense, and Likely Duration of Litigation

The first Girsh factor captures "the probable costs, in both time and money, of continued litigation." *In re Gen. Motors, 55 F.3d at 812*. "By measuring the costs of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably." *Id.* "Settlement is favored under this factor if litigation is expected to be complex, expensive and time consuming." *In re Royal Dutch/Shell Transp. Sec. Litig., 2008 U.S. Dist. LEXIS 124269, 2008 WL 9447623, at *17 (D.N.J. Dec. 9, 2008)*.

"Federal securities class actions by definition involve complicated issues of law and fact." *Id.* This case is no exception. Continued litigation and trial of this action would require the parties to investigate and the Court to adjudicate numerous complicated factual issues, including:

- Each of Roka's customers' experience with the *Listeria* assay before Roka promulgated its new process;
- Each customer's experience with the *Listeria* assay after promulgation of the new process;
- The extent to which each customer was following the new workflow and/or adhering to good laboratory practices;
- The information that Roka (and especially Roka's management and Board) received about each customer's ability **[*35]** to use the *Listeria* assay successfully - both before and after the new process was promulgated;
- Roka's belief that customers would be able to employ the new workflow and that the new process would suffice to solve customers' false-positive problems;
- Roka's consideration of the prospect of adopting a modified, "detuned" *Listeria* assay;
- Roka's financial position; and

• Roka's public disclosures relating to all of the above matters.

Plaintiff's Post Settlement Discovery involved reviewing over 8,000 documents; full-blown discovery would involve hundreds of thousands. Plaintiff would have to review vast stores of internal correspondence, correspondence with underwriters and customers, and scientific materials and test results. The Parties would crisscross the country taking depositions of current and former employees of Roka, Roka's customers, and the IPO underwriters, at great cost. Plaintiff identified several potential witnesses who reside in various parts of California; several who reside in Ohio; several who reside in New Jersey and New York; and several who reside in Pennsylvania.

In addition, Defendants would take the depositions of Plaintiffs, and of Plaintiffs' experts (who reside **[*36]** in North Carolina and Buffalo), and Plaintiffs would take the depositions of Defendants' experts. To survive summary judgment, and at trial, Plaintiff would require expert testimony on — at a minimum — scientific issues, class action damages, and loss causation. *In re Pfizer Inc. Sec. Litig., No. 4-CV-9866-LTS-HBP, 2014 U.S. Dist. LEXIS 92951, 2014 WL 3291230, at *3 (S.D.N.Y. July 8, 2014)*, vacated on other grounds, *819 F.3d 642 (2d Cir. 2016)* (granting summary judgment because "Plaintiffs' failure to proffer admissible [expert] loss causation and damages evidence is fatal to Plaintiffs' claims."). Indeed, while this case is still in the pleadings stage, Plaintiff has already consulted with experts on two of these topics (scientific issues and damages).

In addition, the parties would need to litigate and the Court would need to adjudicate damages issues and the loss-causation defense available to defendants under the Securities Act. Many of those issues would involve complex expert testimony on pathogen testing, damages, and loss causation. Continued litigation of this case would therefore be complex, expensive, and lengthy. See, e.g. *In re Genta Sec. Litig., No. CIV. A. 04-2123 JAG, 2008 U.S. Dist. LEXIS 41658, 2008 WL 2229843, at *3 (D.N.J. May 28, 2008)* ("This [securities fraud] action involves complex legal and factual **[*37]** issues, and pursuing them would be costly and expensive."); *In re Datatec Sys., Inc. Sec. Litig., No. 04-CV-525 (GEB), 2007 U.S. Dist. LEXIS 87428, 2007 WL 4225828, at *3 (D.N.J. Nov. 28, 2007)* ("[R]esolution of [accounting and damages issues] would likely require extensive and conceptually difficult expert economic analysis. . . . Trial on [scienter and loss causation] issues would lengthy and costly to the parties.").

This factor supports approval.

B. Class's Reaction to Settlement

The second *Girsh* factor "gauge[s] whether members of the class support the settlement." *In re Prudential Ins. Co., 148 F.3d at 318*. A lack of significant objections by class members weighs in favor of approving the settlement. *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 578 (E.D. Pa. 2003)*("unanimous approval of the proposed settlement[ ] by the class members is entitled to nearly dispositive weight in this court's evaluation of the proposed settlement."); see also *Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1313, n.15 (3d Cir. 1993)* (stating that "silence constitutes tacit consent to the agreement" where 30 objectors out of approximately 1.1 million shareholders was considered an "infinitesimal number").

Here, 4,155 sets of notice materials were mailed out to potential class members and nominees. To date, no Class Member has objected to any aspect of the Settlement. Bravata Dec. at ¶11. The deadline to object to the Settlement was October 20, 2016. Id. The

deadline to seek exclusion was October 5, 2016. *Id.* at ¶10. To date, only **[*38]** one Class Member has sought exclusion from the Settlement. *Id.* at ¶10; Rosen Dec. Ex. 4. The Class Member seeking exclusion, moreover, would not be entitled to any share of the settlement; because he bought shares for less than the post-disclosure price, he has no recognized loss. Rosen Dec. ¶12. Accordingly, the reaction of the Settlement Class has been overwhelmingly favorable, thus supporting final approval.

C. Stage of Proceedings and Amount of Discovery Completed

The goal of the third Girsh factor is to "capture[] the degree of case development that class counsel accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant Corp. Litig., 264 F.3d 201, 235 (3d Cir. 2001)* (citing *General Motors, 55 F.3d at 813*). "Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties. . . . Indeed, courts in this district have approved settlements while the case was in the pre-trial stage and formal discovery had not yet commenced." *In re Johnson & Johnson, 900 F. Supp. 2d at 482*; accord, e.g., *In re Nat'l Football League, 821 F.3d at 436-37* ("To the extent objectors ask us to require formal discovery before presuming **[*39]** that a settlement is fair, we decline the invitation. In some cases, informal discovery will be enough for class counsel to assess the value of the class claims and negotiate a settlement that provides fair compensation."). Courts in this Circuit frequently approve class action settlement despite the absence of formal discovery. See, e.g., *Schuler v. Medicines Co., No. CV 14-1149 (CCC), 2016 U.S. Dist. LEXIS 82344, 2016 WL 3457218, at *7 (D.N.J. June 24, 2016)* (approving settlement prior to discovery because of counsel's investigation); *In re Johnson & Johnson, 900 F. Supp.2d at 483* ("Even settlements reached at a very early stage and prior to formal discovery are appropriate where there is no evidence of collusion and the settlement represents substantial concessions by both parties.")

Here, Plaintiff and his counsel had a sufficient understanding of their claims and defenses in this action. Final approval is appropriate here because, by the time the parties negotiated the Stipulation, Lead Counsel (*i*) had had an opportunity to review the relevant public facts pertaining to plaintiffs' claims, (*ii*) had consulted with damages and forensic accounting experts, (*iii*) had engaged in briefing on defendants' motion to dismiss, (*iv*) had participated in mediation with a respected mediator, and (*v*) had received factual **[*40]** information from Roka in connection with the mediation. Lead Counsel also was later able to conduct confirmatory discovery, with access to more than 377,000 pages of documents and interviews of three present or former Roka officials.

These efforts enabled plaintiffs and their attorneys to explore the facts and circumstances underlying their claims and to assess the potential risks and rewards of litigating versus settling. Accordingly, the adequacy of the discovery conducted to date favors approval of the settlement. See, e.g., *In re Johnson & Johnson, 900 F. Supp. 2d at 482-83* (approving derivative settlement without formal discovery, but where the parties had "engaged in informal sharing of documents" and "extensive motion practice" and where plaintiffs' counsel had reviewed publicly available materials and consulted with experts).

D. Risks of Establishing Liability and Damages

"The fourth and fifth [*Girsh*] factors survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement." *In re Johnson & Johnson, 900 F. Supp. 2d at 483* (internal quotations omitted). "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation **[*41]** might have been had class counsel elected to litigate the claims rather than settle them." *General Motors, 55 F.3d at 814*. In making this assessment, however, "a court should not conduct a mini-trial and must, to a certain extent, give credence to the estimation of the probability of success proffered by class counsel." *In re Lucent Techs., Inc. Sec. Litig., 307 F. Supp. 2d 633, 644-45 (D.N.J. 2004)* (internal quotations omitted). In complex cases, "[t]he risks surrounding a trial on the merits are always considerable." *Weiss v. Mercedes-Benz of N. Am., 899 F. Supp. 1297, 1301 (D.N.J. 1995)*.

1. Liability

Plaintiff faced several obstacles if this case progressed. Chiefly, as Defendants pointed out in their Motion to Dismiss and the Amended Complaint acknowledged, the IPO Registration Statement warned that Roka had experienced false positives, and had had to redesign the Listeria test's testing process to address the problem. The IPO Registration Statement also disclosed that the new workflow might fail and that Roka might lose customers or traction as a result. *Id.*

Plaintiff alleged, based on the accounts of former Roka employees, that Roka's new process already had failed and that it already had lost customers as a result, thus making Defendants' statements actionable. But the Post-Settlement Discovery complicates certain of the inferences to be drawn from Plaintiff's **[*42]** factual allegations:

> a. It is true that Roka lost Hillshire Farm as an indirect customer (through a contract lab). But notwithstanding any pre-IPO Hillshire *Listeria* false positive issues, Hillshire did not abandon Roka's tests until after the IPO. Rosen Dec. ¶9.a.
>
> b. It is true that Roka lost customers before the IPO because of the *Listeria* false positives problem as Plaintiff alleges. But all but one of these were customers who had simply accepted Instruments for evaluation, while the existing customer was not a critical Roka customer. Rosen Dec. ¶9.b.
>
> c. It appears that many customers, though not all, did successfully adopt the new workflow. Rosen Dec. ¶9.c.

While Lead Plaintiff contends he could nevertheless have establish liability, Plaintiff admits that the facts unearthed in Post-Settlement Discovery may have presented a substantial obstacle to recovery.

Beyond these risks, even if Plaintiff prevailed on liability and damages at trial, Defendants would appeal the verdict, leading to greater expenses, further delays, and a recovery for the Class that may be less than the Settlement Amount or possibly no recovery at all. This Settlement allows the Class to recover promptly without **[*43]** incurring additional risk or costs.

2. Damages

As to the amount of damages, while Plaintiff's prima facie damages in a *Section 11* action are limited only by (as relevant here) the difference between the offering price and the

value of a security at the time the suit was filed, Defendants have available to them an affirmative defense of negative causation. *15 U.S.C. §77k(e)*. In applying this negative causation defense, courts limit recovery to the drop in stock price immediately following a corrective disclosure. See *In re Royal Dutch/Shell Transp. Sec. Litig., 404 F. Supp. 2d 605, 610 (D.N.J. 2005)* ("Both prior to and after the enactment of the PSLRA in 1995, "[t]he damages of a purchaser were always understood to be the difference between the purchase price and the true value of the shares (adjusted for any negative causation) as disclosed after the revelation of the fraud to the public, followed by a reasonable period (usually no longer than a week or ten days) during which the market took cognizance of the fraud and the publicly traded price was presumed, under the 'efficient market' hypothesis ..., to reflect an adjustment for the fraud.") (quotation omitted). Here, that means the Class could recover for the stock drops on November 7, 2014, of $5.34, and potentially on March 27 and 30, 2015, **[*44]** of $0.88.

Defendants, however, would also argue that the stock drops following the corrective disclosures were caused by things unrelated to the alleged misrepresentations. First, Defendants have already argued that the damages on March 27 and 30, 2015, were not caused by the materialization of the concealed risk, because the risk had already been fully revealed on November 7, 2014. Defendants argue, and the Post-Settlement Discovery appears to have substantiated, that the reason Roka was unable to secure new customers after the November 6, 2014 earnings call was that on the call it had publicly committed to developing a new *Listeria* test. Defendants' argument, if accepted, cuts damages from $30.9 million to $26.6 million.

Second, the Registration Statement did disclose that there was some risk that the new process would not work and that Roka would lose customers as a result. Defendants would argue that a portion of the November 7, 2014 drop was caused by the materialization of this disclosed risk — not by the fact that, as of the time of the IPO, the risk of losing customers had already occurred. Plaintiff would have to respond to Defendants' argument with expert evidence. Thus, there **[*45]** was substantial risk that the amount of damages recoverable at trial would be significantly reduced.

E. Risks of Maintaining Class Certification

The risk of obtaining and maintaining class certification through trial also supports approval of the Settlement. Plaintiffs had not yet moved for class certification at the time of the settlement. Defendants would oppose class certification if this case proceeded. Plaintiff would have to rely on expert testimony to establish that damages can be established on a class-wide basis. *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co., 301 F.R.D. 116, 141-42 (S.D.N.Y. 2014)* (certifying class for liability only in *Section 11* case because plaintiffs had not provided an expert model permitting class-wide adjudication of damages). Defendants' expert would conclude that damages could not be established on a class-wide basis, resulting in a battle of the experts at class certification and trial that Plaintiff might lose. See id. Should Defendants succeed, the Court would need to hold mini-trials on damages; it is not clear whether most investors would appear for such trials, given the small amounts of money at stake. The risk that the Court would deny class certification further supports the settlement. See *Rent-Way, 305 F. Supp. 2d at 506*.

Moreover, even if the Class was certified **[*46]** for other than settlement purposes, "[t]here will always be a 'risk' or possibility of decertification, and consequently the court can

always claim this factor weighs in favor of settlement." *In re Prudential Ins. Co., 148 F.3d at 321*; see also *In re Rent-Way Securities Litigation, 305 F. Supp. 2d 491, 506-07 (W.D. Pa. 2003)* ("[A]s in any class action, there remains some risk of decertification in the event the Propose[d] Settlement is not approved. While this may not be a particularly weighty factor, on balance it somewhat favors approval of the proposed Settlement.").

F. Defendants' Ability to Pay

This *Girsh* factor "addresses whether Defendants could withstand a [monetary] judgment for an amount significantly greater than the [proposed] Settlement." *In re Johnson & Johnson, 900 F. Supp. 2d at 484* (internal quotations omitted); *Cendant, 264 F.3d at 240* (same).

Since its founding, Roka has consistently incurred losses, with an accumulated deficit of $109.1 million by March 31, 2014. The accumulated deficit reached $185.3 million by June 30, 2016. [Roka BioScience, Inc., Form 10-Q for the 3 months ended June 30, 2016, at 3, filed August 5, 2016]. Yet Roka only had cash, cash equivalents, and short-term investments of $16.8 million as of June 30, 2016. *Id.* Indeed, at the time that the motion briefs were filed, Roka's market capitalization was about $11 million — down 95% since the IPO.

Defendants held **[*47]** three applicable insurance policies, each with a face amount of $5 million. Yet these policies deplete as they pay Defendants' attorneys' fees. Given the costs of modern litigation, these policies would be mostly depleted by the time of trial. Thus, the Settlement today is more than what Defendants could potentially pay down the road after their insurance coverage is depleted through further litigation. Given Roka's financial state and the status of its insurance policies, this factor weighs in favor of approval.

G. Range of Reasonableness of Settlement Fund

"The last two [Girsh] factors evaluate whether the settlement represents a fair and good value for a weak case or a poor value for a strong case." *In re Johnson & Johnson, 900 F. Supp. 2d at 484* (internal quotations omitted). "In conducting this evaluation, it is recognized that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and [courts should] guard against demanding to[o] large a settlement based on the court's view of the merits of the litigation." *Id. at 484-85* (internal quotations omitted). These factors inquire "'whether the settlement is reasonable in light of the best possible recovery and the risks the parties **[*48]** would race if the case went to trial.'" *Pro v. Hertz Equip. Rental Corp., No. CIV.A. 06-3830 DMC, 2013 U.S. Dist. LEXIS 86995, 2013 WL 3167736, at *5 (D.N.J. June 20, 2013)* (quoting *Prudential, 148 F.3d at 322*).

According to Cornerstone Research, in 2015, cases with damages of less than $50 million settled for a median of 6.7% of total maximum estimated damages. [Laarni T. Bulan, *et al*, Securities Class Action Settlements: 2015 Review and Analysis, at 9 (Rosen Dec. Ex. 6)]. According to Lead Plaintiffs' memorandum in support of preliminary approval [at 9], "Lead Plaintiff's maximum estimate of class damages (the Class wins on every point and the factfinder accepts the Class's damages model) is approximately $30.9 million," so the Settlement Amount of $3.275 million "recovers about 10.5% of maximum potential damages" — above the median recovery in securities class action settlements. Even taking into

account Defendants' claim that Plaintiff could not recover for the March 27-30 price drop, the Settlement Amount of $3.275 million, against maximum likely damages of $26.6 million, recovers 12.3% of maximum damages - almost twice as much as the median settlement. After the parties initial briefing, Lead Plaintiff submitted a reply in further support of the settlement on November 2, 2016. In **[*49]** the Reply, Lead Counsel represented that, as of November 2, 2016, SCS (the claims administrator) had received 1,791 claim forms, including 482 valid claims representing recognized losses of $17,698,523 and 44 deficient claims representing losses of $2,373,742. At the November 9, 2016 hearing, Lead Counsel represented on the record that, accordingly, the actual recovery in this case would be between 16% and 18.5% of claimed losses, depending upon how many of the deficient claims, if any, are ultimately cured. Actual recovery will thus exceed either of the parties initial estimates and will be well above the median settlement in this area.

The recovery is particularly noteworthy in light of the obstacles to recovery. In this case, Plaintiff could not point to an accounting restatement, derivative action brought on behalf of the company, or civil or criminal government investigation. Nor could Plaintiff point to an admission of wrongdoing from Roka, nor even an internal investigation of wrongdoing.

Courts in this Circuit have routinely approved settlements providing similar percentages of recovery - or even far less. See, e.g., *In re Viropharma Inc. Sec. Litig., 2016 U.S. Dist. LEXIS 8626, 2016 WL 312108, at *14 (E.D. Pa. Jan. 25, 2016)* (approving settlement of 9% to 10% of maximum estimated loss, **[*50]** and noting that, between 1996 and 2014, median settlement amount was 4.8% of projected investor losses ranging between $50 million and $99 million); *In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706, 714-15 (E.D. Pa. 2001)* (noting that securities class actions that settled between 1995 and 1999 recovered between 5.5% and 6.2% of estimated losses); see also, e.g., *In re Amer. Bus. Fin. Servs. Inc. Noteholders Litig., 2008 U.S. Dist. LEXIS 95437, 2008 WL 4974782, at *3, *9, *13 (E.D. Pa. Nov. 21, 2008)* (approving settlement for 2.5% of damages); *In re Ikon Office Solutions, Inc., Sec. Litig., 194 F.R.D. 166, 183-84 (E.D. Pa. 2000)* (approving settlement for 5.2% to 8.7% of claimed damages).

The Court also observes that the mediator in this case, Judge Hochberg, declared that the Settlement "constitutes a good result for the plaintiffs". Hochberg Dec. ¶20.

The Settlement Amount is therefore well within the range of reasonableness. Having found that the *Girsh* factors weigh in favor of approval, the Court turns next to the Prudential factors.

H. Maturity of Underlying Issues and Existence of Other Litigation

The Third Circuit suggested in Prudential that courts may consider such additional factors as "the maturity of the underlying substantive issues" and the existence and probable outcomes of other individual and/or class actions involving the same underlying facts. *In re Prudential Ins. Co., 148 F.3d at 323*. Those considerations are inapposite here.

Unlike some other types of class actions (such as certain consumer and product-liability **[*51]** class actions), this securities class action does not present particularly novel legal or factual issues that need to mature before the Court can assess the fairness and adequacy of the proposed settlement. Nor have any other individual or class actions been filed against Roka concerning the IPO Registration Statement.

I. Availability of Opt-Out Rights

The Prudential court held that courts may also consider the availability of opt-out rights. *148 F.3d at 323*. Such rights exist here. Dissatisfied potential Class Members are free to exclude themselves from the proposed settlement if they follow the Court's instructions for opting out.

J. Reasonableness of Attorneys' Fees

The Prudential decision also authorizes consideration of the reasonableness of the plaintiffs' request for attorneys' fees. *Id.* The fee request in this case does not present any issues. First, the parties reached an agreement on the Settlement Amount without any discussion of fees, which will be paid out of the settlement fund in an amount approved by the Court. The Settlement Agreement itself says nothing about the amount of fees that plaintiffs may seek; nor does it provide that defendants will not object to a fee request below any particular **[*52]** amount. This case thus does not raise the specter of a "clear sailing" agreement, because the settlement does not provide either for "the payment of attorneys' fees separate and apart from class funds," *Laguna v. Coverall N. Am., Inc., 753 F.3d 918, 925* (internal quotations omitted), *vacated as* moot after settlement, *772 F.3d 608 (9th Cir. 2014)*, or for defendants' agreement not to contest class counsel's fee request up to a particular amount, see, e.g., *Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1990)* (describing "clear sailing agreement" as one in which defendant "would not contest the [fee] petition and would pay any sum up to [a specified amount] awarded by the district court").

Second, plaintiffs' fee request is independent of the proposed settlement. The Stipulation provides that the settlement — if approved — can take effect regardless of how the Court rules on plaintiffs' fee request and that plaintiffs cannot terminate the settlement based on the amount of fees awarded. [§ XII.C, at 44]

Third, the Court will award, as will be explained later, a reasonable fee considering the work performed and the interests of the class members.

K. Reasonableness of Claim-Processing Procedures

The claim-processing procedures are the standard ones used in securities class-action settlements. Class Members may submit Claim Forms to **[*53]** the Claims Administrator, which will make initial determinations about eligibility for settlement relief. Any Class Member whose claim has been rejected in whole or in part may contest the rejection by submitting an explanation of his or her position to Lead Counsel. If the dispute cannot be resolved, Lead Counsel will submit it to the Court for final decision. [§ I.E, at 26-27]

Having considered all of the Girsh and Prudential factors, this Court approves the settlement as fair and reasonable.

VIII. ATTORNEY'S FEES

Lead Counsel seeks an award of attorneys' fees of one-third of the $3.275 million Settlement Amount, or $1,091,666. The Court is persuaded by Lead Counsel's submissions that a significant fee is warranted in this case, but finds that an award of 30% of the recovery, or $982,500, better protects the interests of the class members, while still adequately compensating class counsel.

Attorneys' fees are typically assessed through

the percentage-of-recovery method or through the lodestar method. *In re AT&T Corp. Secs. Litig., 455 F.3d 160, 164 (3d Cir. 2006)*. The percentage-of-recovery method applies a certain percentage to the settlement fund. See *Welch & Forbes, Inc. v. Cendant Corp., 243 F.3d 722, 732 n.10 (3d Cir. 2001)*. The lodestar method multiplies the number of hours class counsel worked on a case by a reasonable hourly **[*54]** billing rate for such services. *In re AT&T, 455 F.3d at 164*.

In common fund cases such as this one, the percentage-of-recovery method is generally favored because "it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Rite Aid Corp. Sec. Litig., 396 F.3d. 294, 300 (3d Cir. 2005)* (quoting omitted); *In re Lucent Technologies, 327 F.Supp.2d at 431*. However, the Third Circuit has recommended that district courts use the lodestar method to cross-check the reasonableness of a percentage-of-recovery fee award. See *Rite Aid, 396 F.3d at 305*. The cross-check is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier. "[W]hen the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *Rite Aid, 396 F.3d at 306*. The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method. *In re AT&T, 455 F.3d at 164*.

A. Lodestar Cross-Check

Before the Court applies the percentage-of-recovery method therefore, it will briefly delineate the total lodestar amounts for attorneys, paralegals and law clerk time calculated at current market rates and by using those numbers, perform a lodestar cross-check to confirm the reasonableness of the fee request. **[*55]** Having reviewed the attorneys' declarations, the Court is satisfied that the hourly rate charged for each of the attorneys and his/her staff is based upon a reasonable hourly billing rate for such services in the given geographical area, the nature of the services provided and the experience of the lawyer. *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000)*. Having determined that the hourly rates are reasonable and the amount of hours spent prosecuting this case is also reasonable, the Rosen Law Firm's lodestar i.e., the value of its work had it been paid on an hourly basis, is $317,500, for 520.9 hours at a blended hourly rate of $610 per hour. *See* Rosen Fee Dec. ¶3. This includes, among other things, the time spent in the initial investigation of the case, researching legal issues, consulting with a scientific expert, preparing and filing the Amended Complaint, briefing Defendants' request to strike confidential witness allegations, opposing Defendants' motion to dismiss, consulting with a damages expert, drafting a mediation brief, preparing for and attending mediation, reviewing documents produced in confirmatory discovery, negotiating and drafting the Settlement and the Settlement Agreement, drafting papers in support of preliminary **[*56]** approval, overseeing claims administration, and drafting papers in support of final approval. *Id.* The multiplier generated here by the ratio of the requested fee to Lead Counsel's lodestar is 3.4.

In this circuit, multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. *In re AT&T, 455 F.3d at 172*; see e.g., *Weiss, 899 F.Supp. at 1304*; *Muchnik v. First Fed. Savings & Loan Ass'n, 1986 U.S. Dist. LEXIS 19798, 1986 WL 10791 (E.D. Pa. 1986)*. Lead Counsel's proposed 3.4 multiplier is on the higher end of the range, which gives this Court pause due to the early stage at which the

litigation was settled. In *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 742 (3d Cir. 2001)*, the Third Circuit observed that "[i]n all the cases in which high percentages were applied to arrive at attorneys' fees, the courts explained the extensive amount of work that the attorneys had put into the case, and appropriately the lodestar multiplier in those cases never exceeded 2.99." When, as in Cendant, litigation was settled at an early stage, the Third Circuit, in reversing the district court below, "strongly suggest[ed] that a lodestar multiplier of 3 . . . is the appropriate ceiling for a fee award, although a lower multiplier may be applied in the District Court's discretion." *In re Cendant, 243 F.3d at 742*. See also *Rite Aid, 396 F.3d at 303* (explaining that the lodestar multiplier of 3 was appropriate in Cendant because the case was **[*57]** "neither legally nor factually complex," was of short duration, involved a limited amount of motion practice, and required only 5,600 hours of work by counsel). Here, while the Court recognizes the good work of Lead Counsel in bringing this matter to a prompt resolution, the matter was settled before the adjudication of the motion to dismiss, was not legally or factually complex, necessitated only confirmatory discovery, and required the expenditure of only 521 hours by Lead Counsel.

As such, the Court finds that while a multiplier on the higher end of the accepted range is warranted, a multiplier of 3.4 is simply too high in this case of short duration, uncomplicated legal issues, and relatively limited hours. Looking to the Third Circuit's decisions in the area of securities settlements, the Court is persuaded that a 30% fee of $982,500 is appropriate. I look to, for example, *In re Veritas Software Corp. Sec. Litig., 396 F. App'x 815, 818 (3d Cir. 2010)*, where the Third Circuit affirmed a final approval of settlement, observing that "[w]hile the 30% fee is admittedly large, the District Court took into account that class counsel spent four years, and thousands of hours of attorneys' labor, litigating this case. The final lodestar multiplier of 1.52 was well within **[*58]** the range of attorneys' fees awarded and approved by this Court." Recalculating the lodestar in this case on the basis of a 30% award, therefore, gives rise to a multiplier of 3.09, which this Court finds acceptable.

B. Percentage of Recovery

When analyzing a fee award in a common fund case under the percentage-of-recovery method, the Court considers several factors, many of which are similar to the Girsh factors as enunciated previously. See *Rite Aid, 396 F.3d at 301 n.9*. These include:

> (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.

Id. at 301 (citing *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)*. This list is not exhaustive. In Prudential, the Third Circuit noted three other factors that may be relevant and important to consider: (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 **[*59]** agencies conducting investigations, *Prudential, 148 F.3d at 338*; (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, *Id. at 340*; and (3) any "innovative" terms of settlement, *Id. at 339*. The fee award reasonableness factors "need not be applied in a formulaic way" because each case is different, "and in certain cases, one factor may outweigh the rest." *Rite Aid, 396 F.3d at 301* (quoting *Gunter, 223 F.3d at 195 n.1*). The Court may give some of these factors less weight in evaluating a fee award. See *In re Cendant, 264 F.3d at 283*; *Prudential, 148 F.3d at 339*. Moreover, the analysis of the Gunter factors overlaps with the Girsh factors used to assess the appropriateness of the settlement. In that regard, the Court will refer to its earlier findings when reviewing this fee application.

1. The Fund Is Substantial and Confers a Benefit Upon The Class Members

The first Gunter factor "consider[s] the fee request in comparison to the size of the fund created and the number of class members to be benefitted." *Rowe v. E.I. DuPont de Nemours & Co., 2011 U.S. Dist. LEXIS 96450, 2011 WL 3837106, at *18 (D.N.J. Aug. 26, 2011)*. That is because the sheer magnitude of damages has a heavy impact on the amounts defendants are willing to pay to settle their liability. *Bredbenner v. Liberty Travel, Inc., No. CIV.A. 09-1248 MF, 2011 U.S. Dist. LEXIS 38663, 2011 WL 1344745, at *19 (D.N.J. Apr. 8, 2011)* (awarding **[*60]** fee of one third of settlement fund because case involved relatively small fund and relatively few class members). Thus, granting counsel a similar percentage of a smaller fund may simply punish counsel for having litigated a smaller case. Moreover, because of fixed costs and economies of scale, attorneys' fees and costs do not increase dollar-for-dollar with the size of the case. Thus, it takes a greater percentage of the settlement to support litigation in a smaller case.

As securities class actions go, this is a relatively small one. The median damages in securities class action which settled in 2015 was $330 million. [Laarni T. Bulan, et al, Securities Class Action Settlements: 2015 Review and Analysis, at 7 (Rosen Dec. Ex. 5)]. In this case, total maximum damages are about $30.9 million - ten times less. The $3.275 million Settlement, while substantial, is plainly not a mega-fund. *Id.* That said, in this case, only 2,631 potential class members have been identified. Bravata Dec. ¶5. Moreover, so far the fund has only received 482 valid claims and 44 deficient claims that are potentially curable. This is a relatively small number for a securities class action; the fact that there are relatively fewer Class Members ensures that each **[*61]** Class Member will receive a proportionally greater payment.

2. To Date No Class Members Have Objected To The Fee Request

The Individual Notice explicitly provided that Lead Counsel would apply for an award of attorneys' fees of up to one-third of the Settlement. The Notice also advised Class Members that they could object to the Settlement and explained the procedure for doing so. *Id.* As of this date, no Class Member has objected to the attorneys' fees or expenses requested. Bravata Dec. ¶10. Additionally, to date only one Class Member — who bought only 280 shares and would not have been entitled to any Settlement proceeds because he has no recognized losses — has sought to be excluded from the Settlement. Rosen Dec. Ex. 4. The deadline to object to the Settlement was October 20, 2016. Bravata Dec. ¶11. The deadline to opt out of the

Settlement was October 5, 2016. *Id.* ¶10.

Accordingly, the Class's reaction strongly supports a fee award at or beneath the cap set forth in the Individual Notice. See, e.g., *Chemi v. Champion Mortgage, No. 2:05-CV-1238(WHW), 2009 U.S. Dist. LEXIS 44860, 2009 WL 1470429, at *4 (D.N.J. May 26, 2009)* (lack of objections and single opt-out weighed strongly in favor of settlement). This Court believes that an award below the ceiling set forth in **[*62]** the Individual Notice is appropriate to best protect the interests of the class and finds a 30% fee reasonable and within the expectations established by the notice sent to the class members.

3. Lead Counsel Prosecuted This Action With Skill And Efficiency

The skill and efficiency factor under Gunter also weighs heavily in favor of a 30% award. Lead Counsel's skill and efficiency is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Hall v. AT&T Mobility LLC, No. CIV.A. 07-5325 JLL, 2010 U.S. Dist. LEXIS 109355, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010)*.

Lead Counsel's success in quickly bringing this litigation to a successful conclusion is perhaps the best indicator of the experience and ability of the attorneys involved.

The experience of Lead Counsel is set forth in firm resume of the Rosen Law Firm attached as Exhibit 2-A to the Rosen Declaration. As that submission shows, Lead Counsel is highly experienced in the complex field of securities fraud class action litigation. **[*63]** See *Knox v. Yingli Green Energy Holding Co. Ltd., 136 F. Supp. 3d 1159, 1165 (C.D. Cal. 2015)* ("The Rosen Law Firm is "highly qualified [and] experienced" in securities class actions").

The quality and vigor of opposing counsel is also relevant in evaluating the quality of the services rendered by Lead Counsel. See, e.g., *Ikon, 194 F.R.D at 194*. Defense counsel in this case were skilled attorneys from Proskauer Rose LLP, one of the leading securities litigation defense firms in the country. Defendants' lead counsel was Ralph Ferrara, a former General Counsel of the SEC who has been recognized by Chambers and Best Lawyers as one of the top securities litigation and white collar defense practitioners in the U.S. Achieving this favorable Settlement while opposing Proskauer and Mr. Ferrara satisfies this Gunter factor.

4. The Complexity, Expense, and Likely Duration of Litigation Weigh in Favor of the Court's Award

The fourth Gunter factor is intended to capture "the probable costs, in both time and money, of continued litigation" and favors the requested fee. See *In re General Motors, 55 F.3d at 812* (quoting *Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir. 1974)*). Although the legal issues in this case are not particularly complex, securities class actions are by nature particularly expensive to prosecute, usually requiring expert testimony on, at least questions of damages and loss causation. **[*64]** The $3.275 million recovery is substantial in light of the recoverable damages, and the substantial risks and expenses that the Class would have faced by litigating to trial. In this case even were Plaintiffs' claims to survive Defendants' motion to dismiss, Plaintiffs would then be obligated to conduct discovery, move for class certification, and face Defendants' motion for summary judgment. Then, by surviving these steps,

Plaintiffs would need to take their case to a jury. If the jury found in Plaintiffs' favor, they would still face Defendants' post-trial motions and likely appeal. Collecting a judgment requires crossing every one of these hurdles, but each of these steps involves significant risks. *In re Hi-Crush Partners L.P. Sec. Litig., No. 12-CIV-8557 CM, 2014 U.S. Dist. LEXIS 177175, 2014 WL 7323417, at *16 (S.D.N.Y. Dec. 19, 2014)* ("Over the last five years, nearly 48% of all securities class actions have been dismissed on motions prior to trial, while plaintiffs who succeeded at trial have found their judgments overturned on post-trial motions or appeal").

Considering the magnitude and expense of this securities case, a 30% fee award is reasonable.

5. Lead Counsel Undertook the Risk of Non-Payment

Lead Counsel undertook this action on an entirely contingent fee **[*65]** basis, taking the risk that the litigation would yield no or very little recovery and leave it uncompensated for its time, as well as for its out-of-pocket expenses. Courts across the country have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees. *In re Schering-Plough Corp. Enhance Sec. Litig., No. CIV.A. 08-2177 DMC, 2013 U.S. Dist. LEXIS 141475, 2013 WL 5505744, at *28 (D.N.J. Oct. 1, 2013)*. The risk of non-payment is especially high in securities class actions, as they are "notably difficult and notoriously uncertain." See *Trief v. Dun & Bradstreet Corp., 840 F. Supp. 277, 281 (S.D.N.Y. 1993)*. Legal precedents are continually making it more difficult to plead securities class actions. *In re BP p.l.c. Sec. Litig., 852 F. Supp. 2d 767, 820 (S.D. Tex. 2012)* ("The Court is acutely aware that federal legislation and authoritative precedents have created for plaintiffs in all securities actions formidable challenges to successful pleading.").

Here, Lead Counsel undertook this litigation on a contingency basis and with no guarantee its time or expenses would be reimbursed. In light of the difficulty of undertaking such a, Lead Counsel should be reimbursed for its time and expenses.

6. Lead Counsel Spent Significant Time Investigating and Litigating the Case [*66]

The sixth Gunter factor looks at counsel's time devoted to the litigation. *Gunter, 223 F.3d at 199*. This factor is usually considered with the lodestar cross-check to look at reasonableness of counsel's requested fee. I have reviewed the affidavits in this case and find the over 520 hours expended by the Rosen Law Firm to be significant, although not necessarily as extensive as those observed in some other securities actions that progress to a later stage of litigation.

7. The Court's Award Is Consistent With Awards in Similar Cases

The 30% fee the Court awards here is appropriate and comfortably within the range of fees typically awarded. While there is no benchmark for the percentage of fees to be awarded in common fund cases, the Third Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund. *General Motors, 55 F.3d at 822*. For smaller securities fraud class actions, "courts within this Circuit have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses." *In re Ravisent Techs., Inc. Sec. Litig., No. CIV.A.00-CV-1014, 2005 U.S. Dist. LEXIS 6680, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005)* (collecting cases). The 30% fee awarded here is in the typical range for

settlements in this Circuit and is appropriate given the early stage at which this litigation was **[*67]** resolved. *Schuler v. Medicines Co., No. CV 14-1149 (CCC), 2016 U.S. Dist. LEXIS 82344, 2016 WL 3457218, at *8 (D.N.J. June 24, 2016)* (awarding one third of settlement as fees in case that settled before decision on motion to dismiss); *In re Merck & Co., Inc. Vytorin Erisa Litig., No. CIV.A. 08-CV-285DMC, 2010 U.S. Dist. LEXIS 12344, 2010 WL 547613, at *11 (D.N.J. Feb. 9, 2010)* "review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71% with a median value that turns out to be one-third") (quoting *In re Remeron Direct Purchaser Antitrust Litig., No. CIV.03-0085 FSH, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *15 (D.N.J. Nov. 9, 2005)*); *In re Safety Components, Inc. Sec. Litig., 166 F. Supp. 2d 72, 101 (D.N.J. 2001)* (awarding one third and citing representative fee awards, which ranged from 27.5% to 33.8% with a median of 33 1/3%).

8. The $3.275 Million Recovery Is Solely Attributable to the Efforts OF Class Counsel

The result achieved for Class Members here is solely attributable to the efforts and skill of Class Counsel. Unlike in many securities class actions, here Class Counsel did not have the advantage of a Securities and Exchange Commission investigation or any other governmental enforcement proceeding. Class Counsel assumed the entire risk and expense of prosecuting the case and negotiated this favorable settlement without the assistance of any other governmental or private party. The fact that Lead Counsel **[*68]** received no help from any government investigation is a "significant factor" supporting the fee award. *AT&T, 455 F.3d at 173* (citing *Prudential, 148 F.3d at 338*); *In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 749 (E.D. Pa. 2013)*.

9. The Awarded Fee Percentage Is Consistent With Contingent Fee Arrangements in Privately Negotiated Non-Class Litigation

A 30% fee is also consistent with typical fee awards in non-class cases. See *In re RJR Nabisco, Inc. Sec. Litig., No. 818 (MBM), 1992 U.S. Dist. LEXIS 12702, 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992)* ("What should govern [contingent fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases."). If this were an individual action, the customary contingent fee would likely range between 30 and 40 percent of the recovery. See, e.g., *Ikon, 194 F.R.D. at 194*; *Blum, 465 U.S. at 903 n. *19* (Brennan, J., concurring) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."). Lead Counsel's fee of 30% of the Settlement fund comports with these private standards. Further, Lead Plaintiff supports Lead Counsel's fee application. Yedlowski Dec. ¶7.

Thus, this factor supports the Court's award of 30% of the Settlement Fund to Lead Counsel.

B. Lead Counsel's Expenses Were Reasonable and Necessary to [*69] Litigate the Action

"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 case." *In re Cendant Corp., Deriv. Action Litig., 232 F. Supp. 2d 327, 343 (D.N.J. 2002)*. In this case, Class Members stated that Lead Counsel may seek reimbursement of expenses not to exceed $50,000. (Dkt. #45-4,

at 2). Lead Counsel requests that this Court reimburse the $20,972.82 of litigation expenses that counsel advanced in connection with this Action. Rosen Fee Dec.¶6. This Court finds that these expenses, which are set forth in the Rosen Declaration, were reasonably necessary for the prosecution of this litigation. Rosen Fee Dec. ¶7. Approximately $19,150 of Lead Counsel's expenses consist of expert and investigation and mediation fees. *See* Rosen Fee Dec. ¶6. The remaining $1,800 consists primarily of press releases notifying the Class and online legal research. *Id.* Courts have held that all of these items are properly charged to the Class. *In re Cendant Corp., Derivative Action Litig., 232 F. Supp. 2d at 344* (consultants and computer-assisted research); *Beckman v. KeyBank, N.A., 293 F.R.D. 467, 482 (S.D.N.Y. 2013)* (mediator's fees); *Katz v. China Century Dragon Media, Inc., No. LACV1102769JAKSSX, 2013 U.S. Dist. LEXIS 189987, 2013 WL 11237202, at *8 (C.D. Cal. Oct. 10, 2013)* (press releases). No opposition to the expense application has been received. Bravata Dec. ¶11.

C. [*70] Lead Plaintiff is Entitled to a Nominal Award

Lastly, Lead Counsel requests an award of $3,000 to Lead Plaintiff Stanley Yedlowski for his time committed to this litigation. The PSLRA does not provide for incentive awards for lead plaintiffs to compensate them for their service as lead plaintiffs. However, it does acknowledge that "Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." *15 U.S.C. 78u-4(a)(4)*. "The Conference Committee recognizes that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the courts discretion to award fees accordingly." H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995). "[T]he Third Circuit favors encouraging class representatives, by appropriate means, to create common funds and to enforce laws—even approving 'incentive awards' to class representatives." *In re Schering-Plough Corp. Enhance Sec. Litig., No. CIV.A. 08-2177 DMC, 2013 U.S. Dist. LEXIS 147981, 2013 WL 5505744, at *56 (D.N.J. Oct. 1, 2013)*.

In this case, Lead Plaintiff (a) **[*71]** reviewed pleadings; (b) discussed the case with Lead Counsel; (c) approved settlement authority for and made himself available at the Mediation; and (d) independently followed developments regarding Roka. Yedlowski Dec. ¶¶3, 5. In total, Lead Plaintiff spent 75 hours on this case. *Id.* ¶ 6. These are the kinds of activities that warrant reimbursement for class representatives for their lost wages and business opportunities. *Schering-Plough, 2013 U.S. Dist. LEXIS 147981, 2013 WL 5505744, at *56* (reviewing pleadings, corresponding with Lead Counsel, and preparing for and attending mediation); *In re Par Pharm. Sec. Litig., No. CIV.A. 06-3226 ES, 2013 U.S. Dist. LEXIS 106150, 2013 WL 3930091, at *11 (D.N.J. July 29, 2013)* (similar); *Schuler, 2016 U.S. Dist. LEXIS 82344, 2016 WL 3457218, at *11* (reviewed filings, conferred with lead counsel, remained apprised about the case and the company).

The Notice disseminated to the Class informed Class Members of Lead Plaintiff's intention of seeking a reimbursement for the reasonable time and expenses of Lead Plaintiff in pursuing the litigation not to exceed $3,000. No Class member has objected to this award. Bravata Dec. ¶11. Courts regularly make similar awards to lead plaintiffs. *In re Par Pharm. Sec. Litig., No. CIV.A. 06-3226 ES, 2013 U.S. Dist. LEXIS 106150, 2013 WL 3930091, at *11 (D.N.J. July 29, 2013)* (awarding $18,000 to

lead **[*72]** plaintiff); *Ray v. Lundstrom, No. 4:10CV3177, 2012 U.S. Dist. LEXIS 160089, 2012 WL 5458425, at *5 (D. Neb. Nov. 8, 2012)* (awarding $2,000 in case that settled before discovery); *Schuler, 2016 U.S. Dist. LEXIS 82344, 2016 WL 3457218, at *11* ($3,500 in case that settled before discovery).

Finally, Lead Plaintiff was one of only two investors who moved for appointment. Lead Plaintiff's willingness to take on responsibilities in a difficult case should be rewarded. Accordingly, the Court awards Lead Plaintiff the nominal amount of $3,000 as compensation for his time and efforts in representing the Class.

IX. CONCLUSION

Lead Plaintiff's motion for final approval of the parties' $3.275 million settlement is granted. Lead Plaintiff's motion for the award of attorney's fees is granted, Lead Counsel is awarded $982,500 in fees and $20,972.82 in costs, and Lead Plaintiff is awarded the nominal sum of $3,000, all payable from the settlement fund.

Dated: 11/10/2016

/s/ Freda L. Wolfson

The Honorable Freda L. Wolfson

United States District Judge

End of Document

Exhibit 10

Glaberson v. Comcast Corp.

United States District Court for the Eastern District of Pennsylvania

September 22, 2015, Decided; September 22, 2015, Filed

CIVIL ACTION NO. 03-6604

Reporter
2015 U.S. Dist. LEXIS 127370 *; 2015 WL 5582251

STANFORD GLABERSON, et al. v. COMCAST CORPORATION, et al.

Subsequent History: Motion granted by *Glaberson v. Comcast Corp., 2015 U.S. Dist. LEXIS 162710 (E.D. Pa., Dec. 3, 2015)*

Prior History: *Glaberson v. Comcast Corp., 2014 U.S. Dist. LEXIS 172040 (E.D. Pa., Dec. 12, 2014)*

Counsel: **[*1]** For Stanford Glaberson, Plaintiff: ANN D. WHITE, LEAD ATTORNEY, AARP FOUNDATION LIT. (AFL), Washington, DC USA; ANTHONY J. BOLOGNESE, JOSHUA H. GRABAR, LEAD ATTORNEYS, BOLOGNESE & ASSOCIATES, LLC, Philadelphia, PA USA; BARRY C. BARNETT, DANIEL H. CHAREST, DONNA MCNAMARA, LEAD ATTORNEYS, SUSMAN GODFREY LLP, Dallas, TX USA; DAVID R. WOODWARD, LEAD ATTORNEY, HEINS MILLS & OLSON, PLC, Minneapolis, MN USA; DOUGLAS A. MILLEN, WILLIAM H. LONDON, LEAD ATTORNEYS, FREED KANNER LONDON & MILLEN LLC, Bannockburn, IL USA; HILARY K. RATWAY, LEAD ATTORNEY, HAUSFELD LLP, Washington, DC USA; JAYNE A. GOLDSTEIN, LEAD ATTORNEY, POMERANZ LLP, Weston, FL USA; JESSICA N. SERVAIS, SAMUEL D. HEINS, LEAD ATTORNEYS, HEINS MILLS & OLSON PLC, Minneapolis, MN USA; JOSEPH GOLDBERG, LEAD ATTORNEY, FREEDMAN BOYD DANIELS HOLLANDER & GOLDBERG PA, Albuquerque, NM USA; LEELLE KROMPASS, LEAD ATTORNEY, PRO HAC VICE, SUSMAN GODFREY LLP, Dallas, TX USA; SARA BERGER, LEAD ATTORNEY, FREEDMAN BOYD HOLLANDER GOLDBERG & IVES, P.A., Albuquerque, NM USA; SHAWN JONATHAN RABIN, LEAD ATTORNEY, SUSMAN GODFREY, L.L.P., New York, NY USA; WILLIAM R.H. MERRILL, LEAD ATTORNEY, SUSMAN GODREY LLP, Houston, TX USA; CAROL A. MAGER, CONSOLE LAW **[*2]** OFFICE LLC, Philadelphia, PA USA; DAVID ANZISKA, BERGER & MONTAGUE PC, Philadelphia, PA USA; MARTIN I. TWERSKY, BERGER & MONTAGUE, P.C., Philadelphia, PA USA; ROBERTA D. LIEBENBERG, FINE, KAPLAN AND BLACK, Philadelphia, PA USA.

For Comcast Corporation, Defendant: ALYCIA REGAN BENENATI, LEAD ATTORNEY, KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, New York, NY USA; AYANA RIVERS, DAVID M. MAX, DORIT UNGAR, JAMES T. CAIN, MEGAN K. ZWIEBEL, MICHAEL E. HAGENSON, MICHAEL S. SHUSTER, SHERON KORPUS, LEAD ATTORNEYS, KASOWITZ BENSON TORRES & FRIEDMAN LLP, New York, NY USA; CHRISTOPHER B. HOCKETT, LEAD ATTORNEY, DAVIS POLK & WARDWELL LLP, Menlo Park, CA USA; DANA M. SESHENS, LEAD ATTORNEY, PRO HAC VICE, DAVIS POLK & WARDWELL LLP, New York, NY USA; DARRYL J. MAY, BURT M. RUBLIN, LEAD ATTORNEYS, BALLARD SPAHR ANDREWS & INGERSOLL, LLP, Philadelphia, PA USA; ARTHUR J. BURKE, MICHAEL P. CARROLL, DAVIS POLK &

WARDWELL, New York, NY USA; DAVID B. TOSCANO, JESSICA K. FOSCHI, PRO HAC VICE, DAVIS POLK & WARDWELL, New York, NY USA; M. NORMAN GOLDBERGER, BALLARD SPAHR ANDREWS & INGERSOLL, Philadelphia, PA USA; PAUL J. KOOB, BALLARD SPAHR LLP, Philadelphia, PA USA.

For Comcast Cable Holdings, Llc, Comcast Cable Communications **[*3]** Holdings, Inc., Defendants: ALYCIA REGAN BENENATI, LEAD ATTORNEY, KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, New York, NY USA; CHRISTOPHER B. HOCKETT, LEAD ATTORNEY, DAVIS POLK & WARDWELL LLP, Menlo Park, CA USA; DANA M. SESHENS, LEAD ATTORNEY, PRO HAC VICE, DAVIS POLK & WARDWELL LLP, New York, NY USA; DARRYL J. MAY, BURT M. RUBLIN, LEAD ATTORNEYS, BALLARD SPAHR ANDREWS & INGERSOLL, LLP, Philadelphia, PA, USA; DAVID M. MAX, DORIT UNGAR, JAMES T. CAIN, MICHAEL E. HAGENSON, MICHAEL S. SHUSTER, SHERON KORPUS, LEAD ATTORNEYS, KASOWITZ BENSON TORRES & FRIEDMAN LLP, New York, NY, USA; ARTHUR J. BURKE, DAVIS POLK & WARDWELL, New York, NY USA; DAVID B. TOSCANO, PRO HAC VICE, DAVIS POLK & WARDWELL, New York, NY USA; JESSICA K. FOSCHI, PRO HAC VICE, MICHAEL P. CARROLL, DAVIS, POLK & WARDWELL, New York, NY USA; M. NORMAN GOLDBERGER, BALLARD SPAHR ANDREWS & INGERSOLL, Philadelphia, PA USA; PAUL J. KOOB, BALLARD SPAHR LLP, Philadelphia, PA USA.

Judges: JOHN R. PADOVA, J.

Opinion by: JOHN R. PADOVA

Opinion

MEMORANDUM

Padova, J.

Presently pending before the Court are Plaintiffs' Motion for Final Approval of Class Action Settlement (Docket Entry 621) and Plaintiffs' Motion for Award of Attorneys' Fees (Docket Entry 615).[1] Neither Motion **[*4]** is opposed by Defendants, and the Court has received only three objections from class members. A final fairness hearing was conducted on September 9, 2015, at which time no persons appeared to object to the settlement or the award of counsel fees. For the following reasons, the Motions are granted.

I. The Class

On December 12, 2014, the Court certified a settlement class consisting of:

> All cable television customers who 1) currently subscribe or 2) previously subscribed at any time from January 1, 2003 to December 31, 2008, to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates, in the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania. The Class excludes governmental entities, Defendants, Defendants' subsidiaries and affiliates and this Court.

(Docket Entry 614.) That same order appointed Stanford Glaberson as representative of the class, David Woodward, Esq. of **[*5]** Heins, Mills & Olson and Barry Barnett, Esq. of Susman Godfrey as co-lead class counsel, and Rust Consulting, Inc. as

[1] By Order dated December 12, 2014 (Docket Entry 614), the Court granted Plaintiffs' unopposed Motion for Certification of a Settlement Class and Preliminary Approval of Class Action Settlement (the "Preliminary Approval Order").

claims administrator.

II. The Terms of the Settlement

The settlement is valued at $50 million, comprising a cash component valued at $16,670,000, and a services component valued at $33,330,000. It provides different options for current and former subscribers. The essential terms include:

- Current subscribers could choose either (1) a one-time credit of $15 off their bill or (2) credits from a selection of Comcast services including six pay-per-view movies (valued at $35.94), four months of upgraded internet service (valued at either $40 or $38 depending on the subscriber's current level of service), or a two-month subscription to The Movie Channel (valued at $43.90).[2] Current subscribers who returned a claim form but made no choice, or who did not return a claim form, automatically receive a two month subscription to The Movie Channel.[3]

- Class members who no longer subscribe to Comcast services receive a cash payment of $15.

- The settlement provides that Class Counsel will seek up to $15 million for attorneys' fees, costs and expenses to be paid from the cash component **[*6]** of the settlement fund. (Id. ¶¶ 8.2.-8.3.)

- If the cash obligations exceed the value of the cash component, Comcast agrees to contribute additional cash to the settlement fund, with the amount of settlement credits for services to current subscribers correspondingly reduced.[4]

- If the cash obligations are less than the value of the cash component, Comcast shall pay the remaining cash pro rata to current subscriber members of the Class by issuing a one-time credit off their bills. (Id. ¶ 8.7.)

- There is no reverter of cash or services to Comcast. (Id. ¶ 8.1.)

III. MOTION FOR APPROVAL OF FINAL SETTLEMENT

a. Standard for final approval.

Class action settlements must be approved by the Court. See *Fed. R. Civ. P. 23(e)* ("The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval."). We consider whether the Settlement Agreement is fair, reasonable, and adequate. *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 258 (3d Cir. 2009)* ("'Even if it has satisfied the requirements for certification under Rule 23, a class action cannot be settled without the approval of the court and a determination that the proposed

[2] Class Counsel advised the Court in their submission that, while the Settlement Agreement provides the choice of the receipt of pay-per-view movies, Comcast has advised them that preexisting contractual provisions prevent offering this alternative to commercial subscribers. Comcast was unable to include this information in the notices that its billing vender mailed to its commercial subscribers. On March 20, 2015, the Claims Administrator mailed those subscribers a supplemental postcard notice, advising of this limitation of their choices. Our consideration of the fairness of the settlement includes this change.

[3] At the hearing, the **[*7]** Court expressed concern that current subscribers who never returned a claim form would not be aware of their entitlement to a two month subscription to The Movie Channel without some form of supplemental notice advising them of the subscription's commencement. The parties agreed that Comcast would provide a bill insert to those subscribers containing that information. Our consideration of the fairness of the settlement includes this change.

[4] All counsel concur that, in granting Plaintiffs' counsel the full amount of the fees and expenses they request, totaling $15 million, the cash fund would have sufficient resources to satisfy all cash claims that have been made by class members.

settlement **[*8]** is fair, reasonable and adequate.'" (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283, 316 (3d Cir. 1998)))*. Where, as here, "'settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously,'" the Court must protect absentee class members by applying an "even more rigorous, heightened standard." *In re Pet Food Prods. Liab. Litig., 629 F.3d 333, 350 (3d Cir. 2010)* (quoting *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3d Cir. 2004))* (internal quotation marks omitted). The purpose of this inquiry is "to protect the unnamed members of the class from unjust or unfair settlements." *Ehrheart v. Verizon Wireless, 609 F.3d 590, 593 (3d Cir.2010)*. In making this determination, the Court acts as a "fiduciary, guarding the claims and rights of the absent class members." Id.

In determining whether the Settlement Agreement is fair, reasonable, and adequate, we consider the following nine factors ("the Girsh factors"):

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best **[*9]** possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Prudential, 148 F.3d at 317 (quoting *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)* (internal quotation and editorial marks omitted)). Whether a settlement is fair under these factors is a discretionary determination committed to the district judge. See, e.g., *Eichenholtz v. Brennan, 52 F.3d 478, 482 (3d Cir. 1995)*.

In addition to the Girsh factors, we may also consider the following non-exclusive factors ("the Prudential factors"):

> [T]he maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved — or likely to be achieved — for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure **[*10]** for processing individual claims under the settlement is fair and reasonable.

Prudential, 148 F.3d at 323 (stating that because of a "sea-change in the nature of class actions" after Girsh was decided thirty-five years ago, it may be helpful to expand the Girsh factors).

b. Application

1. The Girsh F actors

A. Complexity, expense and likely duration of the litigation.

The initial Girsh factor considers "the probable costs, in both time and money, of continued

litigation." *In re Cendant Corp. Litig., 264 F.3d 201, 233 (3d Cir. 2001)* (citation and internal quotation marks omitted). In applying this factor, courts recognize that antitrust class actions are "'arguably the most complex action[s] to prosecute'" as "'[t]he legal and factual issues involved are always numerous and uncertain in outcome.'" *In re Auto. Refinishing Paint Antitrust Litig., 617 F. Supp. 2d 336, 341 (E.D. Pa. 2007)* (quoting *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)*); see also *In re Fasteners Antitrust Litig., Civ. A. No. 08-1912, 2014 U.S. Dist. LEXIS 9990, 2014 WL 296954, at *5 (E.D. Pa. Jan. 27, 2014)* (observing that "[l]ike many other antitrust cases, this case has involved complex issues and has been lengthy").

The Class argues that this case is a "paradigm example of a complex antitrust action." (Pl. Att'y Fee Mem. at 7.) It has extended over a decade, and required extensive briefing of complex legal and factual issues, exhaustive discovery efforts and extensive motion practice. Counsel undertook eleven years of work and advanced millions of dollars without any assurance of **[*11]** compensation. If the parties had not settled, significant additional work would have been required, including briefing and arguing Comcast's motion to strike Plaintiff's supplemental expert reports filed in support of Settlement Class certification. Trial would have involved extensive pretrial briefing and preparation and the marshalling, presentation and consideration of a very substantial evidentiary record. The Class argues that the prospect of a lengthy, complicated trial and the inevitable subsequent appeals underscore the appropriateness of the settlement. See *In re Processed Egg Prods. Antitrust Litis., 284 F.R.D. 249, 269 (E.D. Pa. 2012)* (approving settlement where "considerable expenditures of financial resources and hours of attorney time relating to discovery for liability and damages" would be required for trial); *In re Ikon Office Solutions, Inc. Sec. Litis., 194 F.R.D. 166, 179 (E.D. Pa. 2000)* (noting that "the extremely large sums of money at issue almost guarantee that any outcome, whether by summary judgment or trial, would be appealed" and that "[t]his factor thus weighs in favor of the proposed settlement"). Finally, given Comcast's ability to fund the litigation, the Class asserts that, absent a settlement, the case would undoubtedly have continued for several more years and required extensive pretrial motion practice, a complicated **[*12]** trial, numerous post-trial motions and highly likely appeals, while the Settlement provides all members of the Settlement Class relief that is both significant and avoids further delay. See *Sullivan v. DB Invs., Inc., 667 F.3d 273, 321 (3d Cir. 2011)* (noting that "[w]e agree with the District Court's conclusion that litigation of the numerous legal and factual issues discussed would have inevitably contributed to the expense and duration of the proceedings" and that "the settlement provided substantial and immediate relief to the class without further expense"); *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 536 (3d Cir. 2004)* (finding first Girsh factor favors settlement "because continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial" and "it was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of any recovery to the class").

We agree that this factor weighs in favor of approval of the settlement. This litigation has been notably complex, lengthy and expensive. It has engendered three appeals to the United States Court of Appeals for the Third Circuit and consideration by the United States Supreme Court. **[*13]** The result before the Supreme Court essentially placed the Class

back to square one in terms of the certification issue, significantly extending the duration of the litigation had a settlement not been reached.

B. The reaction of the class to the settlement.

The deadline for requesting exclusion from the Settlement Class or objecting to the Settlement was June 10, 2015. Of an estimated class size of over 800,000 persons, the Settlement Administrator received only three requests for exclusion and the Court received only three objections. (Botzet Decl. ¶ 13-14.) Counsel contend that the number of claims submitted to date, the absence of significant numbers of objections and the small number of opt-outs requests "reflect positive support by Class members." (Pl. Att'y Fee Mem. at 9.) They contend that the $50 million Settlement Fund "is more than sufficient to pay all claims submitted by any and all Class Members." (Id.) Counsel submit that the strong positive response from Settlement Class Members, evidenced by the lack of substantial numbers of objections, favors a finding that the settlement is fair, reasonable and adequate. See *Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1313-14 (3d Cir. 1993)* (noting that "[l]ess than 30 of approximately 1.1 million class **[*14]** members objected" representing an "infinitesimal" fraction of the class); *Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d Cir. 1990)* (noting that "only" 29 objections from a 281 member class "strongly favors settlement"); *Prudential, 148 F.3d at 318* (affirming determination that class response was favorable in light of facts that 19,000 policyholders out of 8 million opted out and 300 class members objected); *Warfarin, 391 F.3d at 536* (noting that "[o]f the 1.8 million potential class members, 136 consumers and ten TPP claimants opted out . . . and two TPP claimants objected," and "[t]he District Court concluded that the insignificant number of objections filed weighed in favor of approving the settlement"); *Sutton v. Med. Serv. Ass'n, Civ. A. No. 92-4787, 1994 U.S. Dist. LEXIS 7512, 1994 WL 246166, at *9 (E.D. Pa. June 8, 1994)* (stating that "[i]n litigation involving a large class, it would be extremely unusual not to encounter objections").

Of the three objections received by the Court and forwarded to Counsel, one is from a current subscriber, one is from a former subscriber, and the third does not specifically state her subscriber status. The current subscriber Objector is Carrie Chandler, who purchases services at two addresses within the Class area, one in Philadelphia and the other in Chester, Pennsylvania. She states:

> I am objecting to the Settlement offers because I believe that I'm entitled to money offer. During **[*15]** that time frame indicated where I had two accounts with Comcast (and still do) I have given them a lot of money for both accounts. I feel as though Comcast package that their offering is definitely not acceptable for the money given for both accounts and years of dedicated service.

(May 20, 2015 Obj. of Carrie Chandler.) The former subscriber Objector is Mark Rhoades of Medford, New Jersey.[5] He states:

> First, the value of the "Settlement Credits" is over-stated given that the actual value of the Settlement Credits depends on the settlement option selected by the consumer. ... As such, inclusion of "Settlement Credits" as part of the "Settlement Fund" misrepresents the true value of the "Settlement Fund." . . . [T]he use of the misrepresented value . . . as a benchmark to determine the adequacy of counsel fees is improper.

---

[5] We note that Medford, New Jersey is not part of the Class area, and Mr. Rhoades does not state whether he received Comcast services at an address within the Class area. We nonetheless consider the merits of his objection. **[*17]**

> Second, given that the "Settlement Cash Amount" to be paid by Comcast under the settlement totals only $16,670,000, awarding counsel fees in the amount of $15,000,000 is unreasonable.
>
> Third, with only $16,700,000 to be provided for cash rebates to Former Subscribers, and given that the Class Counsel Fees of $15,000,000 are to be paid from the Settlement Fund, there is the possibility **[*16]** of insufficient funds to pay the Former Subscribers under the settlement.
>
> Fourth, given that the Settlement Agreement requires class counsel to provide notice to the Former Subscribers . . ., and given that the attorneys' fees to be paid to class counsel are also to be paid from the Settlement Cash Amount portion of the Settlement Fund, there is the possibility of a conflict of interest between class counsel and Former Subscribers possibly resulting in deficient notice to Former Subscribers.

(June 10, 2015 Obj. of Mark Rhoades.) The Objector whose subscriber status is not stated is Donna Recupito of Honeybrook, Chester County, Pennsylvania. She states:

> Comcast owes me a lot more than $15 or whatever they are proposing! I'm sure I'll never see it but it should be known that every month they promised 1 price + came up with much more pricing + of course they always made excuses + were ALWAYS right. It's ashamed that we even have to pay for TV.

(April 2015 Obj. of Donna Recupito.)

We overrule these objections. The Court is informed by Class Counsel that Objector Chandler opted for the cash benefit. Accordingly, the primary basis for her objection has no merit. We find that the factual assertions underlying the argument posed by Objector Rhodes are untrue. The record belies the assertion that the "Settlement Credits" misrepresent the true value of the Settlement Fund. Comcast has committed to provide those services, and the retail cost of those services has been used to value them as credits against the services portion of the Settlement Fund. His assertion that the "Settlement Cash Amount" will be insufficient to pay counsel fees and the cash settlements, rendering the award of counsel fees unreasonable and raising the possibility of a conflict of interest between counsel and the Class, is also inaccurate. The cash fund is sufficient to pay all cash claims received by the Settlement Administrator, even if the full amount of attorneys' fees and expenses is awarded by the Court. Finally, Objector Recupito appears to be dissatisfied with the amount of the cash benefit she will receive. We overrule this objection based on our overall consideration of the Girsh and **[*18]** Prudential factors as they apply to the amount of the settlement and find that the reaction of the class to the settlement weighs in favor of approving the settlement.

C. The stage of the proceedings and the amount of discovery completed.

The procedural stage of a case at the time of settlement provides a means to examine the question of "whether counsel had an adequately appreciation of the merits of the case before negotiating" the settlement. *Warfarin, 391 F.3d at 537* (citations omitted). "[C]ourts generally recognize that a proposed class action settlement is presumptively valid where . . . the parties engaged in arm's length negotiations after meaningful discovery." *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 144-45 (E.D. Pa. 2000)*. Settlements arrived at following discovery "are more likely to reflect the true value of the claim." *Boone v. City of Phila., 668 F. Supp. 2d 693, 712 (E.D. Pa. 2009)* (citing *Bell Atl. Corp., 2 F.3d at*

1314).

Class Counsel note that this litigation is of long duration, involved extensive discovery, motion practice, multiple trips through appellate courts, a decision by the United States Supreme Court on class certification issues, forty-seven depositions, the review of millions of pages of party and third-party documents, and the retention of multiple experts by the parties, who issued reports and almost all of whom were deposed. Based upon the **[*19]** voluminous record, the Court previously found "that the level to which this case was litigated supports a conclusion that the settlement was reached with full appreciation by counsel of the merits of the case." (Preliminary Approval Order at 9.) Class Counsel assert that they "unquestionably had a full 'appreciation of the merits of the case as well as the legal theories and risks.'" (Pl. Att'y Fee Mem. at 10 (quoting Pet Food Prods., 629 F.3d at 351).) They conclude that the third Girsh factor weighs strongly in favor of final approval. See Warfarin, 391 F.3d at 537 ("Based on the type and amount of discovery undertaken by the parties, the District Court concluded that class counsel adequately appreciated the merits of the case before negotiating, and we agree that this factor strongly favors approval of the settlement."). We agree that Class Counsel have a full appreciation of the strengths and weaknesses of their litigation position and find that this factor weighs in favor of approving the settlement.

D. The risks of establishing liability and damages.

Class Counsel argue that the fourth and fifth Girsh factors further support a finding that the settlement is fair, reasonable and adequate. The fourth factor, the risks of establishing liability, **[*20]** "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 814 (3d Cir. 1995). The fifth factor similarly "'attempts to measure the expected value of litigating the action rather than settling it at the current time.'" Cendant, 264 F.3d at 238-39 (quoting GMC, 55 F.3d at 816). In applying these factors, "the Court need not delve into the intricacies of the merits of each side's arguments, but rather may 'give credence to the estimation of the probability of success proffered by [Class Counsel], who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" Perry v. FleetBoston Fin. Corp., 229 F.R.D. 105, 115 (E.D. Pa. 2005) (citation omitted). Class Counsel assert that the Class would have prevailed at trial, including in establishing Comcast's liability, based on the extensive evidentiary record; however, "they also recognize that class action antitrust cases, like all complex litigation against companies ably represented by teams of talented defense counsel, carry inherent risks." (Pl. Att'y Fee Mem. at 11 (citing Lazy Oil, Co. v. Witco Corp., 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997) (noting that "[h]ere, as in every case, Plaintiffs face the general risk that they may lose at trial, since no one can predict the way in which a jury will resolve **[*21]** disputed issues").) They assert that District Courts within the Third Circuit have granted final approval to settlements of antitrust class actions where, "'[a]s in any antitrust case, [there are] substantial risks of non-recovery, even after preliminary victories were achieved.'" (Id. (quoting In re Elec. Carbon Prods. Antitrust Litig., 447 F. Supp. 2d 389, 400 (D.N.J. 2006)).)

Class Counsel also assert that the Class would be able to prove damages at trial, while recognizing "the risks of a limited recovery or no recovery given the significant differences among the parties' competing experts on the issue of overcharge damages." (Id. at 12

(citing *In re Remeron Direct Purchaser Antitrust Litig., Civ. A. No. 03-85, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *8 (D.N.J. Nov. 9, 2005)* (stating that "[t]he determination of damages is a complicated and uncertain process" and noting that given the conflicting damages expert reports, "[i]t is by no means certain that Plaintiffs would have succeeded in recovering the maximum measure of damages estimated by Plaintiffs' expert") (citations omitted); *Elec. Carbon Prods., 447 F. Supp. 2d at 401* (discussing risks in proving antitrust damages at trial involving "a battle of experts addressing the measurement of . . . overcharges, which can become an esoteric exercise with unpredictable results"); *In re Aetna Inc. Sec. Litig., Civ. A. No. MDL 1219, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *10 (E.D. Pa. Jan. 4, 2001)* (noting that plaintiffs' damages theories were based primarily on testimony and reports of experts, so that plaintiffs risked rejection **[*22]** of its experts by either the court on a Daubert challenge or by the jury); and *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 539 (D.N.J. 1997)* (observing that "a jury's acceptance of expert testimony is far from certain, regardless of the expert's credentials")).)

Counsel note that, in the Preliminary Approval Order, we pointed to the vigorous dispute between the parties' experts and Comcast's motion to strike the most recent reports of Dr. McClave and Dr. Williams, underscoring the risks inherent in continued litigation. (Preliminary Approval Order, at 9 ("The parties' recent expert reports continue to reflect both the ongoing core litigation disputes of the parties and the inherent risks of continued litigation, reinforcing the fact that the Settlement falls within the range of reasonableness").) They argue that the Settlement, on the other hand, provides all Settlement Class Members with significant, certain benefits without further delay, and contend that the fourth and fifth Girsh factors support final approval of the Settlement. We agree that these factor weighs in favor of approval of the settlement.

E. The risk of obtaining and maintaining class certification through trial.

Counsel contend that the sixth Girsh factor also provides additional **[*23]** support for final approval. They note that Plaintiff's motion to certify the narrowed Philadelphia Settlement Class was pending at the time the Settlement Agreement was reached. While they believe "that the extensive evidentiary record before the Court fully supports class certification and would warrant continued certification through trial . . . [and anticipate] that a class would have been certified for litigation purposes," they also recognize that a court may decertify or modify a class action at any time, as we in fact did following the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008)*. (Pl. Att'y Fee Mem. at 13.) Because of this ever-present risk, courts have found the sixth Girsh factor to favor final approval of settlements. See *Processed Egg Prods., 284 F.R.D. at 273* (stating that "[t]he Court of Appeals for the Third Circuit has recognized: There will always be a risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement") (citation and internal quotation marks omitted). Counsel note that the fact that our previous order re-certifying the class was reversed by the United States Supreme Court further underscores this inherent risk. (Pl. Att'y Fee Mem. at 13-14 (citing **[*24]** *Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *8* (noting that the parties' briefing "indicates that this is a hotly contested issue, with Defendants raising multiple and factual legal arguments in opposition to certification" and that "the risks faced by Plaintiffs with regard to class

certification weigh in favor of approving the Settlement")).) We agree that this factor weighs in favor of approval of the settlement.

F. The ability of Defendant to withstand a greater judgment.

Counsel contend that the seventh Girsh factor neither favors nor disfavors the settlement, noting that "many settlements have been approved where a settling defendant has had the ability to pay greater amounts." (Pl. Att'y Fee Mem. at 14 (quoting *In re Remeron End-Payor Antitrust Litig., Civ. A. Nos. 02-2007, 04-5126, 2005 U.S. Dist. LEXIS 27011, 2005 WL 2230314, at *23 (D.N.J. Sept. 13, 2005)*); see also *Warfarin, 391 F.3d at 538* (noting, in affirming certification of a nationwide settlement class and final approval of a settlement, that "[a]lthough the plaintiffs do not dispute that DuPont's total resources far exceed the settlement amount, the fact that DuPont could afford to pay more does not mean it is obligated to pay any more than what the consumer and TPP class members are entitled to under the theories of liability that existed at the time a settlement was reached.").) While the ability of a defendant to withstand a greater judgment **[*25]** is appropriately considered in cases where the settlement amount is less than what plaintiffs might ordinarily agree to because of a defendant's limited financial circumstances, see *Reibstein v. Rite Aid Corp., 761 F. Supp. 2d 241, 254 (E.D. Pa. 2011)*, Counsel contend that such circumstances do not exist here as there is no record evidence that Comcast is financially unstable. They also argue that courts have recognized that "whether a defendant could pay more in settlement is not relevant when considered in a pure vacuum, divorced from considerations of whether the settlement is fair, reasonable and adequate when viewed in the light of the legal issues and facts involved in the case." (Pl. Att'y Fee Mem. at 14 (citing *Warfarin, 391 F.3d at 538*).) They assert that this case presented difficult legal issues and substantial risks, the Class would have necessarily spent substantial additional time and expenses in pursuing the case through trial and on appeal, and the settlement provides significant benefits to the Class. They conclude that, given this context, any ability of Comcast to pay more is not relevant in determining the reasonableness of the settlement. See id. (finding no error in district court's conclusion "that DuPont's ability to pay a higher amount was irrelevant **[*26]** to determining the fairness of the settlement"); *Lazy Oil, Co., 95 F. Supp. 2d at 318* (stating that "[t]he Court presumes that Defendants have the financial resources to pay a larger judgment" but that "in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial, the Court accords this factor little weight in deciding whether to approve the proposed Settlement"); *Perry, 229 F.R.D. at 116* (observing that defendant "could certainly withstand a much larger judgment" and that "[w]hile that fact weighs against approving the settlement, this factor's importance is lessened by the obstacles the class would face in establishing liability and damages"); and *Sullivan, 667 F.3d at 323* ("At bottom, we agree that, 'in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the settlement.'") (citation omitted). Cf. *Dryer v. Nat'l Football League, Civ. A. No. 09-2182, 2013 U.S. Dist. LEXIS 156712, 2013 WL 5888231, at *4 (D. Minn. Nov. 1, 2013)* (reasoning that "there is no issue with the NFL's financial condition," that defendant is "fully able to pay what it has committed to pay" and "is also fully able to continue to litigate this matter vigorously and defend itself against the class's claims should it **[*27]** be necessary," and concluding that "[t]his factor [defendant's

ability to pay] is neutral in the Court's analysis"). Thus, Counsel conclude, the seventh Girsh factor is neutral here, neither favoring nor disfavoring settlement.

We agree that this is a neutral factor, neither favoring nor disfavoring approval of the settlement. Comcast's financial ability to withstand a larger judgment is offset by the relative strengths and weaknesses of the parties' litigation positions and the uncertainty of a more positive result for the Class had the litigation continued to conclusion.

G. The range of reasonableness of the settlement fund in light of the best possible recovery and all of the attendant risks of litigation.

The final pair of Girsh factor focuses on "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Warfarin, 391 F.3d at 538*. These factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." Id. (citing *Prudential, 148 F.3d at 322*). The Third Circuit has noted that "'after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution.'" **[*28]** *Prudential, 148 F.3d at 317* (quoting *GMC, 55 F.3d at 806*). Under *Rule 23(e)*, a court "must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation." *Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *4*.

Counsel contend that the settlement falls squarely within the range of settlements worthy of final approval as fair, reasonable and adequate. They note that we previously determined the settlement to be "within the range of settlements worthy of final approval as fair, reasonable and adequate," stating that "[t]he Settlement Fund amount reflects a sound recovery in relation to the estimated single damages reflected in Dr. McClave's new report." (Preliminary Approval Order at 9.)

In the Preliminary Approval Order we stated:

> We find that Plaintiffs have shown that the relief available under the Settlement falls within the range of reasonableness, and there is a conceivable basis for presuming that the standard applied for final approval — fairness, adequacy, and reasonableness — will be satisfied. The stated $50 million value of the Fund represents approximately 25% of the amount that Dr. McClave now opines is attributable to Comcast's deterrence of overbuilding in the five counties. This is **[*29]** a significant result given the uncertainty whether, absent the Settlement we would accept Dr. McClave's opinion as common proof, and the substantial risk that Plaintiffs would face in persuading a jury to accept Dr. Williams' liability theory and Dr. McClave's damages theory.

(Id. at 10.) We find no cause to change our opinion given that the Class has now received notice of the settlement terms and there has been so little opposition expressed to the reasonableness of the settlement. We also find that the result is eminently reasonable given the clear uncertainty of the Class enjoying a more positive result had the case been litigated to conclusion. Accord *Sullivan, 667 F.3d at 324, 326* (noting that the class's expert estimated that the indirect purchaser plaintiff settlement fund represented an estimated 10.9% of such plaintiffs' single damages and the direct purchaser fund amounted to approximately 20% of their single damages and finding no abuse of discretion in "the District Court's conclusion that the proposed settlement offered a reasonable recovery");

Warfarin, 391 F.3d at 538 (stating that according to plaintiffs' expert's figures, "the $44.5 million settlement fund is approximately 33% of available damages and well within a reasonable settlement **[*30]** range when compared with recovery percentages in other class actions") (citing *Cendant, 264 F.3d at 241* (approving settlement providing 36% - 37% recovery and noting typical recoveries in securities class actions range from 1.6% to 14%)); and *Remeron End-Payor Antitrust Litig., 2005 U.S. Dist. LEXIS 27011, 2005 WL 2230314, at *24* (noting that "an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement was reasonable relative to other factors, such as the risk of no recovery" and concluding that "[t]he Court is satisfied that the settlement agreement accounts for the risks inherent in this complex litigation and provides appropriate relief in light of these risks") (citation omitted).

Accordingly, we find that all relevant Girsh factors favor final approval of the Settlement.

2. The Prudential Factors

A. Maturity of the underlying substantive issues.

This case settled long after completion of discovery and after more than a decade of vigorously contested litigation. The stage at which settlement occurs reflects "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re GMC, 55 F.3d at 813*. "Where [the] negotiation process follows meaningful discovery, the maturity and correctness of the settlement **[*31]** become all the more apparent." *In re Elec. Carbon Prods. Antitrust Litig., 447 F. Supp. 2d at 400* (citing *In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003)*). The fact that the underlying substantive issues were well-developed and well-known further supports approval of this settlement. See *Chakejian v. Equifax Info. Servs., 275 F.R.D. 201, 215 (E.D. Pa. 2011)* (finding that where the underlying substantive issues were "mature in light of the experience of the attorneys, extent of discovery, posture of the case, and mediation efforts undertaken," this factor supported settlement approval); *In re Fasteners Antitrust Litig., Civ. A. No. 08-1921, 2014 U.S. Dist. LEXIS 8829, 2014 WL 285076, at *11 (E.D. Pa. Jan. 24, 2014)* (noting that "[a] substantial amount of information has been provided to Settlement Class Counsel such that counsel are capable of making an informed decision about the merits of the case if it were to proceed to trial, and about the fairness of the settlement terms" and concluding that "[w]e are satisfied that the underlying substantive issues were well developed"). We find that this factor weighs in favor of approval of the settlement.

B. The right to opt-out of the settlement.

All members of the Philadelphia Settlement Class have been provided the opportunity to opt-out. Counsel assert that, of a class consisting of at least 800,000 members, only three requests for exclusion were received by the Settlement Administrator. (Botzet Decl. ¶ 13.) Counsel assert that this response is further **[*32]** reflected in the small number of objections to date (id. ¶ 14), and favors final approval. We agree that this factor weighs in favor of approval of the settlement.

C. Reasonableness of attorneys' fees provisions.

Class Counsel seek an award of attorneys' fees and expenses of $15 million. As detailed in Plaintiff's fee Motion, discussed *infra*, the requested fee and expense award of $15 million (in combination representing 30% of the $50 million settlement fund) consists of $8,574,896.16 in expenses (approximately

17.15% of the settlement fund) and $6,425,103.84 in attorneys' fees (approximately 12.85% of the settlement fund). (See Plaintiff's Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Award to Class Representative, Declaration of David Woodward with Exhibits A-T). Plaintiff's motion for fees and expenses and request for approval of a $10,000 service award to Class Representative Stanford Glaberson, and the supporting memorandum and Declaration of David Woodward, have been posted on the dedicated settlement website and available to Class Members since January 15, 2015. (Botzet Decl. ¶ 4.) Counsel submit that these requests are fair and reasonable **[*33]** under the applicable legal standards and precedent discussed in their motion papers and supporting declarations and exhibits. As detailed in our discussion *infra*, we find that this factor weighs in favor of approval of the settlement.

D. Reasonableness of the procedure for processing claims.

Counsel assert that the Settlement Administrator, Rust Consulting, Inc., is a highly experienced claims administrator who implemented the settlement pursuant to the Court's Preliminary Approval Order. (See id. ¶ 2.) The Settlement Agreement provided a simple method for class members to receive benefits under the settlement. Class members who are current Comcast subscribers were able to submit a claim form providing their name, address and Comcast account number. (See Settlement Agreement ¶ 8.8.1 and Ex. A.) Former subscribers who are class members were entitled to submit an equally simple claim form providing their name, the address where they formerly received Comcast service during the class period, their former Comcast account number, if known, and affirming, under penalty of perjury, that they subscribed to video programming services (other than solely to basic cable services) from Comcast at **[*34]** any time between January 1, 2003 and December 31, 2008 in any one of the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia, Pennsylvania. (Id. ¶ 8.8.2 and Ex. B.) Claims were submitted electronically or by mail. (Id. ¶ 8.8.3.)

Current subscribers who did not elect on their claim form either a $15 bill credit or from the free services automatically receive two free months of The Movie Channel (an estimated $43.90 value). (Id. ¶ 8.2.1.) The same is true of current subscribers who do not file a claim form. (Id.) Because there will be no reverter of any portion of the Settlement Fund to Comcast (id. ¶ 8.1), all cash and service benefits will be provided to class members pursuant to the settlement.

Counsel assert that the nature and fairness of the claims process support final approval. We agree that this factor weighs in favor of approval of the settlement.

c. Conclusion

In conclusion, it must be remembered that a settlement is, by its nature, a compromise. Neither party can expect to receive a perfect outcome. Rather, each must consider the strengths and weaknesses of their litigation position, and determine what is an optimal outcome. Applying the Girsh and Prudential factors, **[*35]** we conclude that the settlement is fair and reasonable and represents an optimal outcome for the Class. Accordingly, we grant final approval.

IV. MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

Class Counsel seek an award of attorneys' fees and reimbursement of litigation expenses in the total amount of $15 million. They assert

that the total expenses necessarily and reasonably incurred to date by Lead Class Counsel and other Class Counsel in this litigation and for the benefit of the Class are $8,574,896.16.[6] Class Counsel request partial reimbursement of attorneys' fees reasonably incurred in this matter in the amount representing the difference between $15 million and the amount of total expenses. Thus, the attorneys' fees component of the $15 million requested fees and expenses request is $6,425,103.84 ($15,000,000 less current expenses). Counsel have provided billing records showing the hours expended by Class Counsel and corresponding lodestars. (See Pls.' Mot for an Award of Attorneys' Fees, Woodward Declaration, Ex. A.) The requested fee represents 12.85% of the gross Settlement Fund and 15.51% of the net Settlement Fund ($50 million less expenses and requested service award, **[*36]** if approved). Class Counsel's collective lodestar in this case is $24,927,677.55, representing 61,511.58 hours expended in prosecuting this complex litigation for the benefit of the Class. The requested fee, if granted in full, would amount to a "negative" multiplier of approximately .26 of the total lodestar.

a. Attorneys' Fees

The Supreme Court has "recognized consistently that . . . a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980)*. See also *Boone, 668 F. Supp. 2d at 713*; and *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. at 192* (noting that "there is no doubt that attorneys may properly be given a portion of the settlement fund in recognition of the benefit they have bestowed on class members"). The common fund doctrine is anchored in the inherent powers of federal courts to "prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co., 444 U.S. at 478*; see also *Fickinger v. C.I. Planning Corp., 646 F. Supp. 622, 632 (E.D. Pa. 1986)* (noting that fees in common fund cases "are not assessed against the unsuccessful litigant (fee shifting), but rather are taken from the fund or damage recovery (fee spreading), thereby avoiding the unjust enrichment of those who otherwise would be benefited by the fund without sharing in the expenses incurred by the successful litigant").

The Third Circuit favors the percentage-of-recovery method of calculating fee awards in common fund cases. See *In re AT&T Corp., Secs. Litig., 455 F.3d 160, 164 (3d Cir. 2006)*; *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)* (citing *Prudential, 148 F.3d at 333*. Courts within the Third Circuit and elsewhere routinely use this **[*38]** method in antitrust class actions. See, e.g., *In re Fasteners Antitrust Litig., 2014 U.S. Dist. LEXIS 9990, 2014 WL 296954, at *3* (stating that "[i]n practice, courts in the Third Circuit assess requests for attorney's fees in antitrust cases using the percentage-of-recovery method, and then cross-check the result with the lodestar method"); *In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 746 (E.D. Pa.*

[6] Not included in Class Counsels' lodestar submission are the fees and expenses incurred by the law firm of Adkins, Kelson & Zavez, P.C., which has submitted its own fee petition (Docket Entry 618). The Zavez firm has expended 879.15 hours on behalf of the Class and submitted a total lodestar of $354,494.50. (May 8, 2015 Decl. of John Peter Zavez ¶ 4.) Lead Class Counsel inform the Court that the Zavez firm's fee will be apportioned from the total amount awarded as fees by the Court, in the same manner as for all other law firms that have performed services for the Class. Accordingly, we will separately grant the Zavez firm's Motion, subject to the provisions contained in the Final Judgment for the apportioning of fees amongst law firms that have performed services for the Class. Our discussion of the attorneys' fee issues addresses all applications that have been made to the Court. **[*37]**

2013) (noting that "[t]he latter method [percentage-of-recovery], is 'generally favored in cases involving a common fund . . . .'") (quoting Prudential, 148 F.3d at 333); Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *12 (finding that "the percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case"). The Third Circuit recommends that district courts perform a lodestar cross-check to ensure that application of the percentage method results in an appropriate recovery. In re Rite Aid Corp. Sec. Litig., 396 F.3d at 305.

The Third Circuit has articulated factors for courts to consider in evaluating the reasonableness of a fee request under the percentage-of-recovery method:

> (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 **[*39]** 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). We need not find that all of the Gunter factors are satisfied in order to grant a fee request. See, e.g., Meijer, Inc. v. 3M, Civ. A. No. 04-5871, 2006 U.S. Dist. LEXIS 56744, 2006 WL 2382718, at *21-22 (E.D. Pa. Aug. 14, 2006) (noting that although time spent litigating the case was relatively low when the case settled after one year, other Gunter factors outweighed that fact). The Third Circuit has also indicated that other factors from In re Prudential Insurance Co. America Sales Practices Litigation may be considered:

> (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. Secs. Litig., 455 F.3d at 165-66 (citing Prudential, 148 F.3d at 338, 340, 339). Counsel assert that the application of all relevant factors provides support for their requested fee.

1. Application of the Gunter Factors

A. Size of the Fund; Number of Persons Benefited

As noted earlier, the Settlement Fund is $50 million and the parties estimate that the Class consists **[*40]** of at least 800,000 persons. (Settlement ¶ 8.1; Woodward Decl. ¶ 55.) Counsel argue that the Settlement provides significant, certain benefits to the Class in the form of cash payments or bill credits for services. For the reasons already discussed, we find that this factor weighs in favor of granting the Motion.

B. Objections

Also as noted earlier, the Court received only three objections from class members, which we have overruled. We find this factor weighs in favor of granting the Motion.

C. Skill and Efficiency of the Attorneys

In appointing Lead Class Counsel for the Settlement Class pursuant to Fed. R. Civ. P. 23(a)(4), we noted that Lead Class Counsel "have extensive experience and expertise in antitrust, class action and complex litigation,

and have successfully prosecuted antitrust class actions and similar cases in courts in this district and throughout the United States, including, for the last decade, this Action." (Preliminary Approval Order at 4.) Lead Class Counsel assert that they have:

> deep experience prosecuting and trying complex antitrust actions. Lead Class Counsel and other Class Counsel devoted substantial time and resources to this case to perform services including developing the factual **[*41]** basis of the claims, working closely with experts, filing numerous pleadings, defeating multiple challenges to those pleadings, engaging in extensive motion practice, conducting significant discovery and litigating all contested issues before this Court, as well as class certification issues before the Third Circuit and the Supreme Court.

(Pl. Att'y Fee Mem. at 12; Woodward Decl. ¶ 59.) They note that they faced formidable opposition from nationally recognized law firms with extensive antitrust and class action experience who rigorously defended the case, and argue that this factor further supports Class Counsel's motion. We find that skill, efficiency, expertise, and professionalism of all counsel involved in this litigation have been exemplary and that this factor weighs in favor of granting the Motion.

D. Complexity and Duration of the Litigation

The complexity and duration of the litigation is "the first factor a district court can and should consider in awarding fees." *Gunter, 223 F.3d at 197*. Counsel note that courts have recognized that an "antitrust class action [is] perhaps the most complex case[] to litigate," *Bradburn Parent Teacher Store, Inc. v. 3M, 513 F. Supp. 2d 322, 338-39 (E.D. Pa. 2007)*; see also *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)*, and assert that they have diligently **[*42]** prosecuted this litigation on behalf of the Class for almost eleven years in the face of vigorous opposition from Defendants' highly skilled counsel. (Pl. Att'y Fee Mem. at 10.) Counsel assert their work involved "careful, thorough research, crafting pleadings that would advance Plaintiff's case through the crucible of extensive litigation of Comcast's several pleading challenges, contested arbitration proceedings at the district and appellate court levels, briefing and arguing Comcast's motion for summary judgment, review of over five million pages of documents, depositions of 47 witnesses, submission by the parties of 37 expert reports and testimony, and highly contested class certification proceedings before this Court, the Third Circuit and the Supreme Court." (Id.) They also note that they filed their Motion prior to the completion of their work on the case; that they do not seek additional reimbursement for the time devoted to implementing the Court-approved Class notice program, working with the claims administrator in the settlement administration process, responding to inquiries from Class members, drafting papers in support of final approval of the Settlement, and preparing **[*43]** for and appearing at the final approval hearing. We find that this factor weighs in favor of granting the Motion.

E. Risk of Nonpayment

"A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust action[], including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high." *Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *14*; see also *Gunter, 223 F.3d at 195 n.1, 199* (explaining that the risk counsel takes in prosecuting a client's case should also be considered in assessing a fee award). Lead

Class Counsel note that they "undertook this litigation on a wholly contingent basis, understanding from the outset that they were embarking on a long and costly litigation through a shifting legal landscape, all the while confronting highly skilled lawyers who would vigorously advocate Defendants' cause and facing uncertainty about whether they would ever receive any compensation for their enormous investment of time and money in advancing the interests of the Class." (Woodward Decl. ¶ 63.) They contend that this case presented a host of risks and uncertainties that could **[*44]** have precluded any recovery. (Id. ¶ 65.) Although they continued to believe that the record evidence would establish Defendants' liability and prove damages on a class-wide basis at trial, Lead Class Counsel assert that they "agreed to the Settlement on behalf of the Class after considering a variety of factors, primarily the significant benefits of the $50 million recovery to the Class. A variety of factors made the outcome at trial uncertain, including the difficulty a jury might have in grasping the economic testimony and deciding highly complex issues, as well as decisions by the Court that impacted Plaintiff's case." (Id. ¶ 67.) They note that we have observed that the Settlement represents "a significant result given the uncertainty whether, absent the Settlement we would accept Dr. McClave's opinion as common proof, and the substantial trial risks that Plaintiffs would face in persuading a jury to accept Dr. Williams' liability theory and Dr. McClave's damages theory." (Preliminary Approval Order at 10.) Finally, they note that, even if Class Counsel successfully tried the case, Plaintiff still would have faced likely and lengthy appeals. They assert that this factor further **[*45]** supports approval of the requested award.[7] We agree that this factor weighs in favor of granting the Motion.

F. Amount of Time Devoted

Class Counsels' collective lodestar is $24,927,677.55, representing 61,511.58 hours expended in prosecuting this case over nearly eleven years. (Woodward Decl. ¶ 70.) Counsel note that this amount does not include **[*46]** any amount for ongoing and anticipated future work in responding to Class member inquiries, managing implementation of components of the Class notice program, assisting and monitoring the claims administrator, drafting Plaintiff's memorandum in support of final approval of the Settlement, and participating in the final approval hearing. As we discuss below, the total lodestar when compared to the amount requested weighs in favor of granting the Motion.

G. Awards in Similar Cases

Counsel assert that their requested fee award is well below the level of awards made in similar antitrust cases. They note that courts within the Third Circuit frequently award fees of one-third of the value of class action settlements. (Pl. Att'y Fee Mem. at 16 (citing *In re Tricor Direct Purchaser Antitrust Litig., Civ. A. No. 05-340, 2009 U.S. Dist. LEXIS 133251 at *14-*18(ECF No. 543) (D. Del. April 23, 2009)* (awarding one-third fee on settlement of $250 million); *In re Flonase Antitrust Litig., 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013)* (awarding one-third fee on settlement of $150

[7] The Class has also appended a Declaration from Professor Eric Green, who mediated the settlement, discussing the substantial risks both sides faced in this litigation. (See Decl. of Eric Green, Docket Entry No. 608-4 at 6 (noting that Defendants "could not be sure of a favorable jury verdict" and faced the risk that "if the Class proved liability at trial, a jury could award damages far in excess of the settlement" and that "the Class faced serious obstacles to establish liability and certifying a class" and faced the risk that "the jury could have awarded damages much less than those sought by the Class or the amount of the settlement.").) Professor Green appropriately observed that "[b]oth sides also faced the risk that a jury could react unfavorably to the evidence presented" and that "continued litigation posed great risk for both sides.". (Id.)

million); *Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *17* (awarding one-third fee on settlement of $75 million); *In re Wellbutrin SR Antitrust Litig., C.A. No. 04-5525, 2011 U.S. Dist. LEXIS 158833 at *20 (ECF No. 413) (E.D. Pa. Nov. 21, 2011)* (awarding one-third fee on settlement of $49 million); In re Wellbutrin XL Antitrust Litig., Civ. A. No. 08-2431, slip op. at 8 (ECF No. 485) (E.D. Pa. Nov. 7, 2012) **[*47]** (awarding one-third fee on settlement of $37.5 million); In re Metoprolol Succinate Antitrust Litig., Civ. A. No. 06-52, slip op. at 9 (ECF No. 194) (D. Del. Feb. 21, 2012) (awarding one-third fee on settlement of $20 million); *In re Fasteners Antitrust Litig., 2014 U.S. Dist. LEXIS 9990, 2014 WL 296954, at *7* (awarding one-third fee on settlement of $17.55 million); and Rochester Drug Coop., Inc. v. Braintree Labs., Inc., Civ. A. No. 07-142, slip op at 9 (ECF No. 243) (D. Del. May 31, 2012) (awarding one-third fee on settlement of $17.5 million)).)

Counsel note that, in contrast to that benchmark, their requested award represents only 15.51% of the net common fund ($50 million less expenses). We find that this factor weighs in favor of granting the Motion.

2. Application of the Prudential Factors

A. Value of Benefits

The value of benefits accruing to class members that is attributable to the efforts of class counsel, as opposed to the efforts of others is also a factor to be considered. See *Prudential, 148 F.3d at 339-40*. Counsel assert that the development and prosecution of this case was based entirely on the investigation and efforts of Class Counsel, and, unlike some antitrust class actions, did not follow on the heels of any government lawsuit **[*48]** or investigation. See *AT&T Corp., Secs. Litig., 455 F.3d at 173* (noting that where class counsel was not aided by the efforts of any government group, this strengthened the district court's conclusion that the fee award was fair and reasonable). They assert that the Settlement's substantial benefits to the Class are attributable solely to the efforts of Lead Class Counsel and other Class Counsel. (Woodward Decl. ¶¶ 12 and 72.) We agree that this factor weighs in favor of granting the Motion.

B. Privately Negotiated Percentage Fee

Counsel argue that the requested fee award is further supported by considerations of the considerably higher fee that would be expected to be privately negotiated in contingency fee litigation. See, e.g., *In re Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14 (Padova, J.)* (stating that "the Court concludes that an award of thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation") (citations omitted). We agree that this factor weighs in favor of granting the Motion.

3. Lodestar Cross-Check

The Third Circuit has embraced the use of a lodestar cross-check to ensure that application of the percentage-of-recovery method does not result in too large a fee recovery. *Rite Aid, 396 F.3d at 305-06*; see also *In re Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14*. Once the lodestar is calculated by multiplying **[*49]** the number of hours counsel reasonably expended by a reasonable billing rate for such services (see *Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*), "[t]he total lodestar estimate is then divided into the proposed fee calculated under the percentage method" and "[t]he resulting figure represents the lodestar multiplier to compare to multipliers in other cases." Manual for Complex Litigation (Fourth) § 14.122 (2014). Where the lodestar is greater than the requested fee award, however, the

court may dispense with a cross-check. See *Fleisher v. Fiber Composites, LLC, Civ. A. No. 12-1326, 2014 U.S. Dist. LEXIS 29151, 2014 WL 866441, at *15 (E.D. Pa. March 5, 2014)* ("Where, as here, counsel requests a fee that represents less than their lodestar, 'there is no need to discuss multipliers and the appropriateness of an increase to the lodestar.'") (citing *Chakejian v. Equifax Info. Servs., LLC, 275 F.R.D. 201, 217 (E.D. Pa. 2011)* (finding that the provision of attorneys' fees and costs contained in the settlement agreement was "eminently reasonable, judging from the lodestar")).

That is the case here. Class Counsel's collective lodestar total, $24,927,677.55, exceeds the requested fee award, yielding a multiplier of only 0.26. (Woodward Decl. ¶ 53.) Counsel assert that, although a lodestar cross-check "may not be necessary in this case, it is still instructive to note that the 0.26 multiplier here is far less than the multiplier of 1 to 4 or higher commonly **[*50]** approved in other similar class actions." (Pl. Att'y Fee Mem. at 20 (citing *Bradburn, 513 F. Supp. 2d at 341* (stating that "[t]he Third Circuit has recognized that multipliers 'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied'" (citations omitted)); *Segen v. OptionsXpress Holdings Inc., 631 F. Supp. 2d 465, 477 (D. Del. 2009)* (multiplier of 2.06); *In re Tricor Direct Purchaser Antitrust Litig., Civ. A. No. 05-340, 2009 U.S. Dist. LEXIS 133251, at *16-*17(ECF No. 543) (D. Del. April 23, 2009)* (multiplier of 3.93); *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 263 (D.Del. 2002)* (multiplier of 1.33); *Remeron Direct Purchaser Antitrust Litig, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *17* (noting that awarded multiplier of 1.86 is on the "low end of the spectrum" (citation omitted)); *Nichols v. SmithKline Beecham Corp., Civ. A. No. 00-6222, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, *24 (E.D. Pa. Apr. 22, 2005)* (approving multiplier of 3.15); *In re Linerboard Antitrust Litig., No. MDL 1261, Civ. A. Nos. 98-5055, 99-1000, 99-1341, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *16 (E.D. Pa. June 2, 2004)* (approving a 2.66 multiplier)).

Class Counsel have submitted to Lead Class Counsel reports itemizing for each attorney and paralegal (1) their historical hourly rate; (2) a description of the services rendered; (3) the number of hours spent performing the services; and (4) the resulting lodestar — i.e., the product of the hourly rate times the total number of hours. These reports also itemize all expenses incurred by the firms in prosecuting this litigation.[8] The following chart summarizes each law firms' lodestar declarations:

Go to table1

We find that the lodestar cross-check confirms the reasonableness of Class Counsel's fee request.

b. Reimbursement of Expenses

The Third Circuit recognizes that attorneys

---

[8] Those individual attorney Declarations are attached as Exhibits C-T to the Woodward Declaration: **[*51]** David Woodward, Heins Mills & Olson, P.L.C. (Ex. C); Barry Barnett, Susman Godfrey, L.L.P. (Ex. D); Joseph Goldberg, Freedman Boyd Hollander Goldberg Urias & Ward, P.A. (Ex. E); Martin I. Twersky, Berger & Montague, P.C. (Ex. F); Anthony J. Bolognese, Bolognese & Associates, LLC (Ex. G); Scott D. Gilchrist, Cohen & Malad, LLP (Ex. H); Benjamin J. Brown, Cohen Milstein Sellers & Toll, PLLC (Ex. I); Ted A. Donner, Donner & Company Law Offices LLC (Ex. J); Roberta D. Liebenberg, Fine, Kaplan and Black, R.P.C. (Ex. K); Douglas A. Millen, Freed Kanner London & Millen LLC (Ex. L); Marc H. Edelson, Hoffman & Edelson, LLC (Ex. M); Richard J. Kilsheimer, Kaplan Fox & Kilsheimer, LLP (Ex. N); Mark A. Griffin, Keller Rohrback L.L.P. (Ex. O); Annika K. Martin, Lieff Cabraser Heimann & Bernstein, LLP (Ex. P); three Declarations of Jayne A. Goldstein, for time and expenses incurred while at the law firms of Mager & Goldstein, LLP (Ex. Q), Mager White & Goldstein, LLP (Ex. R), and Pomerantz, LLP (Ex. S); and Natalie Finkelman Bennett, Shepherd, Finkelman, Miller & Shah, LLP (Ex. T).

who create a common fund for the benefit of a class are entitled to reimbursement from the fund of the reasonable litigation expenses advanced on behalf of the class. See, e.g., *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 732 n.12 (3d Cir. 2001)* (quoting the 1985 Task Force Report for the conclusion that the "common-fund doctrine . . . allows a person who maintains a lawsuit that results in the creation, **[*53]** preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred"); see also *AT&T Corp., Secs. Litig., 455 F.3d at 172 n.8* ("[e]xpenses are generally considered and reimbursed separately from attorneys' fees"); *Warfarin, 212 F.R.D. at 263* (approving costs and expenses reimbursements out of litigation fund as reasonable). Courts routinely approve such expenses incurred in the prosecution of complex cases. See, e.g. *In re OSB Antitrust Litig., Civ. A. No. 06-826, 2008 U.S. Dist. LEXIS 125173 at *19 (ECF No. 947) (E.D. Pa. Dec. 9, 2008)* (approving class counsel's fee request because "[t]his complex lengthy matter involved some eighty depositions, the creation and maintenance of a huge case database, and the preparation and review of expert economic analyses and reports"); *Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *17* (finding the following expenses to be reasonable: "'(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund — pro hac vice'" (quoting *Oh v. AT&T Corp., 225 F.R.D. 142, 154 (D.N.J. 2004)))*.

Class Counsel have requested reimbursement of $8,574,896.16 **[*54]** for out-of-pocket expenses incurred to date in this litigation. Class Counsel assert that they have "incurred these reasonable and necessary expenses over the course of more than a decade, all the while having no assurance of repayment." (Woodward Decl. ¶ 51-52.) The largest component of these expenses comprises payments to economic experts retained by the Class. Plaintiff's expert witness fees total $6,703,918.74. (Pl. Att'y Fee Mem. at 21.) Other significant expenses include the costs associated with storing millions of pages of documents on secure databases; travel to depositions, court hearings and mediation across the country; court reporting expenses; photo and data copying and computerized legal research. (See Woodward Decl., Exs. C-T.)

We find that the requested reimbursement is reasonable.

c. Service Award for Class Representative

Class Counsel also request that the Court approve a service award of $10,000 to Plaintiff Stanford Glaberson, who has served as Class representative since the inception of this litigation. The Court-approved class notice informed the Class that Plaintiff would seek this award.

Courts recognize the purpose and appropriateness of service awards to class **[*55]** representatives. See, e.g., *In re CertainTeed Fiber Cement Siding Litig., 303 F.R.D. 199, 225 (E.D. Pa. 2014)* (noting that '[t]he purpose of these payments is to compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to reward the public service of contributing to the enforcement of mandatory laws" (citing *Sullivan, 667 F.3d at 333 n.65*); *In re Residential Doors Antitrust Litig., Civ A. Nos. 94-3744, 96-2125, MDL 1039, 1998 U.S. Dist. LEXIS 4292, 1998 WL 151804, at *9 (E.D. Pa. Apr. 2, 1998)* (approving awards of $10,000

each to four class representatives); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *19* (approving awards of $25,000 for each of five class representatives); and *Mayer v. Driver Solutions, Inc., Civ. A. No. 10-1939, 2012 U.S. Dist. LEXIS 117556, 2012 WL 3578856, at *5 (E.D. Pa. Aug. 17, 2012)* (approving $15,000 service award for class representative).

Class Counsel assert that Plaintiff has performed a '"public service of contributing to the enforcement of mandatory laws."' (Pl. Att'y Fee Mem. at 23 (quoting *Chakejian, 275 F.R.D. at 220*).) They note that Plaintiff has actively participated in the litigation, has provided Class Counsel with documents and information concerning his subscription to non-basic services from Comcast, was deposed twice (on January 26, 2006 and October 18, 2006), has monitored the litigation through contact with counsel, and has attended a hearing before this Court. (Woodward Decl. ¶¶ 78-79.) Counsel assert that the requested service award is appropriate in light **[*56]** of the risk and sacrifices made by Plaintiff during the more than 10 years this litigation was prosecuted.

We find that a service award of $10,000 to Stanford Glaberson for his service as Class representative is reasonable.

V. CONCLUSION

For the reasons stated, the Court finds that the settlement of this highly contested litigation is fair and reasonable, and we grant final approval. We also (1) approve Class Counsels' attorneys' fee and expense application and enter an order awarding counsel fees and expenses in the amount of $15 million, consisting of $6,425,103.84 in attorneys' fees and $8,574,896.16 in expenses, and (2) approve a service award in the amount of $10,000 for Class Representative Stanford Glaberson.

An appropriate Order and a Final Judgment will be entered.

BY THE COURT:

/s/John R. Padova

JOHN R. PADOVA, J.

ORDER

AND NOW, this 22nd day of September, 2015, following a hearing conducted on September 9, 2015, and for the reasons specified in the Final Judgment entered this day, **IT IS HEREBY ORDERED AS FOLLOWS**:

1. Plaintiffs' Motion for Final Approval of Class Action Settlement (Docket No. 621) is **GRANTED**.

2. Subject to the provisions of Paragraphs 24-26 of the Final Judgment, Plaintiffs' **[*57]** Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Award to Class Representative (Docket No. 615) is **GRANTED**.

3. Subject to the provisions of Paragraphs 16-17 of the Final Judgment, the Motion for Attorney Fees filed by Adkins, Kelston & Zavez P.C. (Docket No. 618) is **GRANTED**.

BY THE COURT:

/s/ John R. Padova

JOHN R. PADOVA, J.

Table1 (*Return to related document text*)

FIRM	HOURS	LODESTAR
Berger & Montage, P.C.	445.00	$153,853.50
Bolognese & Assoc., LLC	2,564.50	$1,027,357.50
Cohen & Malad, LLP **[*52]**	831.40	$273,245.50
Donner & Co. Law Offices LLC	80.00	$17,998.75
Fine, Kaplan and Black, RPC	907.20	$302,546.50
Freed Kanner London & Millen LLC	1,491.10	$750,576.00
Freedman Boyd Hollander Goldberg Urias & Ward, P.A.	3,453.27	$929,997.50
Heins Mills & Olson, P.L.C.	33,145.50	$13,086,595.00
Hoffman & Edelson, LLC	1,573.80	$707,189.00
Kaplan Fox & Kilsheimer LLP	2,446.25	$884,111.25
Keller Rohrback L.L.P.	1,476.10	$619,273.55
Lieff Cabraser Heimann & Bernstein, LLP	274.10	$128,467.00
Mager & Goldstein, LLP	422.25	$174,707.50
Mager White & Goldstein, LLP	48.50	$21,862.50
Pomerantz, LLP	7.30	$5,621.00
Shepherd, Finkleman, Miller & Shah, LLP	27.90	$13,361.00
Susman Godfrey, L.L.P.	11,807.16	$5,642,067.00
TOTAL	**61,511.58**	**$24,927,677.55**

Table1 (*Return to related document text*)

End of Document

Exhibit 11

FILED

June 24, 2022

Hon. Jeffrey B. Beacham, J.S.C.

THE LAW OFFICE OF HOWARD DAVIS, P.C.
***d.b.a.* Davis Environmental Law**
Howard P. Davis, Esq.
(Attorney ID # 031551990)
580 Sylvan Avenue, Suite 2D
Englewood Cliffs, New Jersey 07632
(201) 541-9737 (ph)
(201) 541-6785 (fax)

LEVIN, SEDRAN & BERMAN
Austin B. Cohen, Esq.
(Attorney ID # 035221996)
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106
(215) 592-1500 (ph)
(215) 592-4663 (fax)

Counsel for Plaintiffs

JACQUELINE SUTTON and MELANIE RYAN, On behalf of Themselves and all Others Similarly Situated,

Plaintiffs,
v.

HOFFMANN-LA ROCHE INC.; THE CITY OF CLIFTON, NEW JERSEY; THE TOWNSHIP OF NUTLEY, NEW JERSEY; DELUXE CORPORATION; JOHN DOES 1-100 (names being fictitious and unknown); and XYZ CORPORATIONS 1-100 (names being fictitious and unknown),

Defendants.

HOFFMANN-LA ROCHE INC.,

Defendant/Third-Party Plaintiff,
v.

THE TOWNSHIP OF NUTLEY, NEW JERSEY, DELUXE CORPORATION;

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO. ESX-L-008724-14

CIVIL ACTION

ORDER OF FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATION OF SETTLEMENT FUND, OF AWARD OF ATTORNEYS' FEES AND REIMBURSMENT OF EXPENSES, AND OF AWARD OF SERVICE PAYMENTS TO CLASS REPRESENTATIVES

GRANTED

BRIAD GROUP; S&H Ltd.; CLIFTON LIFESTYLE CENTER, LLC; MERCER ENGINEERING WORKS; MERCER-ROBINSON COMPANY; BENNETT MACHINERY CORPORATION; JOHN DUSENBERY CO., INC.; INTERNATIONAL PAPER COMPANY; NEVINS COMPANY; NEVINS-CHURCH PRESS; UNION BAG-CAMP PAPER CORPORATION; UNION CAMP CORPORATION; LUBRIZOL CORPORATION; LUBRIZOL ADVANCED MATERIAL, INC.; SCHER BROTHERS; SCHER CHEMICAL, INC.; NOVEON, INC.; MAJOR AUTOMOTIVE PRODUCTS COMPANY; MAJOR ENTERPRISES, INC.; SCANDIA PACKAGING MACHINERY COMPANY; MOTIVA ENTERPRISES, LLC; SHELL OIL COMPANY; UTZTI, LLC; UTZ TECHNOLOGIES, INC.; UTZ ENGINEERING, INC.; LYNN HOLDINGS, LLC; DIME REALTY, LLC; and THIRD PARTY DOES 1-50,

Third-Party Defendants.

THE CITY OF CLIFTON, NEW JERSEY,

Third-Party Plaintiff,

v.

E.I. DU PONT DE NEMOURS AND COMPANY; JOHN DOES 1-200 (names being fictitious and unknown; and ABC CORPORATIONS 1-100 (names being fictitious and unknown),

Third-Party Defendants.

HOFFMANN-LA ROCHE INC.,

Defendant/Third-Party Plaintiff,

v.

LOCKHEED MARTIN CORPORATION

Third-Party Defendant.

DELUXE CORPORATION

Defendant /Third-Party Defendant/Third-Party Plaintiff,

v.

LOUIS BERGER GROUP, INC.; LOUIS BERGER & ASSOCIATES, INC.; JOHN DOES 1-100 (names being fictitious and unknown); and ABC CORPORATIONS 1-100 (names being fictitious and unknown)

Third-Party Defendants.

THIS MATTER, having been brought before the Court by Plaintiffs' unopposed Motion seeking final approval of a preliminarily approved class action Settlement, as set forth in the Settlement Agreement[1], and for an award of Attorneys' Fees and Costs, and Class Representative Service Awards, including a Memorandum of Law and Certifications in Support of Plaintiffs' motions, presenting the Settlement Agreement intended to resolve this matter and other supporting materials; and

The Court having entered an Order, on October 21, 2021, after holding a hearing to consider preliminary approval of the proposed Settlement Agreement and related matters, conditionally approving the Settlement Agreement, conditionally certifying a Settlement Class,

[1] The Settlement Agreement is attached as Exhibit A to the Declaration of Austin B. Cohen filed in Support of Plaintiffs' Motion for final approval of the Settlement with all Defendants (the "Cohen Declaration").

conditionally appointing Class Representatives, appointing Settlement Class Counsel, appointing Rust Consulting, Inc. ("Rust") to serve as Settlement Administrator, and approving a proposed Notice Program (the "Preliminary Approval Order"); and

The Court having held a "Final Fairness Hearing" on June 20, 2022, to consider final approval of the Settlement Agreement and related matters; and

The Court, having considered Plaintiffs' motion, the submissions of the Parties relating to the proposed Settlement, any objections, the arguments of counsel at the Final Fairness Hearing as well as the pleadings and papers on file herein, is of the opinion that the Motion for Final Approval of Class Action Settlement should be granted, and that the Motion for Attorneys' Fees, Costs, and Class Representative Service Awards should be granted:

It is therefore on this 24TH day of June, 2022 **ORDERED**: GRANTED

1. The definitions of words and terms contained in the Settlement Agreement are incorporated into this Order.

2. The terms of and findings made in the Preliminary Approval Order are adopted and incorporated into this Order.

3. **Final Class Certification for Settlement Purposes.** Pursuant to New Jersey Rules of Court, the Court finally certifies, for settlement purposes only, the conditionally certified Settlement Class, defined as:

> All current and former owners of the 427 residential properties identified on Exhibit A to the Settlement Agreement (the "Settlement Properties") as of the date that Roche sent regulatory notice letters regarding environmental contamination, determined as of December 23, 2020, but excluding Roche, its parent, subsidiaries, and controlled entities, and government entities. Also excluded from the Settlement Class are former

owners that sold, transferred, or relinquished title to a Settlement Property on or prior to the date that Roche sent its initial regulatory notice to that specific Settlement Property.

4. **Appointment of Class Representatives.** The Court finds that Jacqueline Sutton and Melanie Ryan, who were conditionally appointed to serve as Class Representatives for the Settlement Class, are adequate Class Representatives for the Settlement Class.

5. **Prerequisites for Class Action.** Solely for the purposes of settlement, the Court finds that the prerequisites for a class action under Rule 4:32-1(a) are satisfied for the following reasons:

a. R.4:32-1(a)(1): The Settlement Class appears so numerous that joinder of all members is impracticable;

b. R.4:32-1(a)(2): There appear to be questions of law or fact common to the Settlement Class for purposes of determining whether the Settlement should be approved;

c. R.4:32-1(a)(3): The Class Representatives' claims appear to be typical of the claims of the Settlement Class; and

d. R.4:32-1(a)(4): The Class Representatives and Class Counsel appear to be capable of fairly and adequately protecting the interests of the Settlement Class members in connection with the proposed Settlement.

6. The Court finds, for settlement purposes, that this action is maintainable as a class action under Rule 4:32-2(1)(b) because common questions of law and fact appear to predominate over questions affecting only individual persons in the Settlement Class; and certification of the

Settlement Class appears to be superior to other available methods for the fair and efficient resolution of the claims of Settlement Class members.

7. **Notice of Class Action Settlement to the Settlement Class.** Pursuant to the Preliminary Order, Rust mailed the approved Notice to 684 members of the Settlement Class who could be reasonably identified. Additionally, 592 reminder postcards were sent to Settlement Class members before the claim filing deadline. The approved Summary Notice was published in the December 20, 2021, edition of the Newark Star Ledger. A dedicated settlement website providing more detailed information and access to relevant documents, including the Notice and Claim Form, was established. A dedicated phone line with live operators was also established to handle phone inquiries. The Court finds that the form, content, and method for notifying the Settlement Class complies with the Preliminary Approval Order, meets the requirements of Rule 4:32-2(b) and all Due Process requirements, is the best notice practicable under the circumstances and constitutes due and sufficient notice to all persons entitled to notice. The Court further finds that the Claims Administrator has complied with the Preliminary Approval Order regarding distribution of Notice to the Settlement Class.

8. **Exclusions.** Settlement Class members were notified in the Notice of this class action Settlement of their opportunity to request to be excluded from, or to opt out of, the Settlement Class. No members of the Settlement Class submitted timely written exclusion/opt-out statements to the Claims Administrator. This factor favors approval of the Settlement.

9. **Objections to Settlement.** Settlement Class members were also notified in the Notice of their opportunity to object to the terms of the Settlement by filing written objections with the Court. Not a single Settlement Class member filed an objection. This factor favors approval of the Settlement.

10. **Final Approval of the Settlement and Settlement Agreement.** The Court grants final approval of the proposed Settlement and the Settlement Agreement. The Court finds that settlement on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and that the Settlement is, in all respects, in the best interests of the Settlement Class. Factors considered to assess the fairness, reasonableness, and adequacy of a class action settlement, including the positive reaction of the Settlement Class to the terms of the Settlement, warrant final approval of the Settlement and the Settlement Agreement. The Court further finds that the Settlement set forth in the Settlement Agreement resulted from arm's-length negotiations.

11. **Payment to Settlement Class.** The Court holds that the plan for allocation of the Settlement Fund to members of the Settlement Class as set forth in the proposed plan for allocation prepared by Dr. Robert Simons Ph.D., attached to the Cohen Declaration at Exhibit C, is fair and reasonable. Accordingly, the Claims Administrator shall cause payment to be issued to Settlement Class members in accordance with the terms for calculating the Claimant Allocations set forth in the Settlement Allocation Plan proposed by Dr. Simons and supported by Class Counsel. The Claims Administrator shall mail settlement checks to Settlement Class members at their last known addresses via first class United States mail.

12. **Service Payment to current and former Class Representatives.** Class Counsel have requested service awards in the amount of $20,000 each for the two currently named Settlement Class representatives Jacqueline Sutton and Melanie Ryan, and for service awards in the amount of $10,000 each for the formerly named Class representative Areilly Laszlo and Ezzedin Bautista. Class Counsel's requests for the Service Awards are granted. The Settlement Administrator shall pay these Service Awards from the Settlement Fund before allocating the balance of the fund to Settlement Class members pursuant to Paragraph 11 above.

13. **Attorneys' Fees to Class Counsel.** Class Counsel have applied for an award of attorneys' fees calculated as one-third of the Settlement Fund, plus recovery of identified out-of-pocket costs incurred in this Action. In accordance with the terms of the Settlement Agreement, the Claims Administrator shall calculate and pay the requested attorneys' fees calculated by reference to the Settlement Fund (including interest) before reimbursing out-of-pocket expenses and before paying Service Awards allowed in Paragraph 12 above. Class Counsel are also allowed a payment for out-of-pocket costs in the requested amount of $410,471.58 which includes a *de-minimis* balance of $1,737.51 for expected future expenses, with any unspent remainder of that $1,737.51 being allowed as additional fees upon completion of the Settlement administration.

14. **Settlement Expenses.** All reasonable costs incurred in notifying members of the Settlement Class, as well as administering the Settlement Agreement, shall be paid as set forth in the Settlement Agreement. To the extent that the Settlement Expenses exceed the agreement of Defendant Hoffmann-La Roche, Inc. to separately pay settlement expenses, those costs shall be paid from the Settlement Fund after calculation of Attorneys' Fees as set forth in Paragraph 13 above.

15. **Release of Claims by Settlement Class Members.** In accordance with the terms of the Settlement Agreement and this Final Approval Order, all Settlement Class members have released the Released Parties from any and all Released Claims as defined in Paragraph 19 of the Settlement Agreement. It is expressly intended and understood by the Parties that the Settlement Agreement is to be construed as a complete settlement, accord, and satisfaction of the Settlement Class members' Released Claims.

16. **Dismissal of Action.** The Court dismisses with prejudice all Released Claims on behalf of the Settlement Class.

17. **Binding Effect of Agreement, Order, and Judgment.** The Settlement Agreement and this Final Approval Order are binding on Plaintiffs and on all Settlement Class members and their respective heirs, administrators, executors, representatives, trustees, successors, and assigns, and shall inure to the benefit of Defendants and the other Released Parties, as well as to their respective, heirs, administrators, representatives, trustees, successors, and assigns.

18. **Jurisdiction.** Without affecting the finality of this Order in any way, the Court retains jurisdiction of matters relating to this Order and the administration, interpretation, consummation, and enforcement of the Settlement.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____



Honorable Jeffrey B. Beacham, J.S.C.

UNOPPOSED

Exhibit 12

Positive
As of: May 28, 2025 3:59 PM Z

Collins v. Olin Corp.

United States District Court for the District of Connecticut

April 21, 2010, Decided; April 21, 2010, Filed

Civil Action No. 3:03-cv-945 (CFD)

Reporter
2010 U.S. Dist. LEXIS 39862 *; 2010 WL 1677764

CLARENCE R. COLLINS, JR., et al., Plaintiffs, v. OLIN CORPORATION, et al., Defendants.

Prior History: *Collins v. Olin Corp., 2009 U.S. Dist. LEXIS 5444 (D. Conn., Jan. 12, 2009)*

Core Terms

proposed settlement, settlement, Plaintiffs', Subclass, class member, remediation, negotiations, summary judgment, attorney's fees, environmental, expenses, factors, dispositive motion, Contaminated, ***Properties***, ***damages***, consultants, witnesses, approve, risks, settlement fund, certification, objected, arm's, costs

Counsel: **[*1]** For Clarence R. Collins, Jr., o/b/o themselves & a class of similarly situated prop owners, Jennifer Dontfraid, o/b/o themselves & a class of similarly situated prop owners, Patrick Dontfraid, o/b/o themselves & a class of similarly situated prop owners, Donna Lee Johnson, o/b/o themselves & a class of similarly situated prop owners, Leonardo Melendez, o/b/o themselves & a class of similarly situated prop owners, Sonia Powell, o/b/o themselves & a class of similarly situated prop owners, Dorothy Williams, o/b/o themselves & a class of similarly situated prop owners, Valerie Lassiter, o/b/o themselves & a class of similarly situated prop owners, Matthew Abraham, o/b/o themselves & a class of similarly situated prop owner, Phyllis Abraham, o/b/o themselves & a class of similarly situated prop owners, Henry L. Blue, o/b/o themselves & a class of similarly situated prop owners, Janie Clemons, o/b/o themselves & a class of similarly situated prop owners, Louis Craig, o/b/o themselves & a class of similarly situated prop owners, Ruth B. Eaton, o/b/o themselves & a class of similarly situated prop owners, Maxine Jones, o/b/o themselves & a class of similarly situated prop owners, Collin Rouse, **[*2]** o/b/o themselves & a class of similarly situated prop owners, Clifford Senior, o/b/o themselves & a class of similarly situated prop owners, Adrienne Rouse-Senior, o/b/o themselves & a class of similarly situated prop owners, Raymond Sims, Sr., o/b/o themselves & a class of similarly situated prop owners, Ellecia R. Sims, o/b/o themselves & a class of similarly situated prop owners, Marc Perry, o/b/o themselves & a class of similarly situated prop owners, William C. Walker, o/b/o themselves & a class of similarly situated prop owners, Venus D. Walker, o/b/o themselves & a class of similarly situated prop owners, Morris Draughn, o/b/o themselves & a class of similarly situated prop owners, Mary Draughn, o/b/o themselves & a class of similarly situated prop owners, Carolyn Smith, o/b/o themselves & a class of similarly situated prop owners, Elizabeth Hayes, o/b/o themselves & a class of similarly situated prop owners, Murline Wellesley, o/b/o themselves & a class of similarly situated prop owners, Eugalyn Wilson, o/b/o themselves & a class of similarly situated prop owners, Charlene P. Webb, o/b/o themselves & a class of similarly situated prop owners, Elias Rochester, o/b/o themselves **[*3]** & a class of similarly situated prop owners, Marus Walters, o/b/o themselves & a class of similarly situated prop owners, Herman Bershtein, Exec Ext Josephine Neal, Plaintiffs: Alison Kaplan Clark, LEAD ATTORNEY, Cohen & Wolf- Bpt, Bridgeport, CT; Austin D. Kim, LEAD ATTORNEY, Cohen & Wolf P.C., Bridgeport, CT; Brad J. Mitchell, Michael A. Lesser, LEAD ATTORNEYS, Thornton, Early & Naumes, Boston, MA; Christian F. Uehlein, LEAD ATTORNEY, PRO HAC VICE, Thornton & Naumes, Boston, MA; David C. Strouss, LEAD ATTORNEY, Thornton & Naumes LLP, Boston, MA; David B. Zabel, LEAD ATTORNEY, Cohen and Wolf, P.C., Bridgeport, CT; Heather Spurlock Kennealy, LEAD ATTORNEY, PRO HAC VICE, McRoberts & Roberts, LLP, Boston, MA; Jennifer A. Currie, LEAD ATTORNEY, McRoberts, Roberts & Rainer, LLP, Boston, MA; Mark W. Roberts, LEAD ATTORNEY, McRoberts & Roberts, LLP, Boston, MA; Monte E. Frank, LEAD ATTORNEY, Cohen & Wolf, Danbury, CT; Neil T. Leifer, LEAD ATTORNEY, Thornton & Naumes, Boston, MA.

For Gwendolyn L. Coppage, o/b/o themselves & a class

of similarly situated prop owners, Plaintiff: Alison Kaplan Clark, LEAD ATTORNEY, Cohen & Wolf- Bpt, Bridgeport, CT; Andrew A. Rainer, LEAD ATTORNEY, McRoberts, **[*4]** Roberts & Rainer, LLP, Boston, MA; Brad J. Mitchell, Michael A. Lesser, LEAD ATTORNEYS, Thornton, Early & Naumes, Boston, MA; David C. Strouss, LEAD ATTORNEY, Thornton & Naumes LLP, Boston, MA; David B. Zabel, LEAD ATTORNEY, Cohen and Wolf, P.C., Bridgeport, CT; Mark W. Roberts, LEAD ATTORNEY, McRoberts & Roberts, LLP, Boston, MA; Monte E. Frank, LEAD ATTORNEY, Cohen & Wolf, Danbury, CT; Neil T. Leifer, LEAD ATTORNEY, Thornton & Naumes, Boston, MA.

For William Jones, o/b/o themselves & a class of similarly situated prop owners, Josephine Neal, o/b/o themselves & a class of similarly situated prop owners, Plaintiffs: Alison Kaplan Clark, LEAD ATTORNEY, Cohen & Wolf- Bpt, Bridgeport, CT; Andrew A. Rainer, LEAD ATTORNEY, McRoberts, Roberts & Rainer, LLP, Boston, MA; Brad J. Mitchell, Michael A. Lesser, LEAD ATTORNEYS, Thornton, Early & Naumes, Boston, MA; David C. Strouss, LEAD ATTORNEY, Thornton & Naumes LLP, Boston, MA; David B. Zabel, LEAD ATTORNEY, Cohen and Wolf, P.C., Bridgeport, CT; Jennifer A. Currie, LEAD ATTORNEY, McRoberts, Roberts & Rainer, LLP, Boston, MA; Mark W. Roberts, LEAD ATTORNEY, McRoberts & Roberts, LLP, Boston, MA; Monte E. Frank, LEAD ATTORNEY, Cohen & Wolf, Danbury, **[*5]** CT; Neil T. Leifer, LEAD ATTORNEY, Thornton & Naumes, Boston, MA.

For Abdul Hamid, o/b/o themselves & a class of similarly situated prop owners, Plaintiff: Alison Kaplan Clark, LEAD ATTORNEY, Cohen & Wolf-Bpt, Bridgeport, CT; Andrew A. Rainer, LEAD ATTORNEY, McRoberts, Roberts & Rainer, LLP, Boston, MA; Austin D. Kim, LEAD ATTORNEY, Cohen & Wolf P.C., Bridgeport, CT; Brad J. Mitchell, Michael A. Lesser, LEAD ATTORNEYS, Thornton, Early & Naumes, Boston, MA; Christian F. Uehlein, LEAD ATTORNEY, PRO HAC VICE, Thornton & Naumes, Boston, MA; David C. Strouss, LEAD ATTORNEY, Thornton & Naumes LLP, Boston, MA; David B. Zabel, LEAD ATTORNEY, Cohen and Wolf, P.C., Bridgeport, CT; Heather Spurlock Kennealy, LEAD ATTORNEY, PRO HAC VICE, McRoberts & Roberts, LLP, Boston, MA; Mark W. Roberts, LEAD ATTORNEY, McRoberts & Roberts, LLP, Boston, MA; Monte E. Frank, LEAD ATTORNEY, Cohen & Wolf, Danbury, CT; Neil T. Leifer, LEAD ATTORNEY, Thornton & Naumes, Boston, MA; Jennifer A. Currie, McRoberts, Roberts & Rainer, LLP, Boston, MA.

For Olin Corp, Defendant: Joel B. Samson, Omri E. Praiss, LEAD ATTORNEYS, Husch & Eppenberger -St Louis MO, St. Louis, MO; Mark S. Baldwin, LEAD ATTORNEY, Brown Rudnick LLP, **[*6]** Hartford, CT; Michael H. Wetmore, LEAD ATTORNEY, Husch Blackwell Sanders LLP, St. Louis, MI.

For Town of Hamden, Defendant: Ann Marie Catino, Brian D. Rich, LEAD ATTORNEYS, Halloran & Sage, Hartford, CT; Joseph G. Fortner, Jr., LEAD ATTORNEY, Halloran & Sage LLP, Hartford, CT; Thomas C. Blatchley, LEAD ATTORNEY, Halloran & Sage - Hartford, Hartford, CT.

Judges: CHRISTOPHER F. DRONEY, UNITED STATES DISTRICT JUDGE.

Opinion by: CHRISTOPHER F. DRONEY

Opinion

RULING ON MOTION FOR PROPOSED SETTLEMENT AND ATTORNEYS' FEES AND EXPENSES

This case arises out of a ***class action*** suit brought by the plaintiffs, homeowners in the Newhall section of Hamden, Connecticut, against several defendants, including Olin Corporation ("Olin"). The plaintiffs alleged that the soil and groundwater on their properties was contaminated as a result of the defendant's conduct. For the following reasons, this Court finds that the proposed settlement is procedurally and substantively fair, the distribution of settlement proceeds is reasonable and adequate, and grants the motion for settlement. The motion for attorneys' fees and expenses is also granted.

I. Factual Background and Procedural History

In May of 2003, the plaintiffs brought this action against **[*7]** Olin and the Town of Hamden. They alleged that industrial wastes produced by the Winchester plant in New Haven were deposited in their neighborhood in Hamden (the Newhall neighborhood) and have contaminated their properties. The plaintiffs sought relief for negligence; recklessness; violation of the Connecticut Environmental Protection Act of 1971, *Conn. Gen. Stat. § 22a-15 et seq.*; engaging in abnormally dangerous activity; intentional infliction of emotional distress; and recovery of response costs under the Comprehensive Environmental Response,

Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607. The Court has certified a class comprised of all persons who owned property on May 2, 2003 in the Newhall neighborhood, and three subclasses: (1) the Contaminated Properties Subclass, (2) the ***Stigma*** Subclass, and (3) the Response Costs Subclass.

Counsel for the parties eventually agreed on a proposed settlement agreement. The terms of this proposal include a settlement fund in the amount of $ 1,391,500 to be distributed among the plaintiffs. A Remedial Action Plan approved by the Connecticut Department of Environmental Protection, although not part of this proposed settlement, has **[*8]** been initiated, and is separately funded in the amount of $ 40,000,000.

II. Legal Standards and Discussion

Under the Federal Rules of Civil Procedure, a proposed settlement which binds class members may be approved only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In addition, a fair settlement may not have been the product of collusion. See Joel A. v. Giuliani, 218 F.3d 132, 138 (2d Cir. 2000).

To determine the fairness of a proposed settlement, a Court must examine both its procedural and substantive fairness. See D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001) (noting that "[t]he District Court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms"). Procedural fairness looks to "the negotiating process by which the settlement was reached." *Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982)*. A procedurally fair settlement must be "the result of arm's-length negotiations" wherein plaintiffs' counsel "possessed the experience and ability, and . . . engaged in the discovery, necessary to effective representation of the class's **[*9]** interests." *Id.*, citing City of Detroit v. Grinnell Corp., 495 F.2d 448, 463-66 (2d Cir. 1974). To decide if the substantive terms of the proposed settlement are fair, the Court must consider the nine Grinnell factors:

> "(1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the ***class action*** through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."

Grinnell, 495 F.2d at 463 (internal quotations omitted).

Moreover, a presumption of fairness, adequacy, and reasonableness may attach if the Court finds that arm's length negotiations took place between experienced counsel after a period of meaningful discovery. See *Wal-MartStores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005)*, citing Manual for **[*10]** Complex Litigation, Third, § 30.42 (1995). Federal courts have adopted a "strong judicial policy in favor of settlements, particularly in the ***class action*** context." *In re Painewebber Limited Partnerships Litigation, 147 F.3d 132, 138 (2d Cir. 1998)*, citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995)* and *In re Pacific Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995)*.

A. Procedural Fairness

Since the plaintiffs in this case were adequately represented and, as a result, the proposed settlement was the product of "arm's length negotiations," see *Weinberger, 698 F.2d at 74*, the proposed settlement is procedurally fair. This case was originally filed in May 2003. See, e.g. Notice of Removal, Civil Action No. 03-cv-945 (CFD), Dkt. # 1. Since that time, counsel for the plaintiffs consulted experts, conducted many depositions, interviewed fact witnesses, and requested production of numerous documents. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 10. As a result, counsel developed a sufficient level of familiarity with the case so as to seek and obtain certification of the class, brief and argue **[*11]** dispositive motions, and engage Olin's counsel in settlement negotiations. See id.

During those negotiations, counsel for the parties functioned as adversaries. Magistrate Judge Thomas P. Smith held a settlement conference involving counsel for both sides on June 18, 2009 in Hartford. See Notice of Settlement Conference, Civil Action No. 03-cv-945 (CFD), Dkt. # 287. When these negotiations did not lead to a resolution, counsel for both parties again convened in Boston for a full-day mediation before retired Judge William Cahill of the San Francisco County Superior

Court. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 11. The compensation structure set forth in the proposed settlement agreement comports with Judge Cahill's recommendation. See id. This proposal would create a settlement fund that is three times as large as Olin's final offer during the settlement conference before Judge Smith. See id.

After more than six years of litigation and several formal mediation sessions, counsel for both sides agreed to a proposed settlement funded by Olin to an extent that far exceeds its initial offers. This record suggests that the plaintiffs received adequate **[*12]** legal representation and that the settlement agreement is the product of "arm's length negotiations." See *Weinberger, 698 F.2d at 74*. Without any evidence of collusion, the procedural element of this proposed settlement is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*. Adequate notice was also provided to all class members.

B. Substantive Fairness

1. Complexity, Expense, and Likely Duration of Litigation

Under *Grinnell*, the Court must examine a variety of factors in determining the substantive fairness of a proposed settlement. See *495 F.2d at 463*. In this case, the "complexity, expense and likely duration of the litigation," see id., counsels in favor of finding this proposed settlement to be fair. Should this case continue, counsel for the plaintiffs face complex issues of environmental law. In order to try to prove their case, the plaintiffs would have to identify and retain a variety of expert witnesses. Counsel for the plaintiffs set forth seven specific categories which would require expert testimony at trial, including toxicology, waste disposal practices, environmental ***contamination***, ammunition, diminution of property values, and emotional distress. See Plaintiffs' **[*13]** Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 13. In addition to the complex issues of proof, securing expert testimony in these areas would be expensive for the plaintiffs. Furthermore, rejecting this proposed settlement would force this case to continue into its seventh year of litigation, with much time still ahead. As a result, this factor counsels in favor of approving the proposed settlement.

2. Reaction of Class Members

Another important aspect of evaluating the fairness of the proposed settlement is the reaction of the class members. See *Grinnell, 495 F.2d at 463*. During the notice period, none of the Contaminated Properties Subclass decided to opt out of the proposed settlement and just six of the 452 members of the ***Stigma*** Subclass elected to do so. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, pp. 14-15. Afterwards, Elizabeth Hayes, President of the Newhall Coalition, submitted a letter protesting the settlement which was signed by other class members. [1] See Letter from Elizabeth Hayes, Civil Action No. 03-cv-945 (CFD), Dkt. # 315 (hereinafter "Hayes Letter"). This letter articulated several objections to the proposed settlement, **[*14]** primarily that they preferred full remediation (instead of a clean-up that extended four feet below the surface) and that their claims justify more favorable compensation. See id., pp. 3-4. At the fairness hearing, Ms. Hayes and other class members spoke to the Court and voiced the reasons behind their opposition to the proposed settlement.

The Court understands that the class members who spoke at the settlement hearing, like all the other plaintiffs, have suffered a terrible ordeal. Although not part of this settlement, under the current plan, Olin and the State of Connecticut will each contribute half of the $ 40 million required to fund the proposed remediation process. See Plaintiffs' **[*15]** Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 7. As to this settlement, homes in the Contaminated Properties Subclass will be remediated up to four feet below the surface. The class members whose homes are not fully remediated by this clean-up will receive $ 23,000, while class members whose homes are fully remediated will receive $ 7,600. See id. at pp. 22-23. Members of the ***Stigma*** Subclass will receive $ 750 per property and all members will retain several claims, including the ability to seek damages for manifest physical injuries. See id. at pp. 4, 23. [2] Going forward, the class members have no assurances that their claims would survive further dispositive motions or that they would ultimately prevail

---

[1] Plaintiffs' counsel contends that the letter contains signatures from individuals who are not members of the class. Of the eighty-five signatures, twenty-seven were not members of the class. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, pp. 6-7. Of the fifty-eight signatures, seven were members of the Contaminated Properties Subclass and fifty-one were members of the ***Stigma*** Subclass. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, pp. 6-7.

[2] These amounts are before court-approved deduction of attorneys' fees and expenses.

at trial. Furthermore, the Court recognizes the substantial sums allocated by both Olin and the State of Connecticut toward the current remediation plan set forth in the proposed settlement. Continued litigation would risk that fewer financial resources would be available to fund remediation at a later date.

The Court may approve a proposed settlement even where substantial portions **[*16]** of the class have objected. See, e.g. *TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1987)* (affirming approval of settlement where between fifty-four and fifty-eight percent of classmembers objected); *County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1325 (2d Cir. 1990)* (affirming approval of settlement where "a majority" of classmembers objected); *Grant v. Bethlehem Steel Corp., 823 F.2d 20, 23 (2d Cir. 1987)* (affirming approval of settlement where as many as forty-eight percent of class may have objected). Even if the Court accepts each of the signatories to the Hayes Letter as objectors, less than twelve percent of the classmembers will have objected to the proposed settlement. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 16. On the other hand, nearly thirty percent of the ***Stigma*** Subclass has submitted Settlement Forms, along with a majority of the Contaminated Properties Subclass members. See id. Accordingly, this Court may approve the proposed settlement, so long as it is procedurally and substantively fair, despite the objections set forth by the signatories to the Hayes Letter.

*3. Stage of Proceedings and **[*17]** Amount of Discovery Completed*

Several dispositive motions and settlement conferences have taken place throughout the pendency of this case. As previously discussed, counsel for both parties attended full-day mediation sessions before Magistrate Judge Smith of this Court and retired Judge Cahill of the San Francisco County Superior Court. In addition, a variety of dispositive motions have been briefed, argued, and decided. Most recently, Olin moved for summary judgment on statute-of-limitations grounds, see Defendant's Motion for Summary Judgment, Civil Action No. 03-cv-945 (CFD), Dkt. # 208, which was denied. See Ruling on Defendant's Partial Motion for Summary Judgment, Civil Action No. 03-cv-945 (CFD), Dkt. # 281. Previously, Olin successfully moved for partial summary judgment, which lead to the dismissal of those claims which were based on actions taken prior to 1932 by Olin's predecessor company. See Olin Corporation's Motion for Summary Judgment, Civil Action No. 03-cv-945 (CFD), Dkt. # 111; Ruling on Defendant's Partial Motion for Summary Judgment, Civil Action No. 03-cv-945 (CFD), Dkt. # 178. In addition, counsel for the plaintiffs sought and obtained class certification. See **[*18]** Ruling on Plaintiffs' Third Amended Motion for ***Class*** Certification, Civil ***Action*** No. 03-cv-945 (CFD), Dkt. # 232. To file and argue these various motions, counsel for the plaintiffs would have reviewed documents, interviewed witnesses, taken depositions, and otherwise fully investigated the plaintiffs' claims. Based on the number of dispositive motions filed and argued in this case, as well as the substantial efforts undertaken during settlement conferences, this Court finds that the maturity of the litigation counsels in favor of approving the proposed settlement.

4. Risk of Establishing Liability and Damages

This factor requires the Court to balance the benefits of immediate recovery promised by the the proposed settlement agreement against the risks attendant to further litigation. See *Grinnell, 495 F.2d at 463*. As discussed above, the proposed settlement guarantees the plaintiffs financial compensation and remediation of their properties up to four feet below the surface. Meanwhile, if litigation were to continue, the plaintiffs would face serious challenges in establishing their claims against Olin. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. **[*19]** 18. As discussed in this Court's prior ruling on the issue of successor liability, see Ruling on Defendant's Partial Motion for Summary Judgment, Civil Action No. 03-cv-945 (CFD), Dkt. # 178, the plaintiffs would not be able to recover for any of the damages they sustained as a result of actions taken prior to 1931. Should litigation continue, Olin stated an intent to move for summary judgment in an effort to preclude any recovery by the ***Stigma*** Subclass. See Dkt. # 314. In all, several significant issues complicate the plaintiffs' ability to prove Olin liable during further litigation.

Many of the same factors which complicate the ability of the plaintiffs to prove that Olin is liable would also hinder their attempts to prove damages. Counsel for the plaintiffs acknowledged that the process of establishing damages would have rested on an unpredictable "battle of the experts." Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 19. Since the proposed settlement promises plaintiffs more than $ 1 million in recovery and also funds a significant remediation process, the plaintiffs would face a serious risk of a lower recovery if the litigation continued.

*5. Risk **[*20]** of Maintaining the **Class Action** and Olin's Ability to Withstand Greater Judgment*

The risks associated with maintaining class certification and the defendant's ability to pay a larger sum in settlement are neutral factors which "weigh neither for nor against approval" of a proposed settlement. *In re Luxottica Group S.p.A. Securities Litigation, 233 F.R.D. 306, 314 (E.D.N.Y. 2006)*. While this Court has certified the class of plaintiffs in this case, see Ruling on Plaintiffs' Third Amended Motion for **Class** Certification, Civil **Action** No. 03-cv-945 (CFD), Dkt. # 232, Olin could still seek decertification of the class before trial, after a verdict, or on appeal. Though Olin has not stated an intent to do so, the ever-present risk of class decertification counsels in favor of approving the proposed settlement. See generally *McLaughlin v. American Tobacco Co., 522 F.3d 215 (2d Cir. 2008)* (decertifying class on appeal).

Even if Olin could withstand a larger judgment, "fairness does not require that the [defendant] empty its coffers before this Court will approve a settlement." *McBean v. City of New York, 233 F.R.D. 377, 388 (S.D.N.Y. 2006)*. In addition to payments in excess of $ 1 million that **[*21]** will be made to the individual plaintiffs, Olin is also contributing $ 20 million to help fund the remediation efforts. Therefore, the defendant will pay a significant amount to the plaintiffs, both directly and indirectly, under the proposed settlement. As a result, if this Court determines that the proposed settlement is substantively fair, based on the other *Grinnell* factors, Olin's ability to withstand a higher judgment would not preclude approval of the proposed settlement. See *D'Amato, 236 F.3d at 85* (noting that "this factor, standing alone, does not suggest that the settlement is unfair"). See also *In re Paine Webber Ltd. Partnership Lit., 171 F.R.D. 104, 129 (S.D.N.Y. 1997)* (same); *In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 178 n. 9 (S.D.N.Y. 2000)* (same).

6. Reasonableness in Light of Plaintiffs' Strengths and Weaknesses

The Court's inquiry into whether the proposed settlement falls within the range of reasonableness "is not susceptible of a mathematical equation yielding a particularized sum," *In re Michael Milken and Associates Sec. Lit., 150 F.R.D. 57, 66 (S.D.N.Y. 1993)*, but rather "must be judged in light of the strengths and weaknesses of the plaintiff[s'] **[*22]** case." *In re Austrian and German Bank Holocaust Litigation, 80 F. Supp. 2d at 178* (internal quotation marks omitted). As discussed above, the plaintiffs face several significant obstacles in proving Olin's liability, the necessary damages, and surviving any further dispositive motions. Given these difficulties as well as the other factors discussed above, the proposed settlement is within a range that is reasonable in the view of this Court.

C. Attorneys' Fees and Expenses

In this case, counsel for the plaintiffs seeks $ 463,833.33 in attorneys' fees, which accounts for one third (33.33%) of the total fund. The Second Circuit has expressed a preference for the percentage method of calculating attorneys' fees, noting that such an approach "aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121 (2d Cir. 2005)*, quoting *In re Lloyd's Am. Trust Fund Litig., 2002 U.S. Dist. LEXIS 22663, 2002 WL 31663577, at *25 (S.D.N.Y. 2002)* (internal quotations omitted). To determine whether that percentage is reasonable, the Court must analyze several factors: "(1) the time and **[*23]** labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation …; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000)*, quoting *In re Union Carbide Corp. Consumer Products Business Securities Litig., 724 F.Supp. 160, 163 (S.D.N.Y. 1989)*.

In this case, the *Goldberger* factors support an award of fees sought by plaintiffs' counsel. Since the beginning of this case more than six years ago, counsel has worked a combined 8,468.6 hours. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 25. At a normal billing rate, they submit that nearly $ 2,000,000 in fees would have been reasonably charged. See id. As discussed throughout this ruling, this case was extremely complex. Counsel faced a challenging environmental tort case, which required expert consultation and numerous evidentiary challenges. Several dispositive motions were filed and argued. Furthermore, plaintiffs' counsel is experienced in the field of environmental law and, in this case, litigated against similarly **[*24]** competent and qualified counsel for the defense. A compensation of one third of the total fund is in line with the percentage fees awarded in similar **class action** suits. See, e.g. *Silverberg v. People's Bank, 23 Fed.Appx. 46, 48 (2d Cir. 2001)* (affirming award to plaintiffs' counsel of "nearly" one

third of the settlement fund in attorneys' fees); *Dullard v. Berkeley Associates Co., 606 F.2d 890, 895, fn. 5 (2d Cir. 1979)* (observing that awarding one third of recovery, after costs, is "presumptively permissible" in personal injury cases). Finally, public policy considerations justify this award of attorneys' fees. In environmental tort cases, issues of proof and causation are often difficult. Contingent-fee arrangements will encourage other attorneys to accept and prosecute cases on behalf of individuals who have sustained injuries similar to those of the plaintiffs in this case.

Plaintiffs' counsel also requests $ 183,294.84 in expenses which were incurred during this suit. Generally, courts may award reimbursement to counsel for "expenses that are 'incidental and necessary' to the representation, provided they are 'reasonable.'" *Reichman v. Bonsignore, Brignati & Mazzotta P.C., 818 F.2d 278, 283 (2d Cir. 1987)*, **[*25]** quoting *Northcross v. Board of Education, 611 F.2d 624, 639 (6th Cir.1979)*. These costs were originally generated in connection with consulting and securing experts and consultants, deposing witnesses, traveling, and other incidental expenses. See Plaintiffs' Proposed Ruling, Civil Action No. 03-cv-945 (CFD), Dkt. # 317, p. 29. Generally, "investigative and expert witnesses, filing fees, service of process, travel, legal research and document production and review-are the type for which the paying, arms' length market reimburses attorneys." *In re Global Crossing Securities and ERISA Litig., 225 F.R.D. 436, 468 (S.D.N.Y. 2004)* (internal quotation marks omitted). As discussed above, expert input is especially important in the prosecution of an environmental tort case. Therefore, consulting with experts and consultants in the field was "incidental and necessary" to representing the interests of the plaintiff class. See *Reichman, 818 F.2d at 283*. Likewise, deposing witnesses and the related travel and incidental expenses are also necessary to representing the class. See *In re Global Crossing, 225 F.R.D. at 468*. Since the amount of costs requested is also reasonable, plaintiffs' counsel **[*26]** is entitled to the requested fees.

III. Conclusion

For the foregoing reasons, the Motion for Settlement [Dkt. # 308] and the Motion for Attorneys' Fees and Expenses [Dkt. # 310] are GRANTED.

So ordered this 21st day of April, 2010 at Hartford, Connecticut.

/s/ Christopher F. Droney

CHRISTOPHER F. DRONEY

UNITED STATES DISTRICT JUDGE

End of Document

DeNITTIS OSEFCHEN PRINCE, P.C.
James A. Barry, Esq. (027512008)
525 Route 73 North, Suite 410
Marlton, NJ 08053
(856) 797-9951
jbarry@denittislaw.com

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

Page(s)

Table of Authorities……ii-iv

Summary of Relief Sought……...1

Introduction to the Action……1

Summary of the Settlement Negotiations……3

Summary of the Proposed Settlement……..4

Summary of Argument……6

I. THE SETTLEMENT IS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES AND SHOULD BE GIVEN FINAL APPROVAL……8

A. The Use of Federal Authority Has Been Authorized on Motions to Approve a Proposed Class Action Settlement in New Jersey State Court……..8

B. New Jersey Law Highly Favors Settlement of Class Actions……9

C. General Standards to Be Applied……..10

D. Specific Factors to Be Applied……14

1. The Complexity, Expense, and Duration of the Litigation……..15

2. Reaction of the Class……..17

3. The Stage of the Proceedings and the Amount of Discovery Completed……18

4 & 5. The Risk That the Class Would Not Establish Liability and/or Damages……20

6. The Risk of Maintaining Class Certification Through Trial……22

7. The Ability of Defendants to Withstand a Greater Judgment……22

8 & 9. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation…….23

Conclusion……26

TABLE OF AUTHORITIES

Cases

Page(s)

Alves v. Main, 2012 U.S. Dist. LEXIS 171773 at *72 (D.N.J. Dec. 4, 2012)……...12

Austin v. Pa. Dept. of Corrections, 876 F. Supp. 1437, 1472 (E.D. Pa.1995)……...23

Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314 (3d Cir. 1993)……..17

Builders League of S. Jersey, Inc. v. Gloucester Cnty. Utils. Auth.,
386 N.J. Super. 462, 471 (App. Div. 2006)……8, 10

Canupp v. Sheldon, 2009 U.S. Dist. LEXIS 113488, *38-39 (M.D. Fla. Nov. 23, 2009)…….12

Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 627 (App. Div. 1987)……11

Collins v. Olin Corp., 2010 U.S. Dist. LEXIS 39862, *15 (D.Ct. April 21, 2010)…….25, 26

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)…….23

Educ. Station Day Care Ctr., Inc. v. Yellow Book USA, Inc.,
2007 N.J. Super Unpub. LEXIS 1607 at *13 (App. Div. 2007)……9, 10

Eichenholtz v. Brennan, 52 F.3d 478, 489 (3d Cir. 1995)……10, 18

Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975)……..23

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)…….14

Glaberson v. Comcast Corp., 2015 U.S. Dist. LEXIS 127370 at *22
(E.D. Pa. Sept. 22, 2015)……...20

Glichen v. Bradford, 35 F.R.D. 144, 152 (S.D.N.Y. 1964)……23

Gurriere v. Bloomfield Condo. Assocs., LLC,
2015 N.J. Super. Unpub. LEXIS 2137, at *69 (Ch. Div. July 20, 2015)……...15

Hawker v. Consovoy, 198 F.R.D. 619, 633 (D.N.J. 2001)…….23

Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 105 (2007)……..11

In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices,
263 F.R.D. 226, 239 (E.D. Pa. 2009)…….15

In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.,
789 F. Supp. 2d 935, 975 (N.D. Ill. 2011)……..19

In re Cendant Corp. Litig., 264 F.3d 201, 234-35 (3d Cir. 2001)……..17

In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.,
269 F.R.D. 468, 485 (E.D. Pa. 2010)…….17

In re Corrugated Container Antitrust Litig., 659 F.2d 1322, 1325 (5th Cir.1981)……11

In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003)……13

In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000)……...18

In re NFL Players Concussion Injury Litig., 821 F.3d 410, 438 (3d Cir. 2016)……..18, 19

In re Pacific Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995)……...12, 23

In re Paine Webber Ltd. P'ships Litig., 171 F.R.D. 104, 125 (S.D.N.Y. 1997)……..23

In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 249, 267 (E.D. Pa. 2012)……...19

In re Prudential Ins. Co. of Am. Sales Practices Litig.,
148 F.3d 283, 317 (3d Cir. 1998)……...14

In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 509 (W.D. Pa. 2003)……...13

In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005)……17

In re Telik, Inc. Secs. Litig., 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008)……...13

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004)……..9

Krangel v. Golden Rule Res., Inc., 194 F.R.D. 501, 507 (E.D. Pa. 2000)……17

Lake v. First Nationwide Bank, 900 F. Supp. 726, 732 (E.D. Pa. 1995)…….17, 23

Lazy Oil Co. v. Wotco Corp., 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997)……...20

Levin v. Mississippi River Corp., 59 F.R.D. 353, 361 (S.D.N.Y.),
aff'd 486 F.2d 1398 (2d Cir. 1973), cert. denied, 414 U.S. 1112 (1974)……...10

Lubitz v. DaimlerChrysler Corp.,
2006 WL 3780789 at *3 (Law Div. Dec. 21, 2006)……...8, 9, 11, 17, 19

Morris Cnty. Fair Housing Council v. Boonton Twp.,
197 N.J. Super. 359, 369 (Law Div. 1984)……8, 9, 10

Newman v. Stein, 464 F.2d 689, 693 (2d Cir.), cert. denied, 409 U.S. 1039 (1972)…….23

Strougo v. Atlantic Shore Holding Co.,
457 N.J. Super. 138, 157 (Ch. Div. Sept. 26, 2017)……...10, 14, 16

Texas v. Organon USA Inc. (In re Remeron End-Payor Antitrust Litig.),
2005 U.S. Dist. LEXIS 27011 at *62 (D.N.J. Sep. 13, 2005)……..7

Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 237 (D.N.J. 2005)……...18

Vasquez v. Coast Valley Roofing, Inc., 266 F.R.D. 482, 489-490 (E.D. Cal. 2010)……..12

Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1300-01 (D.N.J. 1995)……..16

W. Va. v. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970),
aff'd, 440 F.2d 1079 (2nd Cir. 1971)……...20, 22

Yedlowski v. Roka Bioscience, Inc.,
2016 U.S. Dist. LEXIS 155951, *41 (D.N.J. Nov. 10, 2016)……20

Statutes **Page**

Rule 4:32-1(e)……..1

Rule 4:32-2(c)……..9

Rule 4:32-2(e)……..8

Other **Page**

Herbert B. Newberg and Alba Conte, Newberg on Class Actions § 11.41 (3d ed. 1992)…….12

Joseph A. Osefchen & Philip Stephen Fuoco, "Leveling the Playing Field
in the Garden State: A Guide to New Jersey Class Action Case Law,"
37 Rutgers L.J. 399, 477 (2006)……11

Summary of Relief Sought

Pursuant to New Jersey Court Rule 4:32-1(e), Plaintiffs hereby move for an Order:

1) Granting final approval to the accompanying proposed Class Action Settlement as embodied in the Settlement Agreement (Exhibit 1 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval);

2) Granting final certification of the Settlement Class;

3) Granting approval to the proposed fee application and awarding fees to class counsel; and

4) Granting approval to the proposed incentive awards to the class representatives.

Introduction to the Action

On or about June 26, 2024, Diane Cavagnaro and Raymond Cavagnaro (the "Cavagnaros") filed a civil class action complaint against Defendants Shieldalloy Metallurgical Corporation ("SMC" or "Defendant"), AMG Critical Materials, N.V. ("AMG"), and TRC Companies, Inc. ("TRC"). Plaintiffs allege that they, and Class Members, suffered property damages in the form of diminution of property values arising from Class Members' regulatory disclosure obligations associated with the inclusion of their properties within Classification Exception Areas ("CEAs") proposed and established by TRC in or around 2018 as part of TRC's contractual remediation obligations to SMC related to SMC's Property located at 35 South West Boulevard, Newfield, New Jersey. SMC and AMG moved to dismiss the complaint, or in the alternative to strike the class allegations on October 15, 2024. Those motions were fully briefed and argued before the Court on December 20, 2024. The Court, after hearing argument granted AMG's motion to dismiss for lack of personal jurisdiction without prejudice and denied SMC's motion to dismiss.

Thereafter, Plaintiffs' counsel was retained by an additional Class Member, Anthony Alimenti who owns a Class Property. However, given the fact that the Settling Parties had agreed

to enter into settlement discussions, Plaintiffs' counsel did not amend their complaint to add Mr. Alimenti. Mr. Alimenti did participate in the mediation process and has fully participated in the negotiation of this Settlement Agreement, has supplied documents to counsel, and has fully engaged with the litigation of this matter including by being interviewed by Plaintiffs' expert prior to the mediation. Therefore, the proposed settlement includes Mr. Alimenti as a proposed Settlement Class Representative and the term Plaintiffs in the present case refers to the Cavagnaros as well as Mr. Alimenti.

Defendant has denied and expressly continues to deny any wrongdoing or liability whatsoever. Defendant disputes the factual, legal, and scientific bases for Plaintiffs' claims against it, and does not admit or concede any fault, wrongdoing, or liability in connection with any allegations or claims that have been asserted against it in the Action or any violation of any law or duty alleged against it in the Action. Defendant denies that Plaintiffs and/or the Settlement Class Members are entitled to any form of damages or other relief against Defendant. Defendant has maintained and continues to maintain that it has meritorious defenses to all causes of action against it alleged in the Action. Defendant has maintained and continues to maintain that certification of a class for litigation purposes based on Plaintiffs' allegations against it would be improper. Defendant is prepared to vigorously defend against the claims alleged against it in the Action and has maintained and continues to maintain that the claims asserted against it in the Action are meritless.

Defendant has asserted, among other defenses, that (a) Class Members who own Class Properties contained within the Well Restriction Area ("WRA") established in 1986 are barred from suit by virtue of prior litigation, settlement and release affecting properties located in the WRA; (b) the statute of limitations has expired for all Class Member claims; (c) claims asserted

by all Class Members were discharged through the Chapter 11 Bankruptcy for Metallurg, Inc. and Shieldalloy Metallurgical Corporation which was confirmed on February 26, 1997; and (d) Class Members sustained no damages.

Nevertheless, after carefully considering the facts and applicable law and the risks, costs, delay, inconvenience, and uncertainty of continued and protracted litigation, and after engaging in extensive, arm's-length negotiations, with the assistance of an experienced mediator, Defendant and Plaintiffs have agreed to resolve the Litigation via the proposed Class Action Settlement Agreement.

On July 31, 2026, this Court granted preliminary approval to the proposed class action settlement, granting preliminary certification of the settlement class, authorizing distribution of the class settlement notice and claim form, and scheduling a hearing on final approval of the proposed class action settlement for November 30, 2026. The Court amended the Preliminary Approval Order at the request of the parties on August 21, 2026. The class settlement notice and claim forms have now been distributed to the members of the settlement class in the form and manner previously approved by the court in the Preliminary Approval Orders. To date, no class members have submitted any objection to the proposed class settlement. The owners of two class properties have submitted requests for exclusion, but have provided no criticism of the settlement in their request.

Summary of the Settlement Negotiations

Plaintiffs have been zealously litigating their claims against SMC and TRC for two years. During that time, SMC and TRC have been zealously defending against Plaintiffs' claims, resulting in a complex litigation that has been hotly contested, time-consuming and costly. The Settling Parties recognize that any future phases of this case will likely be just as contentious and

thoroughly litigated. The ultimate resolution of the disputed claims will likely take several additional years, with the expectation that each additional substantive ruling in the case will become the subject of an attempted appeal by the losing side.

Recognizing the risks facing each side and the enormous burden and cost in both time and money of more years of protracted litigation, the Settling Parties began to seriously explore settlement on a class-wide basis in August of 2025. On August 14, 2025, the Plaintiffs and Defendant jointly participated in a full-day mediation overseen by the Honorable Peter E. Doyne, A.J.S.C. (Ret.), former Assignment Judge of the Superior Court of New Jersey, Bergen County. That all-day mediation session was then followed by several months of extensive arms-length negotiations in good faith, and with additional assistance by the mediator. On or about July 15, 2026, the parties reached agreement on the proposed Class Action Settlement Agreement in this matter which is presented to the Court in this motion.

Summary of the Proposed Settlement

The proposed settlement calls for certification of a Settlement Class defined as:

> Any Person that/who, as of the Execution Date, owns Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B to the Settlement Agreement** (the "Class Properties"). Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection ("NJDEP"), and any other department of the State of New Jersey or municipal entity are not Class Members.

Under the proposed Settlement Agreement, a class settlement fund of $1,325,000 shall be established for the benefit of the Settlement Class that/who are Eligible Claimants. Payments to Eligible Claimants shall be allocated and calculated as follows:

a. A payment of $300 shall be allocated from the Net Settlement Fund to each Class Property located inside the Well Restriction Area and shall be paid to each Eligible Claimant that, as of Execution Date, owns such Class Property pursuant to Sections IV.C.2.c. of the Settlement Agreement;

b. a gross payment equal to no more than 7% of the 2025 tax assessed value of each Class Property located outside the Well Restriction Area (subject to certain Court-approved pro rata reductions as set forth in detail in the Settlement Agreement); and

c. In the event that there are multiple Eligible Claimants for a single Class Property, each Eligible Claimant for such Class Property shall be provided an equal share of the payment allocated to the Class Property.

Exhibit B to the Settlement Agreement lists each Class Property, as well as whether the Class Property is located inside or outside of the WRA so Class Members may easily determine where their property is located. It is submitted that the proposed Settlement Agreement represents a fair and reasonable compromise of the disputed claims pleaded in the class action complaint. The Settlement Amount is fair and reasonable given the facts of this case and the recoveries in similar class actions. Moreover, any analysis of the fairness and reasonableness of the proposed Settlement Agreement must be informed by an assessment of the significant risk that, if litigation continues, the Class Members may get either a smaller recovery or no recovery at all. Prior to entering into the Settlement Agreement, Defendant vigorously defended this matter credibly argued that the claims in this Action were discharged in the prior bankruptcy filed by Shieldalloy. Plaintiffs believe that absent the Settlement Agreement Defendant would continue to vigorously litigate this matter and would, among other defenses, seek to bar the Action in bankruptcy court, unless this Settlement Agreement is approved, and that the defenses raised represent a significant risk to the class liability and damage claims. In striking contrast to such risks, the proposed Settlement

Agreement provides a guaranteed result now – without having to wait for trial and any appeals to play out – which is both fair and reasonable to all Class Members.

Summary of Argument

Plaintiffs respectfully submit that the proposed settlement is a fair and reasonable compromise of the disputed claims at issue and should be granted final approval. The motion practice, mediation, settlement negotiations, review of DEP filings, review of historical transcripts and presentations regarding the formation of the WRA, and voluntary informal exchange of information between the parties, as well as the extensive investigation performed by Class Counsel, have provided each side with a sound basis for thoroughly evaluating the strengths and weaknesses of Plaintiffs' claims and the defenses to those claims. The resulting benefit to the class is a compromise of strongly disputed claims and represents an outstanding result for the class under the circumstances and given the prevailing law.

The proposed class Settlement was negotiated at arms-length among zealous and experienced counsel for the Parties, with the help of the Honorable Peter E. Doyne, A.J.S.C. (Ret.), former Assignment Judge of the Superior Court of New Jersey, Bergen County On or about July 15, 2026, the parties reached agreement on the proposed Class Action Settlement Agreement in this matter which is presented to the Court in this motion. The proposed settlement is a reasonable and fair compromise of the hotly disputed claims.

The risks faced by the class cannot be overestimated if litigation were to continue cannot be ignored. All litigation is inherently risky, but the class claims in this matter face significant additional litigation risks which threaten class members with either a smaller recovery than what they are being offered now in settlement or no recovery at all. In particular, Defendants have raised credible arguments that: (a) Class Members who own Class Properties contained within the Well

Restriction Area ("WRA") established in 1986 are barred from suit by virtue of prior litigation, settlement and release affecting properties located in the WRA; (b) the statute of limitations being expired for all Class Member claims; (c) claims asserted by all Class Members were discharged through the Chapter 11 Bankruptcy for Metallurg, Inc. and Shieldalloy Metallurgical Corporation which was confirmed on February 26, 1997; (d) the prospect that Shieldalloy will attempt to re-open the prior bankruptcy; and (e) Class Members sustained no calculable and provable damages. While Plaintiffs believe they could overcome these risks if litigation were to continue, there is no doubt that there are significant risks as both the class liability and damage claims. Depending on the outcome of these issues, the class could well end up with no recovery at all.

Moreover, the proposed class Settlement provides a real cash benefit to the class now, rather than years in the future after the completion of summary judgment, trial, and appeals. Defendants have raised complex defenses and have shown a willingness to litigate this matter vigorously. Plaintiffs believe that they would be able to overcome these defenses, but only after a long, contested litigation and potential appeals. In contrast, the proposed Settlement offers excellent relief to the class now, without any further litigation and its associated risks. See Texas v. Organon USA Inc. (In re Remeron End-Payor Antitrust Litig.), 2005 U.S. Dist. LEXIS 27011 at *62 (D.N.J. Sep. 13, 2005) (**"Early settlements benefit everyone involved in the process and everything that can be done to encourage such settlements, especially in complex class action cases, should be done."**). Exhibit 3 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval. Instead of forcing class members to face and overcome the risks associated with continued litigation, the proposed settlement offers class members a recovery that is immediate, substantial, and guaranteed.

Moreover, it is submitted that the reaction of the class to the proposed settlement strongly supports approval. Despite having received the court-approved form of settlement notice, advising class members, inter alia, of their right to object to the proposed settlement and of their right to exclude themselves from the class, no class member has objected to the proposed settlement and no class member has requested to be excluded from the class.

For all these reasons, which are set forth in detail below, the proposed settlement should be granted final approval.

I. THE SETTLEMENT IS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES AND SHOULD BE GIVEN FINAL APPROVAL.

A. The Use of Federal Authority Has Been Authorized on Motions to Approve a Proposed Class Action Settlement in New Jersey State Court.

There are relatively few published opinions in New Jersey on the standards to be applied in determining whether to approve a proposed class action settlement in New Jersey state court under R. 4:32-2(e). Thus, New Jersey state courts routinely consider federal case law in deciding whether to approve a class settlement. See Morris Cnty. Fair Housing Council v. Boonton Twp., 197 N.J. Super. 359, 369 (Law Div. 1984), cited with approval in Builders League of S. Jersey, Inc. v. Gloucester Cnty. Utils. Auth., 386 N.J. Super. 462, 471 (App. Div. 2006):

> **"There is only limited discussion in New Jersey case law of the procedures to be followed in presenting proposed settlements of class actions for judicial approval and of the standards to be applied in determining whether approval should be given. However, R. 4:32-4 [now R. 4:32-2(e)] was taken from and is identical to Fed. R. Civ. P. 23(e). Therefore, *it is appropriate to seek guidance in federal case law in determining the procedures and standards for approval of settlements of representative actions*."** (emphasis added) (citations omitted)

See also Lubitz v. DaimlerChrysler Corp., 2006 WL 3780789 at *3 (Law Div. Dec. 21, 2006):

> **"Any settlement involving a certified class in a class action requires court approval. R. 4:32-2(e). This rule, modeled after**

> **Fed. R. Civ. P. 23, has not received extensive treatment in New Jersey reported opinions. Accordingly, *I will borrow from federal decisions where necessary to help me parse the operation of the applicable rule*."** (emphasis added) (citations omitted)

Exhibit 4 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval.

B. New Jersey Law Highly Favors Settlement of Class Actions.

As held in Educ. Station Day Care Ctr., Inc. v. Yellow Book USA, Inc., 2007 N.J. Super Unpub. LEXIS 1607 at *13 (App. Div. 2007): **"The law favors settlement, particularly in class action and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."** Exhibit 5 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval. See also Morris Cnty. Fair Housing Council, 197 N.J. Super. at 366 (**"Our courts have long endorsed the policy of encouraging the settlement of litigation."**); In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004) (**"[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."**).

New Jersey law makes clear that, while a proposed class action settlement cannot be finalized without a finding by the court that the settlement is fair and reasonable, the court should strive to give effect to the proposed settlement wherever possible. See Lubitz, 2006 WL 3780789 at *9, stating on a motion to approve a class action settlement under Rule 4:32-2(c):

> **"It is worthwhile to acknowledge that settlement of litigation holds a lofty position in the pantheon of public policy. The settlement of lawsuits is favored not because of the salutary consequence of relieving overburdened judicial and administrative calendars but because of the notion that the parties to a dispute are in the best position to determine how to resolve a contested matter in a way that is least disadvantageous to everyone. In recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible."** (emphasis added) (citations omitted)

C. General Standards to Be Applied.

In making an assessment regarding the fairness of a class action settlement, courts are not to adjudicate the merits of the case. See Builders League of S. Jersey, Inc., 386 N.J. Super. at 472 (**"The purpose of the fairness hearing is to assure that the settlement is reasonable, not to adjudicate the case on his merits."**); Morris Cnty. Fair Housing Council, 197 N.J. Super. at 370 (**"The hearing on the proposed settlement is not a plenary trial and the court's approval of the settlement is not an adjudication of the merits of the case"**); Strougo v. Atlantic Shore Holding Co., 457 N.J. Super. 138, 157 (Ch. Div. Sept. 26, 2017) (**"The hearing on the proposed settlement is not a plenary trial and the court's approval of the settlement is not an adjudication of the merits of the case."**). See also Eichenholtz v. Brennan, 52 F.3d 478, 489 (3d Cir. 1995) (the court should not **"turn a decision on approval of a proposed settlement into a determination on the merits in all but name"**).

Nor is it the job of the court to try to rewrite the proposed settlement agreement or to **"reopen and enter into negotiations with the litigant in the hope of improving the terms of the settlement."** Levin v. Mississippi River Corp., 59 F.R.D. 353, 361 (S.D.N.Y.), aff'd 486 F.2d 1398 (2d Cir. 1973), cert. denied, 414 U.S. 1112 (1974). In the words of the Appellate Division in Educ. Station Day Care Ctr., 2007 N.J. Super Unpub. LEXIS 1607, *12:

> **"A trial court's task in reviewing a class action settlement is to determine whether it is fair, reasonable, and adequate to the class as a whole. The trial court's role is to approve or reject the proposed settlement in its entirety, not to revise or amend particular provisions. '[T]he court's function [is] to determine the reasonableness of the agreement, not to renegotiate the terms of the settlement.'"** (emphasis added) (citations omitted)

The court should not look to "pie in the sky" estimates of what might have been obtained in the abstract, but instead it should focus on the real-world conditions that govern the litigation.

See, e.g., Joseph A. Osefchen & Philip Stephen Fuoco, "Leveling the Playing Field in the Garden State: A Guide to New Jersey Class Action Case Law," 37 Rutgers L.J. 399, 477 (2006)[1] (**"The goal of all such factors is to analyze the proposed settlement in context, to determine whether it is reasonable – not in the abstract – but under the circumstances that prevail in the litigation."**). As stated by the Appellate Division in Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 627 (App. Div. 1987): **"The basic test for court approval of a settlement of a class action is whether it is fair and reasonable to the members of the class."**

In applying this test, the court must recognize that there is no one "perfect" settlement. As noted by the New Jersey Superior Court in Lubitz, 2006 WL 3780789 at *15:

> **"There is always a 'better' settlement just around the corner, but without a principled way to reject the instant compromise other than to nitpick it to death, there is no just reason to disturb the efforts of those who toiled so long and hard to reach a reasonable accommodation of all parties' interests."**

There may be any number of potential settlements which fall into the range of reasonableness, since a class settlement – like any other settlement – represents an exercise of compromise and judgment by the negotiating parties. Thus, **"[a] just result is often no more than an arbitrary point between competing notions of reasonableness."** In re Corrugated Container Antitrust Litig., 659 F.2d 1322, 1325 (5th Cir.1981). As held by the New Jersey Superior Court in Lubitz, 2006 WL 3780789 at *10:

> **"[I]n deciding the fairness of a proposed settlement, the evaluating court must, of course, guard against demanding too large a settlement based on his view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution."** (emphasis added) (citation omitted)

[1] This law review article was cited with approval by the New Jersey Supreme Court in Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 105 (2007).

See also Herbert B. Newberg and Alba Conte, Newberg on Class Actions § 11.41 (3d ed. 1992):

> **"The compromise of complex litigation is encouraged by the courts and favored by public policy. By their very nature, because of the uncertainties of outcome, difficulties of proof, and length of litigation, class action suits lend themselves readily to compromise."**

The Court should give due deference to the opinions and estimates of experienced counsel, who are the most intimately familiar with the details of the case and are in the best position to evaluate the chances of success at trial. See In re Pacific Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995) (**"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation."**); Alves v. Main, 2012 U.S. Dist. LEXIS 171773 at *72 (D.N.J. Dec. 4, 2012) (**"Here, Class Counsel are highly skilled attorneys, especially in this area of the law. Their opinions carry persuasive weight."**) Exhibit 6 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval.; Vasquez v. Coast Valley Roofing, Inc., 266 F.R.D. 482, 489-490 (E.D. Cal. 2010) (**"In reviewing the opinions of counsel, 'great weight' is accorded to the recommendation of the attorneys. They are the ones who are most closely acquainted with the facts of the underlying litigation."**) (citations omitted); see also Canupp v. Sheldon, 2009 U.S. Dist. LEXIS 113488, *38-39 (M.D. Fla. Nov. 23, 2009):

> **"Attorneys for both Plaintiffs and Defendant have decades of class action litigation experience. Under such circumstances, both sides can evaluate the case in light of a complete understanding of the strengths and weaknesses of their side. A court 'should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation.'"**

Exhibit 7 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval.

In fact, it has long been held that a **"presumption of correctness"** attaches to a proposed class settlement that is the result of arms-length negotiations by experienced counsel. See In re Telik, Inc. Secs. Litig., 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (**"With respect to process, a class action settlement enjoys a 'presumption of correctness' where it is the product of arm's-length negotiations conducted by experienced, capable counsel."**); In re Linerboard Antitrust Litig., 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) (**"A presumption of correctness is said to attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery."**); In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 509 (W.D. Pa. 2003) (**"[S]ettlement negotiations took place at arm[']s length between highly experience[d] and competent counsel. Their assessment of the settlement as fair and reasonable is entitled to considerable weight."**).

In the case at bar, the proposed class settlement was the product of extensive, arms-length negotiations by highly experienced class action counsel with the help of a highly respected mediator. This back-and-forth provided the parties with ample opportunity to analyze the strengths and weaknesses of their positions and to recognize and evaluate the risks associated with the class claims. Indeed, the settlement was agreed to only after Defendants had provided (in conjunction with mediation and settlement discussions) essential information and data specifically requested by Class Counsel.

Class Counsel are highly experienced in class actions, having collectively participated in numerous certified class actions and having served as lead counsel, or co-lead counsel, in many of those actions. Based on that experience, the admitted facts of this case, the informal discovery produced, the defenses that Defendants would have, and the voluminous factual and legal research conducted by Class Counsel into the causes of action pleaded in the class complaint, Class Counsel

is of the opinion that the proposed class settlement is an outstanding result for the class under the circumstances. Put simply, there is no reason to risk continuing to litigate this matter since the settlement effectively achieves most of the goals set forth in the class complaints and provides each class member with an opportunity for a significant and substantial partial payment now, without any need for risky (and lengthy) continued litigation.

D. Specific Factors to Be Applied.

In Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975), the Third Circuit articulated a nine-factor test to help determine if a proposed class settlement fell within a range of reasonableness. These nine factors were re-stated and approved by the Third Circuit in In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 317 (3d Cir. 1998). These criteria are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceeding and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. Id.

The Girsh test has been adopted and applied by the New Jersey Superior Court in considering whether to approve proposed class action settlements. See Strougo v. Atlantic Shore Holding Co., 457 N.J. Super. 138, 159 (Chancery Div. 2017):

> **"Because the Girsh factors are reinforced by a substantial amount of case law in the Third Circuit and elsewhere, this court is persuaded to formally adopt these factors in New Jersey when conducting an analysis to determine the approval of a class action settlement pursuant to Rule 4:32-2(e)."**

See also Gurriere v. Bloomfield Condo. Assocs., LLC, 2015 N.J. Super. Unpub. LEXIS 2137, at *69 (Ch. Div. July 20, 2015):

> **"In analyzing whether a proposed class settlement is 'fair and reasonable,' New Jersey courts have adopted a list of factors set forth by the Third Circuit in Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)."**

Exhibit 8 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval. Plaintiffs submit that each factor is met here.

1. **The Complexity, Expense, and Duration of the Litigation.**

By their nature, class actions often raise a large number of complex and difficult legal issues. The potential complexity, expense, and duration of such a matter is magnified by the presence of novel issues. See In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices, 263 F.R.D. 226, 239 (E.D. Pa. 2009), approving a class action settlement, noting:

> **"[The class] claims add to the complexity of this already complicated case because of the novel issues they present. The settlement avoids all of the costly uncertainty discussed above, and instead, provides class members with certain, timely relief."**

The case at bar does not involve "cookie cutter" claims which follow a well-worn path blazed by prior litigants. Rather, Plaintiffs' complaint raises complex and novel legal theories, challenging a state of affairs that has existed for many years. The continued litigation of these claims through class certification and trial would likely take several more years, and would no doubt require competing expert opinions and testimony as well as the expenditure of untold additional costs and attorney hours on discovery and motion practice.

Moreover, this litigation would certainly not end at trial. The losing side would likely appeal any legal ruling by the trial court on the merits and class certification. Thus, in order to prevail on their claims, Plaintiffs and the class would have to "win" multiple times; first at trial

and then before one or more appellate courts, potentially on several separate issues. At a minimum, this prospect exponentially increases the potential complexity, cost, and duration of this matter, with only minimal (if any) additional benefits likely to be won for the class as a whole beyond what is being offered now in the settlement. The only certain result from continued litigation would be a long delay of many years in any benefit or payment to the class and the expenditure of tens of thousands of additional attorney hours and tens of thousands of dollars in additional costs. In contrast to the time, uncertainty, and expense involved in such continued litigation, the proposed settlement guarantees an immediate, highly favorable result for the class. Thus, this factor supports approval of the proposed class settlement.

Finally, the cost and expense of litigating a class action through trial and appeal can be enormous. Several courts – including the New Jersey Superior Court – have described such costs as **"staggering."** See, e.g., Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1300-01 (D.N.J. 1995) (noting that the expense involved in taking a class action or other complex commercial litigation to trial **"can be staggering"**); Strougo, 457 N.J. Super. at 160 (approving a proposed class action settlement, noting that **"The court agrees that the potential cost to litigate this case to final disposition will be staggering. This factor weighs heavily in favor of settlement."**). This case is no exception, particularly considering the likelihood of continued multiple appeals as referenced above.

Based on the foregoing, it is submitted that the cost, duration, and complexity of this matter weigh overwhelmingly in favor of approving the proposed settlement, particularly when, as here, each class member is being offered via the settlement the opportunity for a substantial cash payment. The only certain results that would flow from the continued litigation of this case would be a long delay in any benefit to the class and the expenditure of thousands of additional attorney

hours, as well as tens of thousands in additional litigation costs, potentially for only minimal additional returns – or worse, for Plaintiffs' claims potentially to be extinguished altogether. In contrast to the time, uncertainty, and expense involved in continued litigation, the proposed settlement guarantees an extremely favorable, tangible result for the class now.

2. Reaction of the Class.

Notice of the proposed settlement has been distributed to the class members in the manner approved in the Court's Preliminary Approval Order of July 31, 2026. To date, **no class members have objected** to the proposed settlement. A low number of objections by class members to a proposed class action settlement weighs heavily in favor of approval of the settlement. See Lubitz, 2006 WL 3780789 at *14 (**"Courts construe class members' failure to object to proposed settlement terms as evidence that the settlement is fair and reasonable."**); Lake v. First Nationwide Bank, 900 F. Supp. 726, 732 (E.D. Pa. 1995) (**"the low number of objections or requests for exclusion bolsters the contention that this is not an unreasonable settlement"**); In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305 (3d Cir. 2005) (**"a low level of objection is a 'rare phenomenon'"** and strongly supports approval of a proposed settlement); In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig., 269 F.R.D. 468, 485 (E.D. Pa. 2010) (citing In re Cendant Corp. Litig., 264 F.3d 201, 234-35 (3d Cir. 2001)) (**"The Third Circuit has looked to the number of objectors from the class as an indication of the reaction of the class"**); Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314 (3d Cir. 1993) (**"infinitesimal number"** of objectors **"strongly favors settlement"**) (internal cites omitted); Krangel v. Golden Rule Res., Inc., 194 F.R.D. 501, 507 (E.D. Pa. 2000):

> **"Courts have deemed the attitude of class members toward the settlement of a class action, as evidenced by the absence of objections, as constituting an indication that the settlement is fair and reasonable."**

Similarly, only the owners of two class properties have requested to be excluded from the settlement class and provided no criticism of the settlement in their requests for exclusion. This extremely low number of "opt-out" requests also indicates class-wide satisfaction with the settlement. See, e.g., In re NFL Players Concussion Injury Litig., 821 F.3d 410, 438 (3d Cir. 2016) (approving class settlement where **"approximately 1% of class members opted out"** of the proposed class action settlement and holding **"these figures weigh in favor of settlement approval"**); Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 237 (D.N.J. 2005) (calling 2,204 requests for exclusion from the class an **"extremely low"** rate of exclusions). Here, the "opt-out" rate is not merely low, it is a single individual.

From the foregoing, it is clear that the overall reaction of the class reflects overwhelming support of the settlement, and thus this factor also supports approval of the settlement.

3. The Stage of the Proceedings and the Amount of Discovery Completed.

This factor aims at making sure Plaintiffs have an informed basis for evaluating the settlement proposal. See Eichenholtz v. Brennan, 52 F.3d 478, 488 (3d Cir. 1995). In the present case, the parties engaged in formal written discovery as well as informal exchanges of information. However, the issue is whether Plaintiffs have enough information to evaluate the case, rather than the amount of formal discovery that was conducted, and courts have been clear that much less discovery than was done in this case is sufficient. See In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000), affirming approval of a class action settlement, stating:

> **"It is true that extensive formal discovery had not been completed. However, '[i]n the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement."**

See also In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 975 (N.D. Ill. 2011) (**"The lack of formal discovery is not an impediment to approval of the Settlement"**).

Informal discovery – where the parties voluntarily exchange factual information as part of settlement negotiations – and investigation by Class Counsel from public sources including an extensive review of DEP files regarding the contamination at issue can provide Class Counsel with an informed basis for evaluating a settlement offer. For example, in Lubitz the Court held that informal discovery exchanged by the parties during settlement negotiations met the requirement that the parties have sufficient information to evaluate the merits of the proposed settlement, and stating:

> **"[T]he fact that this case settled before class certification was decided and before the completion of all formal discovery should not mask the fact that plaintiffs' attorneys had obtained substantial discovery data through litigational processes and the mediation mechanism."**

Lubitz, 2006 WL 3780789 at *17. See also In re NFL Players Concussion Injury Litig., 821 F.3d 410, 436-37 (3d Cir. 2016) (**"informal discovery will be enough for class counsel to assess the value of the class' claims and negotiate a settlement that provides fair compensation."**); In re Processed Egg Prods. Antitrust Litig., 284 F.R.D. 249, 267 (E.D. Pa. 2012) (approving class settlement stating that **"although no formal discovery was conducted in this case during the time of the Moark Settlement negotiations or agreement, Plaintiffs' Interim Co-Lead Counsel conducted informal discovery, including, inter alia, independently investigating the merits prior to filing the complaint"**).

In the case at bar, the parties have an ample basis for evaluating the merits of the proposed settlement. The parties served written discovery, Plaintiffs conducted an extensive review of DEP

files regarding the contamination at issue and retained a consulting expert to establish a damages model. Moreover, the mediation process including an exchange of written submissions, settlement negotiations, and informal exchange of information between the parties, as well as the extensive investigation performed by counsel, have provided each side with a sound basis for evaluating the strengths and weaknesses of Plaintiffs' claims and the defenses. All of this information has provided Class Counsel with a firm basis for assessing the reasonableness of the proposed settlement, and thus this factor supports approval.

4 & 5. The Risk That the Class Would Not Establish Liability and/or Damages.

In all complex cases, **"[t]he risks surrounding a trial on the merits are always considerable."** Yedlowski v. Roka Bioscience, Inc., 2016 U.S. Dist. LEXIS 155951, *41 (D.N.J. Nov. 10, 2016) (quotation omitted) Exhibit 9 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval.; see also Glaberson v. Comcast Corp., 2015 U.S. Dist. LEXIS 127370 at *22 (E.D. Pa. Sept. 22, 2015) (**"all complex litigation against companies ably represented by teams of talented defense counsel, carry inherent risks"**) Exhibit 10 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval.. As one court explained, **"[i]n every case, Plaintiffs face the general risk that they may lose at trial, since no one can predict the way in which a jury will resolve disputed issues … no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."** Lazy Oil Co. v. Wotco Corp., 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997).

Although Plaintiffs believe the claims pleaded are meritorious, it is beyond dispute that litigation always involves substantial risks. This is especially true in class action litigation. As one court has observed in W. Va. v. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2nd Cir. 1971):

> **"It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement."**

Here, there are substantial risks relating to the class claims regarding both liability and damages. Defendants have raised credible arguments as to both liability and damages. This includes the following defense arguments: (a) Class Members who own Class Properties contained within the Well Restriction Area ("WRA") established in 1986 are barred from suit by virtue of prior litigation, settlement and release affecting properties located in the WRA; (b) the statute of limitations has expired for all Class Member claims; (c) claims asserted by all Class Members were discharged through the Chapter 11 Bankruptcy for Metallurg, Inc. and Shieldalloy Metallurgical Corporation which was confirmed on February 26, 1997; (d) the prospect that Shieldalloy will attempt to re-open the prior bankruptcy; and (e) Class Members sustained no calculable and provable damages. If this litigation were to continue and Defendants were to prevail on one or more of these arguments, class members could end up receiving nothing on their claims.

Further, even assuming the trial court were to agree with Plaintiffs' positions and a verdict were obtained in favor of the class, there is no certainty that such a ruling would survive an appeal. And even assuming that Plaintiffs would win such an appeal, any such appeal would increase the time and effort spent on this matter, delaying the distribution of any money to the class, without substantial additional benefits likely to be won for the class.

In place of this uncertainty, the proposed settlement provides each class member with an opportunity to obtain a fair and reasonable recovery of monetary relief **now**, without any further risk and without having to wait years for a trial or multiple rulings on appeal.

6. The Risk of Maintaining Class Certification Through Trial.

This factor also supports approval of the proposed settlement. While Class Counsel certainly believe that a non-settlement class can and should be certified in this case, the proposition of certifying a class in contested litigation, and maintaining certification through trial, is always risky. Defendants would no doubt oppose class certification in any form except as part of a negotiated class settlement. Any ruling by the Court on such a contested class motion would likely be appealed by the losing party, again adding to the risk and uncertainty for the proposed class members, and further delaying any benefits to the class. Thus, while Class Counsel believe they would eventually obtain certification of a class and maintain class certification through trial even over Defendant's objections and defenses, that result is by no means guaranteed. See, e.g., W. Va. V. Chas. Pfizer & Co., 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2nd Cir. 1971) (**"It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."**).

Given that a fair and substantial class settlement is being offered here, there is simply no good reason for class members to take the risk that a class may not be certified in contested litigation.

7. The Ability of Defendants to Withstand a Greater Judgment.

This factor should be given little or no weight in the case at bar. While Defendants may well be able to withstand a greater judgment, there is simply no avoiding the fact that the proposed settlement will provide each class member who submits a claim with a guaranteed, tangible monetary recovery now, without having to face any of the risks of continued litigation or having to wait years for a verdict and appeal. That is a fair and excellent result for the class, and Defendants' financial resources do not alter that analysis.

8 & 9. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation.

In evaluating a settlement, a court should not attempt to arrive at a mathematical computation of its fairness. The court should not **"balance the scales with the nicety of an apothecary."** Glichen v. Bradford, 35 F.R.D. 144, 152 (S.D.N.Y. 1964). Rather, a court should attempt to determine whether the settlement is within a **"range of reasonableness."** Newman v. Stein, 464 F.2d 689, 693 (2d Cir.), cert. denied, 409 U.S. 1039 (1972), noting that such a range:

> **"[R]ecognizes the uncertainties of law and fact in any particular case, and the concomitant risks and costs necessarily inherent in bringing any litigation to completion."**

In determining whether a settlement is in the range of reasonableness, the judgment of Class Counsel is entitled to considerable weight. Hawker v. Consovoy, 198 F.R.D. 619, 633 (D.N.J. 2001); In re Paine Webber Ltd. P'ships Litig., 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (**"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."**); Austin v. Pa. Dept. of Corrections, 876 F. Supp. 1437, 1472 (E.D. Pa.1995); Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (the court should be hesitant to substitute its own judgment for that of counsel in evaluating a proposed class settlement). This is because **"[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation."** In re Pacific Enters. Sec. Litig., 47 F.3d 373, 378 (9th Cir. 1995). As stated by the Eastern District of Pennsylvania in Lake, 900 F. Supp. at 732:

> **"Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class."**

See also Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975):

"While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court such opinion should be given weight in evaluating the proposed settlement."

It is the opinion of Class Counsel that the proposed settlement represents the best possible result under the circumstances. Under the settlement, the class will avoid the significant risks inherent in their claims. Moreover, they will receive that benefit now, without having to wait years for appeals, trial and subsequent appeals to play out. The only guaranteed result of continued litigation would be a delayed payment of benefits – if any – to the class and the substantial expenditure of additional time, attorney hours, and litigation costs. All these factors weigh heavily in favor of final approval of the proposed settlement.

With regard to the best possible outcome given the attendant risks of litigation, this settlement also represents a great outcome for the class. Damages in this matter were a hotly contested issue, with Defendant arguing that even were Plaintiffs to overcome the other defenses raised in the case, the damages attributable to the CEAs were zero. Plaintiffs consulting expert provided counsel with an assessment of damages which ultimately provided a total loss range of 15.3% to 23.5% of the market value of the properties impacted by the CEAs. This assessment was made irrespective of the defenses raised in the case.

In perhaps the closest comparison case by which to measure damages, the Court in Sutton v. Hoffman LaRoche approved a settlement for a class of properties impacted by groundwater contamination which provided for a gross recovery[2] of 13.4% of the tax assessed value of class properties. Class Counsel in Sutton argued the recovery amounted to 100% of the actual damages in the case. Importantly, Sutton was litigated for seven years to reach that result, including an appeal of class certification to the Appellate Division. Furthermore, Sutton did not involve a

[2] Prior to the payment of Class Counsel's fees and costs.

Defendant which had previously declared bankruptcy, or the statute of limitations issues raised by a pre-existing WRA in this case. Also, the calculation of 13.6% was prior to the payment of Class Counsel's fees and costs from the fund. In the present case, non-WRA class members who file a claim are entitled to actually receive up to 7% of their tax assessed value.[3]

With regard to the Well Restriction Area properties, the settlement provides for $300 payments for any property contained within the WRA. This sum recognizes the significant hurdles that Plaintiffs would need to overcome should the case proceed. As the Court is aware, the WRA was established in 1986 and, as addressed in the motion to dismiss briefing, was the subject of public notice and debate at the time it was established as it required properties within its bounds to be connected to public water as private wells were no longer permitted due to contamination in the groundwater. Additionally, there was litigation filed with regard to the WRA by some property owners prior to the Metallurg's bankruptcy filing. In light of these facts, Class Counsel submits that a payment of $300 per property is a good result. A similar structure was approved by the Court in Collins v. Olin Corp., where the court approved a three tiered class settlement, with payments of $23,000 to properties which were contaminated and had not been remediated; $7,600 to properties which had been contaminated and had been fully remediated; and $750 to properties which had only suffered stigma damages.[4] Collins v. Olin Corp., 2010 U.S. Dist. LEXIS 39862, *15 (D.Ct. April 21, 2010) Exhibit 12 to the Declaration of James A. Barry in Support of Plaintiffs'

[3] Were the Court to apply the same calculation used in Sutton to the properties outside the WRA, the result is very similar. There are 91 properties outside of the WRA with a 2025 tax assessed value of $16,829,600 resulting in an average tax assessed value of $184,940.65. Taking the total settlement fund of 1,325,000 and reducing that amount by the payments to be made to WRA properties (assuming a 100% claim rate) results in a gross settlement fund for the WRA properties of $1,262,000 that number divided by 91 results in an average gross recovery of $13,868.13 for WRA properties, approximately 7.5% of their average tax assessed value.

[4] As noted by the Court these sums were prior to court approved deductions for attorneys' fees and expenses. Id. at n 2.

Motion for Final Approval. Similar to the situation in Collins, the facts particularly applicable to the WRA properties warrant the payment of a single lump sum as opposed to a percentage of the value of the properties in this case and $300 is a reasonable sum in light of all the attendant facts of the case.

Conclusion

For the foregoing reasons, the Court should grant final approval to the proposed class action settlement.

Dated: November 9, 2026

DeNITTIS OSEFCHEN PRINCE, P.C.

By: _____

James A. Barry, Esq. (027512008)
Stephen P. DeNittis, Esq. (031981997)
Joseph A. Osefchen, Esq. (024751992)
Shane T. Prince, Esq. (022412002)
525 Route 73 North, Suite 410
Marlton, New Jersey 08053
Phone: (856) 797-9951
JBarry@Denittislaw.com
SDenittis@Denittislaw.com
JOsefchen@Denittislaw.com
SPrince@Denittislaw.com

Attorneys for Plaintiffs and the Class

DeNITTIS OSEFCHEN PRINCE, P.C.
James A. Barry, Esq. (027512008)
525 Route 73 North, Suite 410
Marlton, NJ 08053
(856) 797-9951
jbarry@denittislaw.com

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action **PROOF OF SERVICE**

I, James A. Barry, of full age do hereby certify that:

1. I am a partner with the DeNittis Osefchen Prince, P.C., attorneys for Plaintiffs.

2. On November 9, 2026, I electronically filed the foregoing Notice of Unopposed Motion for Final Approval of Class Action Settlement; Approval of Award of Attorney Fees and Costs; and Approval of Incentive Award for Lead Plaintiffs.

3. All counsel of record were automatically served by eCourts.

4. A courtesy copy was sent via priority mail to The Honorable Robert G. Malestein, J.S.C.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: November 9, 2026

By: _____
James A. Barry

DeNITTIS OSEFCHEN PRINCE, P.C.
James A. Barry, Esq. (027512008)
525 Route 73 North, Suite 410
Marlton, NJ 08053
(856) 797-9951
jbarry@denittislaw.com

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY
Plaintiffs,	:	DOCKET NO. GLO-L-000816-24
v.	:	Civil Action
SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10),	:	
Defendants.	:	

CLASS COUNSEL'S PETITION FOR ATTORNEY'S FEES AND COSTS AND REQUEST FOR APPROVAL OF PROPOSED INCENTIVE AWARD FOR CLASS REPRESENTATIVES

TABLE OF CONTENTS

Page(s)

Table of Authorities……ii-iii

Summary of Relief Sought……...1

I. THE WORK UNDERTAKEN BY COUNSEL……...1

II. NO CLASS MEMBER HAS OBJECTED TO THE PROPOSED AWARD OF ATTORNEYS' FEES OR COSTS……3

III. THE PROPOSED AWARD OF ATTORNEYS' FEES AND COSTS WAS NEGOTIATED AT ARMS-LENGTH, ONLY AFTER SUBSTANTIVE RELIEF FOR THE CLASS HAD ALREADY BEEN AGREED UPON……..4

IV. THE REQUESTED AWARD OF FEES AND COSTS FALLS WELL WITHIN THE AMOUNT AWARDED WHERE FEES ARE AWARDED BASED ON A PERCENTAGE OF THE SETTLEMENT FUND……..5

V. THE REQUESTED COSTS ARE REASONABLE AND SHOULD BE APPROVED…...6

VI. THE REPRESENTATIVE INCENTIVE AWARDS SHOULD BE APPROVED……..7

Conclusion……10

TABLE OF AUTHORITIES

Cases

Page(s)

Bogosian v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985)……9

Bredbenner v. Liberty Travel, Inc., 2011 WL 1344745 (D.N.J. 2011)……3

Brotherton v. Cleveland, 141 F. Supp. 2d 907 (S.D. Ohio 2001)……9

Chemi v. Champion Mortg., 2009 WL 1470429 (D.N.J. 2009)……..3

Cullen v. Whitman Med. Corp., 197 F.R.D. 136 (E.D. Pa. 2000)……..6

Elkins v. Equitable Life Ins. Co., No. 96-296-CIV-T-17B,
1998 U.S. Dist. LEXIS 1557 (M.D. Fla. Jan. 27, 1998)……..3

Enter. Energy Corp. v. Columbia Gas Transmission Corp.,
137 F.R.D. 240 (S.D. Ohio 1991)……7

Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461 (E.D. Pa. 2000)……7

Hanrahan v. Britt, 174 F.R.D. 356 (E.D. Pa. 1997)……7

Huguley v. General Motors Corp., 128 F.R.D. 81 (E.D. Mich. 1989),
aff'd 925 F.2d 1464 (6th Cir.1989)……...7

In re Ins. Brokerage Antitrust Litig., 297 F.R.D. 136 (2013)……...5, 6, 8

In re Ins. Brokerage Antitrust Litig., 579 F.3d 241 (3d Cir. 2009)……..5

In re Busiprone Antitrust Litigation, MDL No. 1413 (S.D.N.Y. Order of April 7, 2003)……...9

In re Cardizem CD Antitrust Litigation,
MDL No. 1278 (S.D. Mich., Order of Nov. 26, 2002)……9

In re Chambers Dev. Secs. Litig., 912 F. Supp. 852 (W.D. Pa. 1995)……7

In re First Jersey Securities, Inc., MDL No. 681 (E.D. Pa. 1989) ($24,000)……...9

In re Graphite Electrodes Antitrust Litigation,
MDL No. 1244 (E.D.Pa. Order of September 8, 2003)……...9

In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532 (E.D. Pa. June 2, 2004)……..3, 8

In re Merck & Co., Inc., Vytorin ERISA Litig., No. 08-285,
2010 U.S. Dist. LEXIS 12344 (D.N.J. Feb. 9, 2013)……..6

In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013 (D.N.J. 2005)….3

In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491 (W.D. Pa. 2003)…….3

In re SmithKline Beckman Corp. Secs. Litig., 751 F. Supp. 525 (E.D. Pa. 1990)……..7

Kirsch v. Delta Dental of N.J., Inc., 534 F. App'x 113 (3d Cir. 2013)…….5

Lake v. First Nationwide Bank, 900 F. Supp. 726 (E.D. Pa. 1995)…….7

Machulsky v. Lilliston Ford, Inc., 2008 N.J. Super Unpub. LEXIS 2603 (App. Div. 2008)…..7, 8

Meijer, Inc. v. 3M, No. 04-5871, 2006 U.S. Dist. LEXIS 56744
(E.D. Pa. Aug. 14, 2006)……..3

Milliron v. T-Mobile USA, Inc., 2009 U.S. Dist. LEXIS 101201 (D.N.J. Sept. 10, 2009)…….6

Munoz v. Ariz. State Univ., 80 F.R.D. 670 (D. Ariz. 1978)…….4

Sutton v. Hoffman-LaRoche, ESX-L-8724-14 (Law Div. June 24, 2022)……..5, 8

Vista Healthplan, Inc. v. Cephalon, Inc., 2020 U.S. Dist. LEXIS 69614
(E.D. Pa. Apr. 17, 2020)……...6

Other **Page**

Manual for Complex Litigation Fourth § 21.7 (2004)…….4

Summary of Relief Sought

As the Court is aware, the complaint in this matter alleged causes of action under the following theories of liability: (1) private nuisance; (2) strict liability; (3) trespass; (4) gross negligence; (5) negligence; and (6) unjust enrichment. None of those causes of action provide for fee shifting. Class Counsel have worked diligently to prosecute the claims in this matter for two years. Thanks to their efforts, the class has now obtained a fair and reasonable settlement. In obtaining this result, Class Counsel expended significant attorneys' hours and costs litigating this case.

Despite this, neither Plaintiffs nor the class members have paid any fees to Class Counsel. Plaintiffs were not even charged a consultation fee. Nor did Plaintiffs pay any costs of litigating this matter, all of which were advanced by Counsel. Rather, Class Counsel brought these matters entirely on a contingent basis, with no guarantee of any recovery or even reimbursement for their costs unless they prevailed. After fighting hard for more than two years to achieve what they set out to do in this case, Class Counsel now seek Court approval of an award of attorneys' fees of $441,622.50 (i.e., 33.33% of the settlement fund) and $50,000 in reimbursement of litigation costs. Class Counsel also seeks approval of incentive awards for $20,000 class representatives Raymond and Diane Cavagnaro jointly and for Anthony Alimenti as set forth in the Settlement Agreement. For the following reasons, it is submitted that the requested award of attorneys' fees and costs and the Class Representative incentive awards are reasonable and should be approved.

I. THE WORK UNDERTAKEN BY COUNSEL

The initial complaint in this matter was filed before this Court on June 26, 2024. Defendants AMG Critical Minerals, N.V. ("AMG") and Shieldalloy Metallurgical Corporation ("SMC") each separately filed a motion to dismiss on October 15, 2024. Defendant Shieldalloy

Metallurgical Corporation also sought an order to strike Plaintiff's class allegations in its motion to dismiss. On October 18, 2024 Defendant TRC Environmental Corporation ("TRC") joined in the motion to dismiss filed by Shieldalloy Metallurgical Corporation. The motions to dismiss were fully briefed separately, and the Court held oral argument on December 20, 2024. After hearing argument the Court denied Defendant Shieldalloy Metallurgical Corporation's motion in its' entirety and granted Defendant AMG's motion to dismiss without prejudice. On January 31, 2025 SMC filed its Answer and Crossclaims in the matter. Plaintiff served written discovery demands on SMC and TRC on April 3, 2025. On April 12, 2025 Defendant SMC served written discovery demands on Plaintiffs and on April 15, 2025 Defendant TRC served written discovery demands on Plaintiffs. The parties thereafter negotiated a case management order which provided for a stay of discovery to permit the parties to attempt to resolve the matter. That Order was entered by the Court on June 4, 2025. Plaintiff retained a consulting expert to assist with the calculation of damages for the class, the consulting expert met with both Mr. and Mrs. Cavagnaro as well as Anthony Alimenti to interview them, conducted a site visit of the relevant area, and provided an initial opinion to Plaintiffs' counsel to assist with bringing this matter to resolution.

On August 14, 2025, the Plaintiffs and Defendant SMC jointly participated in a full-day mediation overseen by the Honorable Peter E. Doyne, A.J.S.C. (Ret.), former Assignment Judge of the Superior Court of New Jersey, Bergen County. That all-day mediation session was then followed by thirteen months of extensive arms-length negotiations in good faith, and with additional assistance by the mediator. On or about July 15, 2026, the parties reached agreement on the proposed Class Action Settlement Agreement first by reaching an agreement on the relief to the Class, and only after that agreement was reached did the parties discuss and ultimately reach an agreement with regard to fees and costs.

II. NO CLASS MEMBER HAS OBJECTED TO THE PROPOSED AWARD OF ATTORNEYS' FEES OR COSTS.

The lack of any objections by class members to the requested award of attorneys' fees and costs is a factor that weighs heavily in favor of the proposed award. See Bredbenner v. Liberty Travel, Inc., 2011 U.S. Dist. LEXIS 39663 at *56 (D.N.J. 2011) (**"The absence of any objection weighs in favor of the fee request."**); Chemi v. Champion Mortg., 2009 U.S. Dist. LEXIS 44860, *31 (D.N.J. 2009) (**"This absence of objections weighs in favor of Plaintiffs' request."**); In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, *16 (D.N.J. 2005) (**"The lack of objections from the Class supports the reasonableness of the fee request."**); Meijer, Inc. v. 3M, 2006 U.S. Dist. LEXIS 56744, at *68 (E.D. Pa. Aug. 14, 2006) (**"The Court finds that this total absence of objections to the requested fees weighs in favor of approval."**); In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, *18 (E.D. Pa. June 2, 2004) (**"The absence of objections supports approval of the Fee Petition."**); In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003) (**"[T]he absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsels' request."**); Elkins v. Equitable Life Ins. Co., 1998 U.S. Dist. LEXIS 1557 at *105 (M.D. Fla. Jan. 27, 1998) (**"The lack of objections is itself important evidence that the requested fees are fair."**).

In the case at bar, the form of class notice approved by the Court and distributed to the class specifically advised class members of the fact that Class Counsel would seek an award of fees of $441,622.50 (i.e., 33.33% of the settlement fund), and reimbursement of litigation costs of $50,000, as well as all other aspects of the proposed settlement. Despite this, no class member has objected either to the settlement as a whole, or to Class Counsel's request for fees and costs.

As indicated by the above-referenced cases, this factor weighs in favor of approval of this fee request.

III. THE PROPOSED AWARD OF ATTORNEYS' FEES AND COSTS WAS NEGOTIATED AT ARMS-LENGTH, ONLY AFTER SUBSTANTIVE RELIEF FOR THE CLASS HAD ALREADY BEEN AGREED UPON.

As noted previously, pursuant to their usual practice, Class Counsel refused to discuss the issue of attorneys' fees until after agreement had already been reached by the parties on the substantive relief for the class. This practice guarantees that the interests of the class are placed first – as they should be – and that the issue of attorneys' fees is a secondary consideration. See Munoz v. Ariz. State Univ., 80 F.R.D. 670, 671-72 (D. Ariz. 1978) (**"Attorneys fees are subsidiary to the issue of settlement and should be considered subsequent to reaching a tentative settlement by the parties."**); see also Manual for Complex Litigation Fourth § 21.7 (2004) (recommending against simultaneous negotiation of class relief and attorney fees).

The case at bar was vigorously litigated for two years, with Class Counsel performing a thorough investigation of the underlying facts and law, interviewing Plaintiffs and numerous class members, retaining a consulting expert, and filing multiple pleadings and briefs as well as engaging in an all day mediation and follow up negotiation sessions. Class Counsel reviewed extensive documentation of the underlying contamination at issue and the resulting CEAs through review of NJDEP files, enabling Class Counsel to develop (in conjunction with the aforementioned investigation and interviews) a comprehensive understanding of the strengths and weaknesses of Plaintiffs' claims. This hotly-contested litigation eventually led to similarly-contentious arms-length negotiations, and ultimately agreement, on the substantive relief to the class. These facts underscore the reasonableness of Counsel's fee request.

IV. THE REQUESTED AWARD OF FEES AND COSTS FALLS WELL WITHIN THE AMOUNT AWARDED WHERE FEES ARE AWARDED BASED ON A PERCENTAGE OF THE SETTLEMENT FUND.

As the Court is aware, the complaint in this matter alleged causes of action under the following theories of liability: (1) private nuisance; (2) strict liability; (3) trespass; (4) gross negligence; (5) negligence; and (6) unjust enrichment. None of those causes of action provide for fee shifting and thus, Plaintiffs must seek reimbursement of fees and costs under the percentage of the fund method. Plaintiffs' counsel has not been paid any fees or reimbursed any costs during the prosecution of this matter and have pursued the claims on behalf of Plaintiffs and the Class on an entirely contingent basis, with the understanding that if the case was unsuccessful Plaintiffs' counsel would not be paid for the time in handling the matter, and would not be reimbursed for any costs in the prosecution of the case.

"The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 280 (3d Cir. 2009). See also Kirsch v. Delta Dental of N.J., Inc., 534 F. App'x 113, 115 (3d Cir. 2013) (**"We have noted that '[t]he percentage of recovery method is generally favored in common fund cases'"**); In re Ins. Brokerage Antitrust Litig., 297 F.R.D. 136, 153 (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.'"**).

Here, the amount of fees and costs requested is 33.33% of the common fund; an amount which falls well within the amount awarded in other class actions, including the most recent similar case handled within the New Jersey Superior Court. See Sutton v. Hoffman-LaRoche, ESX-L-

8724-14, at 8 (June 24, 2022). Vista Healthplan, Inc. v. Cephalon, Inc., 2020 U.S. Dist. LEXIS 69614, *82 (E.D. Pa. Apr. 17, 2020) (**"Class Counsels' requested fees in this case represent 33 1/3 % of the total recovery, which is well within the range of reasonable fees, on a percentage basis, in the Third Circuit."**); Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 150 (E.D. Pa. 2000) (explaining that **"the award of one-third of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district"**); In re Ins. Brokerage Antitrust Litig., 297 F.R.D. 136, 155 (3d Cir. 2013) (**"The requested award in this matter is 33%...This percentage has regularly been found acceptable in common fund settlements in this District."**); In re Merck & Co., Inc., Vytorin ERISA Litig., 2010 U.S. Dist. LEXIS 12344, at 46-48 (D.N.J. Feb. 9, 2013) (awarding attorney fee of 33%, plus expenses, from the common fund); Milliron v. T-Mobile USA, Inc., 2009 U.S. Dist. LEXIS 101201, at 41 (D.N.J. Sept. 10, 2009) (approving attorney fee of 33 1/3%, plus expenses, on common fund amount of $13.5 million).

Based on the foregoing, Class Counsel's proposed award of fees of $441,622.50, which constitutes 33.33% of the common fund, is reasonable and should be approved.

V. THE REQUESTED COSTS ARE REASONABLE AND SHOULD BE APPROVED.

Class counsel is seeking reimbursement of litigation costs of $50,000. The actual out-of-pocket litigation costs spent by Class Counsel on the prosecution of this matter were $50,042.85. A detailed explanation of these costs can be found in the accompanying Declaration of James Barry in support of Plaintiffs' Motion for Approval of Fees, Costs and Representative Incentive Awards at ¶13 and attached thereto as Exhibit 1. It is submitted that each of these costs were necessary for the successful prosecution of this matter, and consequently the request for reimbursement of litigation costs of $50,000 should be approved by this Court as reasonable.

VI. THE REPRESENTATIVE INCENTIVE AWARDS SHOULD BE APPROVED

The importance of incentive awards to class representatives has been increasingly recognized by various courts in recent years, including the New Jersey Appellate Division. See Machulsky v. Lilliston Ford, Inc., 2008 N.J. Super Unpub. LEXIS 2603 (App. Div. 2008), affirming an incentive award to a class member who intervened and became a de facto class representative, stating: **"Incentive awards to class representatives in class actions are a recognized element of agreements to resolve class actions."** See also Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 473 (E.D. Pa. 2000) (awarding the named plaintiff an incentive award); Hanrahan v. Britt, 174 F.R.D. 356, 369 (E.D. Pa. 1997); Lake v. First Nationwide Bank, 900 F. Supp. 726, 736 (E.D. Pa. 1995) (awarding an **"allowance for the time that the Lakes spent prosecuting this matter"**); In re Chambers Dev. Secs. Litig., 912 F. Supp. 852, 863 (W.D. Pa. 1995) (awarding $2,500 incentive award because **"it has been this Court's practice to approve such incentive awards if they are reasonable"**); In re SmithKline Beckman Corp. Secs. Litig., 751 F. Supp. 525, 535 (E.D. Pa. 1990) (approving $5,000 incentive awards to representatives who **"have rendered a public service by contributing to the vitality of the federal Securities Acts"**); Enter. Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991) (awarding incentive to representatives whose **"actions resulted in a substantial benefit to Class Members"**).

The purpose of such awards is to recognize that the named plaintiff has undertaken an extra burden beyond those of ordinary class members, in order to help recover a benefit for the entire class. See Huguley v. General Motors Corp., 128 F.R.D. 81, 85 (E.D. Mich. 1989), aff'd 925 F.2d 1464 (6th Cir.1989):

> **"[N]amed plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation they have borne."**

As explained by the New Jersey Appellate Division in Machulsky, 2008 N.J. Super Unpub. LEXIS 2603 at *6-12, the purpose of such an award to the named plaintiff is to recognize that:

> **"[T]he public policy favoring private civil litigation as a means to promote certain important social values often fails to provide adequate compensation or incentive for plaintiffs to take on this burden simply on principle. The representative assumes substantial risk, not just of losing the time and costs of litigation, but also of retaliation or collateral notoriety.** (citation omitted)"

In the case at bar, Defendants have agreed to pay an incentive award of $20,000 jointly to Plaintiffs Raymond and Diane Cavagnaro, and $20,000 Anthony Alimenti, subject to court approval. The proposed incentive award was disclosed to the class in the class notice. See Exhibit D to Settlement Agreement attached to the Certification of James Barry as Exhibit 2. Despite this, no class member has objected to any aspect of the proposed settlement, including these incentive awards. The lack of such objections supports the reasonableness of this request. See In re Ins. Brokerage Antitrust Litig., 297 F.R.D. 136, 158 (2013) (**"No objections were made to the requested amount, and as such, this Court will approve the incentive awards for each named Plaintiff"**).

The requested incentive awards are identical to those approved by the Court in Sutton v. Hoffman-LaRoche. Sutton v. Hoffman-La Roche Inc., ESX-L-08724-14, *7 (Law Div June 24, 2022) (approving $20,000 incentive awards to two named class representatives) Exhibit 3 to the Declaration of James A. Barry in Support of Plaintiffs' Motion for Final Approval. Moreover, the amount of these incentive awards is in line with amounts previously awarded by courts in class actions, particularly where a fund of over $1 million was created. See In re Linerboard Antitrust Litig., No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, at *58 (E.D. Pa. June 2, 2004) (approving

$25,000 to each representative of the class); In re Graphite Electrodes Antitrust Litigation, MDL No. 1244 (E.D.Pa. Order of September 8, 2003) ($ 80,000 incentive award approved); Bogosian v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985) ($20,000 incentive award approved); In re First Jersey Securities, Inc., MDL No. 681 (E.D. Pa. 1989) ($24,000); In re Busiprone Antitrust Litigation, MDL No. 1413 (S.D.N.Y. Order of April 7, 2003) ($25,000 incentive award approved); Brotherton v. Cleveland, 141 F. Supp. 2d 907 (S.D. Ohio 2001) ($50,000 incentive award approved); In re Cardizem CD Antitrust Litigation, MDL No. 1278 (S.D. Mich., Order of Nov. 26, 2002) ($20,000 incentive award approved).

Class counsel asks that this incentive award be approved. The named Plaintiffs shouldered burdens far beyond those borne by other class members and were instrumental in obtaining the relief obtained in the class settlement. The effects described in the lawsuit have existed for some time. Yet Plaintiffs were the only persons willing to step forward, stand up and file suit, thereby risking possible adverse publicity and other potential negative repercussions, by filing a class action lawsuit and to shoulder the burdens associated with serving as class representatives. These burdens included bringing the case to class counsel, spending a significant amount of time and effort helping to investigate this matter, being interviewed by counsel on numerous occasions as well as separately by Plaintiffs' consulting expert, and helping to gather information and documents used to prepare the class complaint, discovery requests, and settlement papers. The requested incentive award would help compensate the named Plaintiffs for such time and effort, as well as to recognize that Plaintiffs helped to obtain a tangible benefit for their fellow class members that simply would not exist without Plaintiffs' efforts.

Conclusion

For the foregoing reasons, Class Counsel's petition for attorneys' fees in the amount of $441,622.50 (i.e., 33.33% of the Settlement Amount), plus reimbursement of their reasonable litigation costs of $50,000 is reasonable and should be granted.

Dated: November 9, 2026

DeNITTIS OSEFCHEN PRINCE, P.C.

By: _____

James A. Barry, Esq. (027512008)
Stephen P. DeNittis, Esq. (031981997)
Joseph A. Osefchen, Esq. (024751992)
Shane T. Prince, Esq. (022412002)
525 Route 73 North, Suite 410
Marlton, New Jersey 08053
(856) 797-9951
JBarry@Denittislaw.com
SDenittis@Denittislaw.com
JOsefchen@Denittislaw.com
SPrince@Denittislaw.com

Attorneys for Plaintiffs and the Class

DeNITTIS OSEFCHEN PRINCE, P.C.
James A. Barry, Esq. (027512008)
525 Route 73 North, Suite 410
Marlton, NJ 08053
(856)797-9951
jbarry@denittislaw.com

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action

DECLARATION OF JAMES A. BARRY IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS AND CLASS REPRESENTATIVE AWARDS

I, James A. Barry, upon my oath certify as follows:

1. I am a partner with the law firm DeNittis Osefchen Prince, P.C. ("DOP"), counsel of record for Plaintiffs and the class in this matter. I am an attorney-at-law in the State of New Jersey, the Commonwealth of Pennsylvania, the Supreme Court of the United States, the United States Court of Appeals for the Third Circuit, the United States District Court for the District of New Jersey and the Eastern District of Pennsylvania. I respectfully submit this declaration in support of Plaintiffs' motion for attorney's fees and costs and class representative awards in the above-captioned class action.

2. I fully support the proposed settlement in the case at bar and believe it is fair, reasonable, and in the best interest of the class. The class representatives in this matter also fully support the proposed settlement.

3. I and the other attorneys in my firm have conducted extensive legal research regarding the various claims and potential defenses in this matter.

4. I and the other attorneys in my firm also have conducted an extensive investigation of the facts relating to this case, including substantial review of DEP files, coordination with a consulting expert and a review of informal discovery produced by Defendant.

5. I and the other attorneys in my firm have diligently prosecuted this case for approximately two years by, inter alia, thoroughly investigating Plaintiffs' claims, as well as the claims of class members; preparing and serving a class action complaint on Defendants; successfully briefing a motion to dismiss; preparing and serving discovery on Defendants; coordinating with a consulting expert; reviewing informal discovery produced by Defendants; participating in a full day of mediation followed by months of settlement negotiations; and ultimately successfully negotiating the proposed class settlement with Defendants.

6. During the pendency of this case, the parties participated in arms-length negotiations over a period of several months, as well as a full day of mediation before the Hon. Peter E. Doyne, A.J.S.C. (ret.).

7. I believe the foregoing has provided me with a firm basis for evaluating the risks of this case, the relative strengths and weaknesses of the parties' positions, and the reasonableness of the proposed settlement.

8. It is my opinion that, given the current state of the law and the facts which are now known regarding this action, the proposed settlement is not only fair and reasonable, but represents an excellent result for the class.

9. The parties have concluded that settlement is desirable in order to avoid the time, expense, and inherent uncertainties of protracted litigation, and to resolve finally and completely all claims of Plaintiffs and all members of the class as outlined in the Settlement Agreement.

10. Substantial arm's-length settlement negotiations have taken place between the parties.

11. Plaintiffs and their counsel recognize the costs and risks of further prosecuting this litigation, and believe that Plaintiffs' best interests, and the interests of all class members, are best served by the proposed class settlement as memorialized in the attached Settlement Agreement.

12. My firm undertook this matter entirely on a contingent basis and was responsible for advancing all costs and expenses in the prosecution of this matter. Any fees earned and reimbursement of expenses in this matter will be limited to such amounts as may be awarded by the Court.

13. To date, my firm has expended costs in the amount of $50,042.85 in the prosecution of this matter, none of those funds have been reimbursed. A copy of my firm's expense report is attached hereto as Exhibit 1.

14. I have served in leadership positions in a number of class actions and mass torts. Such class actions, include, the following cases: Caprarola v. Wells Fargo, Docket No. CAM-L-3570-13 (Super Ct. N.J. 2015); Martinez-Santiago v. Public Storage, 1:14-cv-00302-JBS-AMD (D.N.J.); Castro v. Sovran Self Storage, Inc., 1:14-cv-06445-RBK-JS (D.N.J.) In re Experian Data Breach

Litigation, 8:15-cv-01592-AG-DFM (C.D.CA.); In re Yapstone Data Breach Litigation, 4:15-cv-04429-JSW (N.D. Cal); Dickens v. Sedgwick Claims Management, MID-L-5305-16 (Super Ct. N.J.); Morrow v. Quest Diagnostics, 2:17-cv-0948 CCC JBC (D.N.J.); Stechert v. The Travelers Home and Marine Insurance Co., 2:17-cv-000784-KSM (E.D.Pa.); Gamez v. PCS Revenue Control Systems, Inc., 2:21-cv-08991-JXN-AME (D.N.J.): In Re Physiomesh Litigation (Flexible Composite Mesh), MCL 627 (Atlantic County); In re Proceed Mesh Litigation (Proceed Surgical Mesh and Proceed Ventral Patch Hernia Mesh), MCL 630 (Atlantic County); In re Prolene Hernia System Mesh Litigation, MCL No. 633 (Atlantic County); Ogelsby v. Johnson & Johnson and Ethicon, 3:18- cv - 16079 (D.N.J.).

I also have also published on the issue of class actions in New Jersey State and Federal Court, co-authoring the Chapter entitled "New Jersey Class Actions" in the 2020 New Jersey Mass Torts & Class Actions Treatise published by the New Jersey Institute of Continuing Legal Education with the Hon. Joel Schneider, U.S.M.J. (ret.).

I have presented and/or lectured to attorneys on the following class action and/or mass tort topics at the following Continuing Legal Education seminars:

- **New Jersey Association for Justice**
  Jamesburg, New Jersey – May, 2015
  Compulsory Arbitration Provisions in Consumer Contracts

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – April, 2016
  Rising Stars Panel

- **American Lawyer Media, Inc.**
  Philadelphia, Pennsylvania – October 2016
  The Locks Law Firm Presents The ABCs of Complex Litigation: Asbestos, Benzene, CRPS and More

- **Lightstream Communications CLE**
  Bryn Mawr, Pennsylvania – April, 2017
  David vs. Goliath: What Can We Learn from Class Action Lawsuits?

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – April, 2017
  Boardwalk Seminar
  Data Breach: Who is Looking at What?
  TCCWNA Update
  Forced Arbitration Update

- **HarrisMartin Publishing**
  Atlanta, Georgia – November 2017
  HarrisMartin's Equifax Data Breach Litigation Conference
  Damages

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – May, 2018
  Boardwalk Seminar
  TCCWNA Update

- **New Jersey State Bar Association (ICLE)**
  New Brunswick, New Jersey – May, 2019
  How the Latest Consumer Protection Laws Impact Your Clients and Practice
  A look at health club cases – contracts, cancellation and other provisions

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – May, 2019
  Boardwalk Seminar
  Data Breach Litigation

- **New Jersey State Bar Association (ICLE)**
  New Brunswick, New Jersey – October, 2019
  Class Action Playbook
  Case Selection
  Filing Your Complaint

- **Mass Torts Made Perfect**
  Las Vegas, Nevada – April, 2021
  Ethicon Hernia Mesh – Key theories of Liability, and the Path to Trials in 2022

- **New Jersey Association for Justice**
  Atlantic City, New Jersey - April 2023
  Boardwalk Seminar
  Data Breach and Privacy Litigation – Common Issues

- **New Jersey Association for Justice**
  Atlantic City, New Jersey – May 2025
  Boardwalk Seminar
  Class Action Update

15. I have also appeared and/or argued in the following New Jersey Appellate Division and/or Supreme Court cases on issued relevant to class actions:

- Fazio v. Altice USA, 261 N.J. 90 (2025)(argued)
- Kernahan v. Home Warranty Administrator of Florida, Inc., 236 N.J. 301 (2019)(argued)
- Moore v. Atlantic County, 2018 N.J. Super Unpub. LEXIS 2064 (App. Div. Sept. 13, 2018)(argued)
- Spade v. Select Comfort, 232 N.J. 504 (2018)(argued)
- Mellett v. Aquasid, LLC, 452 N.J. Super. 23 (App. Div. 2017) cert. den. 231 N.J. 224 (2017)
- Dugan v. TGI Fridays, Inc., 231 N.J. 24 (2017)
- Roach v. BM Motoring, LLC, 228 N.J. 163 (2017)
- Morgan v. Sanford Brown Institute, 225 N.J. 289 (2016)(argued)

16. The named Plaintiffs in this matter provided substantial assistance to us throughout the case on behalf of the class. Plaintiffs initially contacted class counsel, conferred with class counsel several times, provided documents and information needed to draft the class complaints, and reviewed the class complaints to ensure accuracy. Plaintiffs also provided documents and information needed to draft discovery requests and further prosecute the case to a successful conclusion. Thus, it is my opinion that Plaintiffs are entitled to the requested incentive awards.

17. The members of the settlement class have been notified of the settlement in the manner previously approved by the Court.

18. Out of 301 class properties, none have objected to the proposed class settlement to date, and just owners of two class properties have requested exclusion from the class. The opt-out deadline in this matter was October 30, 2026 and the objection deadline in this matter is November 19, 2026.

19. Attached hereto as Exhibit 2 is a true and correct copy of the fully-executed Settlement Agreement in this matter.

20. Attached hereto as Exhibit 3 is a true and correct copy of the opinion Sutton v. Hoffman-LaRoche, ESX-L-8724-14, at 8 (June 24, 2022).

21. Attached hereto as Exhibit 4 is a true and correct copy of the opinion Bredbenner v. Liberty Travel, Inc., 2011 U.S. Dist. LEXIS 39663, (D.N.J. 2011).

22. Attached hereto as Exhibit 5 is a true and correct copy of the opinion Chemi v. Champion Mortg., 2009 U.S. Dist. LEXIS 44860 (D.N.J. 2009).

23. Attached hereto as Exhibit 6 is a true and correct copy of the opinion In re Remeron Direct Purchaser Antitrust Litig., U.S. Dist. LEXIS 27013 (D.N.J. 2005).

24. Attached hereto as Exhibit 7 is a true and correct copy of the opinion Meijer, Inc. v. 3M, 2006 U.S. Dist. LEXIS 56744 (E.D. Pa. Aug. 14, 2006).

25. Attached hereto as Exhibit 8 is a true and correct copy of the opinion In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532 (E.D. Pa. June 2, 2004).

26. Attached hereto as Exhibit 9 is a true and correct copy of the opinion Elkins v. Equitable Life Ins. Co., 1998 U.S. Dist. LEXIS 1557 (M.D. Fla. Jan. 27, 1998).

27. Attached hereto as Exhibit 10 is a true and correct copy of the opinion In re Merck & Co. Vytorin ERISA Litig., 2010 U.S. Dist. LEXIS 12344 (D.N.J. Feb. 9, 2010).

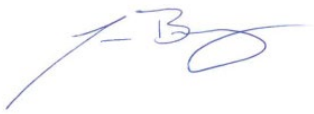
28. Attached hereto as Exhibit 11 is a true and correct copy of the opinion Milliron v. T-Mobile USA, Inc., 2009 U.S. Dist. LEXIS 101201 (D.N.J. Sept. 10, 2009).

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

Dated: November 9, 2026

Respectfully submitted,

DeNITTIS OSEFCHEN PRINCE, P.C.



James A. Barry

Exhibit 1

DeNittis Osefchen and Prince, P.C.
Customer QuickReport
January 1, 2024 through November 5, 2026

Shieldalloy adv. Cavagnaro, Diane, et al

Type	Date	Memo	Client Cost
Stmt Charge	09/27/2024	Filing fee-Substitute Attorney	35.00
Stmt Charge	10/03/2024	Retainer-Damages Expert (Cavagnaro v. Shieldalloy)	10,000.00
Stmt Charge	10/18/2024	Filing fee-Notice of Appearance	50.00
Stmt Charge	10/31/2024	FedEx	35.65
Stmt Charge	12/31/2024	FedEx	30.75
Stmt Charge	02/05/2025	Transcript	270.00
Stmt Charge	06/02/2025	Mediation fee-Plaintiff Cavagnaro (8/14/25)	7,500.00
Stmt Charge	09/03/2025	FedEx	27.60
Stmt Charge	09/17/2025	Balance due for October 2024 charges and June-July 2025 charges after appling $10,000 retainer	19,838.75
Stmt Charge	03/11/2026	Balance due-Mediation on 8/14/25 (Shieldalloy adv. Cavagnaro)	12,172.90
Stmt Charge	07/15/2026	Filing fee-Motion to Certify Class	50.00
Stmt Charge	09/30/2026	FedEx	32.20
			50,042.85

GLO-L-000816-24 11/09/2026 12:25:37 PM Pg 2 of 96 Trans ID: LCV20262988349

Exhibit 2

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY
	:	DOCKET NO. GLO-L-000816-24
v.	:	
	:	Civil Action
SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants	:	

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement ("Settlement Agreement") is entered into by, between, and among the named Plaintiffs, Raymond Cavagnaro and Diane Cavagnaro, and Plaintiff, Anthony Alimenti (collectively, "Plaintiffs"), on behalf of themselves and the Settlement Class Members, and Defendant Shieldalloy Metallurgical Corporation ("Defendant" or "SMC" and collectively with Plaintiffs, the "Settling Parties"), by and through their respective counsel of record. This Settlement Agreement seeks to settle and resolve Plaintiffs' alleged damages as a result of establishment of certain groundwater classification exception areas and the Class Members' regulatory disclosure obligations associated with the inclusion of their respective properties within such classification exception area(s). This Settlement Agreement is conditioned upon and subject to approval of the Court as required by New Jersey Court Rule 4:32-2. The Settling Parties stipulate and agree that, in consideration of the promises and covenants set forth in this Settlement Agreement and upon the Effective Date, this Action, and the Released Claims shall be finally and fully settled, compromised, dismissed, resolved, and released, on the following terms and conditions:

I. RECITALS

A. On or about June 26, 2024, Raymond Cavagnaro and Diane Cavagnaro initiated the Action by filing a civil class action complaint captioned Raymond Cavagnaro and Diane Cavagnaro v. Shieldalloy Metallurgical Corporation, AMG Critical Materials, N.V. i/p/a AMG Critical Minerals, N.V. ("AMG"), and TRC Companies, Inc. ("TRC") (SMC, AMG and TRC are collectively referred to herein as the "Defendants") in the Superior Court of New Jersey, Gloucester County (Law Division) under docket number GLO-L-000816-24 (the "Complaint").

B. Plaintiffs allege that the Class Members suffered property damages in the form of diminution in property values arising from Class Members' regulatory disclosure obligations associated with the inclusion of their properties within certain groundwater classification exception area(s) proposed and established by TRC in or around 2018 as part of TRC's contractual remediation obligations to SMC.

C. On August 14, 2025, the Settling Parties[1] and their respective counsel jointly participated in a full-day mediation overseen by The Honorable Peter E. Doyne, A.J.S.C. (Ret.), former Assignment Judge of the Superior Court of New Jersey, Bergen County.

D. Following the mediation, and after months of further extensive arms-length negotiations in good faith, and with additional assistance of the mediator, the Settling Parties ultimately reached an agreement in principle to settle and resolve the Action on behalf of themselves and the Settlement Class Members on the terms and conditions embodied in this Settlement Agreement.

E. Class Counsel state that they have performed substantial work in the prosecution of the claims of the Plaintiffs and the Settlement Class Members. Class Counsel also state that they have conducted extensive factual investigation and legal research into the various claims and various defenses asserted in the Action and have engaged in substantial motion practice, including defending against Defendant's motion to dismiss or in the alternative to strike Plaintiffs' class allegations. Class Counsel believe that the proposed settlement of the Action, as set forth herein, is fair, reasonable, and adequate, and in the best interest of the Settlement Class Members, and that this Settlement Agreement should be approved by the Court under New Jersey Court Rule 4:32-2.

[1] TRC declined SMC's request to participate in mediation and settlement negotiations with Plaintiffs.

F. Based upon their review, investigation, and evaluation of the facts and law relating to the matters alleged in the Complaint, Plaintiffs and Class Counsel, on behalf of Plaintiffs and the Settlement Class Members, have agreed to settle this Action pursuant to the provisions of this Settlement Agreement, after considering, among other things: (1) the substantial benefits to the Settlement Class Members under the terms of this Settlement Agreement; (2) the risks, costs, and uncertainty of protracted litigation and potential litigation in bankruptcy court, especially in complex class actions such as this, as well as the difficulties and delays inherent in such litigation; (3) the lack of environmental sampling performed by Plaintiffs demonstrating contamination on or under any of the Class Properties; and (4) the desirability of consummating this Settlement Agreement promptly in order to provide expeditious and effective relief to the Plaintiffs and the Settlement Class Members.

G. Defendant has denied and expressly continues to deny any wrongdoing or liability whatsoever. Defendant disputes the factual, legal, and scientific bases for Plaintiffs' claims against it, and does not admit or concede any fault, wrongdoing, or liability in connection with any allegations or claims that have been asserted against it in the Action or any violation of any law or duty alleged against it in the Action. Defendant denies that Plaintiffs and/or the Settlement Class Members are entitled to any form of damages or other relief against Defendant. Defendant has maintained and continues to maintain that it has meritorious defenses to all causes of action against it alleged in the Action. Defendant has maintained and continues to maintain that certification of a class for litigation purposes based on Plaintiffs' allegations against it would be improper. Defendant is prepared to vigorously defend against the claims alleged against it in the Action and has maintained and continues to maintain that the claims asserted against it in the Action are meritless.

H. After carefully considering the facts and applicable law and the risks, costs, delay, inconvenience, and uncertainty of continued and protracted litigation, and after engaging in extensive, arm's-length negotiations, with the assistance of a mediator, the Settling Parties seek to resolve the Action on the terms stated herein.

I. This Settlement Agreement reflects a compromise by, between, and among the Settling Parties, and shall in no event be construed as or deemed an admission, concession, or contention by any of the Settling Parties of the truth of any of the allegations in the Complaint, or of any fault on the part of Defendant, and all such allegations and claims asserted in the Complaint or released by this Settlement Agreement are expressly denied by Defendant.

II. DEFINITIONS

A. As used in this Settlement Agreement, including the exhibits attached hereto, the following terms have the following meanings, unless this Settlement Agreement specifically provides otherwise:

1. "Action" means the above-captioned class action Raymond Cavagnaro and Diane Cavagnaro v. Shieldalloy Metallurgical Corporation, et al., GLO-L-000816-24 (Superior Court of New Jersey, Gloucester County – Law Division).

2. "Administrative Costs" means the reasonable costs, fees, and expenses of the Settlement Administrator associated with establishing and maintaining the Settlement Fund Account, providing Notice to the Settlement Class, implementing the Claim Process, and carrying out all other actions and responsibilities required by and consistent with this Settlement Agreement. Administrative Costs shall be paid from the Gross Settlement Fund, subject to Court Approval in the Preliminary Approval Order, and Settlement Payments to Eligible Claimants shall be made in accordance with the Final Approval Order.

3. "Check-Cashing Period" shall have the meaning assigned to it in Section IV.C.3.d of this Settlement Agreement.

4. "Claim For Payment" means a claim for a Settlement Payment submitted by a Settlement Class Member via the submission of a Claim Form pursuant to the procedures set forth in Section IV.C.1 of this Settlement Agreement.

5. "Claim Deadline" means the last day of the Claim Period.

6. "Claim Form" means the document substantially in the form attached as **Exhibit A** to this Settlement Agreement, which shall be used by Settlement Class Members to submit a Claim For Payment pursuant to this Settlement Agreement.

7. "Claim Period" means one hundred and twenty (120) days following the Notice Date.

8. "Claim Process" means the process for submitting, reviewing, and paying Claims For Payment as described in Section IV.C. of this Settlement Agreement.

9. "Claimant" means a Settlement Class Member who submits a Claim Form to the Settlement Administrator pursuant to the procedures set forth in Section IV.C.1 of this Settlement Agreement.

10. "Class Counsel" means Stephen P. DeNittis, James A. Barry, and the law firm of DeNittis Osefchen Prince, P.C.

11. "Class Member" means any Person that/who, as of the Execution Date, owns a Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about

September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** (the "Class Properties"). Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection ("NJDEP"), and any other department of the State of New Jersey or municipal entity are not Class Members.

12. "Class Property" or "Class Properties" means each and every Residential Property located within either CEA (or both CEAs) identified on **Exhibit B**.

13. "Complaint" means the civil complaint as defined in Section I.A of this Settlement Agreement.

14. "Court" means the Superior Court of New Jersey, Gloucester County (Law Division).

15. "Defendant" or "SMC" means Shieldalloy Metallurgical Corporation.

16. "Defendant's Counsel" means Phil Cha, Esq., Dana B. Klinges, Esq., Lindsay A. Brown, Esq. and James Hearon, Esq. of the law firm Duane Morris LLP.

17. "Effective Date" means (i) if there are no objectors to final approval of the Settlement, the date of entry of the Final Approval Order; or (ii) if there are any objectors to the final approval of the Settlement, the later of (a) the day following the expiration of the thirty-day deadline for appealing the Final Approval Order, if no appeal is filed, and (b) if any appeal regarding the Final Approval Order is filed, the date upon which such appeal is dismissed or concluded with affirmance of the Final Approval Order and further appellate review of the Final Approval Order has been exhausted.

18. "Eligible Claimant" means a Claimant who has submitted a valid and timely Claim For Payment pursuant to this Settlement Agreement as determined by the Settlement Administrator. To be timely, a Claim For Payment must be submitted on or before the Claim Deadline.

19. "Exclusion Deadline" shall have the meaning assigned to it in Section IX.A of this Settlement Agreement.

20. "Execution Date" means the date on which the last of the signatories for the Settling Parties provides its signature on this Settlement Agreement.

21. "Final Approval Hearing" means the hearing set by the Court under New Jersey Court Rule 4:32-1, *et seq.*, at or after which the Court shall make a final decision regarding whether to finally approve the Settlement as fair, reasonable, and adequate, and to enter the Final Approval Order.

22. "Final Approval Order" means the Court's Order, the proposed form of which has been agreed to by the Settling Parties and attached hereto as **Exhibit C**, finally approving the Settlement, as described in Section XI.A herein.

23. "Gross Settlement Fund" means the Settlement Amount plus any interest that accrues in the Settlement Fund Account.

24. "Net Settlement Fund" means the Gross Settlement Fund minus Administrative Costs, service awards to Plaintiffs, and payment of attorneys' fees and reimbursement of costs and expenses for Class Counsel.

25. "Notice" means the notice of the proposed Settlement set forth in Section VI of this Settlement Agreement. The Notice shall be substantially in the form attached hereto as **Exhibit D**.

26. "Notice Date" means thirty (30) days following the entry of the Preliminary Approval Order.

27. "Notice Plan" means the plan for providing notice of the Settlement to the Settlement Class, as approved by the Court in its Preliminary Approval Order.

28. "Objection Deadline" shall have the meaning assigned to it in Section X.A of this Settlement Agreement.

29. "Payment Date" shall have the meaning assigned to it in Section IV.C.3.d of this Settlement Agreement.

30. "Payment List" shall have the meaning assigned to it in Section IV.C.3.c of this Settlement Agreement.

31. "Person," whether in the singular or plural, means a natural person, guardian, corporation, professional corporation, association, limited liability company, limited company, partnership, limited partnership, joint venture, affiliate, joint-stock company, estate, legal representative, trust, proprietorship, any other type of private entity, and their respective spouses, heirs, predecessors, successors, executors, administrators, representatives, and assigns.

32. "Plaintiffs" means Raymond Cavagnaro, Diane Cavagnaro and Anthony Alimenti, on behalf of themselves and the Settlement Class.

33. "Preliminary Approval Order" means the order to be entered by the Court preliminarily approving the Settlement, and that is substantially in the form attached as **Exhibit E** to this Settlement Agreement.

34. "Release" means the release and covenant not to sue set forth in Section VII of this Settlement Agreement.

35. "Released Claims" shall have the meaning assigned to it in Section VII.A.1 of this Settlement Agreement.

36. "Released Parties" means Defendants Shieldalloy Metallurgical Corporation, AMG Critical Materials N.V., and TRC Companies, Inc. and each of their past, present, and/or future administrators, advisors, affiliated business entities, affiliates, agents, assigns, attorneys, constituent corporation or entity (including constituent of a constituent), counsel, directors, divisions, employee benefit plans, employee benefit plan participants or beneficiaries, employees, executors, heirs, insurers, managers, members, officers, owners, direct or indirect corporate parents, partners, partnerships, predecessors, principals, resulting corporation or entity, servants, shareholders, subrogees, subsidiaries, successors, trustees, trusts, joint ventures, and any other representatives, individually or in their corporate or personal capacity, and anyone acting on their behalf, including in a representative or derivative capacity.

37. "Releasing Parties" means Plaintiffs and the Settlement Class Members that/who do not otherwise timely submit a valid request for exclusion from the Settlement Class, each of their respective heirs, predecessors, successors, assigns, family members, personal representatives, attorneys, officers, stockholders, shareholders, corporate parents, subsidiaries, affiliates, directors, managers, partners, principals, owners, agents, fiduciaries, spouses, children, dependents, parents, creditors, judgment creditors, representatives, employees, employers, executors, administrators, conservators, receivers, subrogees, trusts, trustees, members, servants, independent contractors, lessors, lessees, tenants, legally authorized representatives, insurers or reinsurers, and on behalf of anyone else who or which could or might assert any claim under or through any of the foregoing. Releasing Parties does not include government entities, including,

without limitation, the United States, State of New Jersey, the NJDEP, and any other department of the State of New Jersey.

38. "Residential Property" means those properties assigned a Class 2, 3A, or 15F property classification for tax purposes, as defined in N.J. Admin. Code § 18:12-2.2, provided that the tax records for Class 3A or 15F properties indicate a single family dwelling or a dwelling designed for use and enjoyment of not more than four families is present on the property.

39. "Residual Funds" means any funds that remain in the Settlement Fund Account after payment of funds to all Eligible Claimants, all Administrative Costs, court-approved Class Counsel attorneys' fees and costs, and court-approved service awards in accordance with this Settlement Agreement, but shall not include Undeposited Settlement Payments.

40. "Settlement Administrator" means the entity or person selected to implement the Notice Plan and administer the Settlement Agreement as set forth in this Settlement Agreement. The Settlement Administrator shall be agreed to by the Parties and is subject to Court approval.

41. "Settlement Agreement" means this settlement agreement and the exhibits attached hereto, settling and resolving the Action.

42. "Settlement Amount" means the One Million, Three Hundred Twenty-Five Thousand Dollars ($1,325,000.00) to be paid by or on behalf of Defendant into the Settlement Fund Account.

43. "Settlement Class" means all Persons that/who, as of the Execution Date, own one or more Class Properties. Government entities, including, without limitation, the United States, State of New Jersey, the NJDEP, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class. Also excluded from the Settlement Class

are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

44. "Settlement Class Members" means each and every member of the Settlement Class.

45. "Settlement Class Representatives" means Raymond Cavagnaro, Diane Cavagnaro and Anthony Alimenti.

46. "Settlement Fund Account" means the escrow account established and maintained by the Settlement Administrator for purposes of receiving, holding and disbursing the Gross Settlement Fund.

47. "Settlement Payee List" shall have the meaning assigned to it in Section IV.C.3.a of this Settlement Agreement.

48. "Settlement Payment" shall have the meaning assigned to it in Section IV.C.2 of this Settlement Agreement.

49. "Settlement Website" means the Internet website established and maintained by the Settlement Administrator as part of the administration of this Settlement, at the URL www.VinelandShieldalloyLitigation.com.

50. "Settling Parties" means Plaintiffs and Defendant Shieldalloy Metallurgical Corporation, collectively.

51. "Toll-Free Number" shall have the meaning assigned to it in Section VI.C of this Settlement Agreement.

52. "Undeposited Settlement Payments" means any Settlement Payment funds remaining in the Settlement Fund Account one year after the Payment Date for checks that were

successfully delivered but not timely deposited and/or checks or electronic payments deemed undeliverable by the Settlement Administrator.

53. "Website Notice" means the notice of the terms of the proposed Settlement that shall be provided in the manner contemplated by Section VI.B herein and that shall appear on the Settlement Website. The Website Notice shall be agreed to by the Settling Parties.

54. "Well Restriction Area" means the geographical area identified by the City of Vineland Ordinance No. 86-67.

B. When a capitalized singular form of a plural defined term is used, it refers to any one of the defined terms. When a capitalized plural form of a singular defined term is used, it refers to one or more of the defined terms.

III. CERTIFICATION OF THE SETTLEMENT CLASS

A. Only for the purposes of the Settlement Agreement and the proceedings contemplated herein for effectuating the Settlement Agreement, Plaintiffs shall move for certification of a class consisting of the Settlement Class Members pursuant to New Jersey Court Rule 4:32-2, and Defendant shall not oppose the aforementioned certification.

B. Only for the purposes of the Settlement Agreement, Plaintiffs shall move for the appointment of Settlement Class Representatives and for the appointment of Class Counsel, and Defendant shall not oppose the aforementioned appointments.

C. If the Effective Date does not occur for any reason, certification of a class consisting of the Settlement Class Members shall be vacated and deemed void; this Settlement Agreement shall be vacated and deemed void; the Plaintiffs and Class Counsel shall cause the Settlement Amount paid by Defendant to be immediately returned to Defendant; nothing related to the Settlement or its negotiations shall be admissible in connection with a contested class certification

motion or otherwise in the Action or any other proceeding in any forum; and each Party shall retain all of its respective rights, claims, and defenses, as they existed prior to execution of this Settlement Agreement.

IV. SETTLEMENT RELIEF

A. Settlement Fund. In consideration for the complete and final settlement of this Action, the Release, and other promises and covenants set forth in this Settlement Agreement, and subject to the other terms and conditions herein, Defendant will pay the Settlement Amount into the Settlement Fund Account pursuant to Section IV.B.1. The Settlement Amount will be paid by or on behalf of Defendant and will be used solely for the following purposes: payment of all Settlement Payments to the Settlement Class Members as set forth in Section IV.C.2 of this Settlement Agreement; payment of Administrative Costs; payment of attorneys' fees and costs for Class Counsel awarded by the Court; and payment of service awards for Plaintiffs awarded by the Court. Under no circumstance shall Defendant be required to pay any amounts in excess of or in addition to the Settlement Amount.

B. Establishment and Funding of the Settlement Fund Account.

1. Within thirty (30) days after the date of entry of the Preliminary Approval Order, Defendant will cause the Settlement Amount to be wired into the Settlement Fund Account.

2. The Settlement Fund Account shall be established and administered by the Settlement Administrator with approval of the Court and shall meet the requirements applicable to a Qualified Settlement Fund pursuant to Treasury Regulations Section 1.468B-1 *et seq.* If the Settlement Fund Account has not been approved by the Court and established by the deadline for payment of the Settlement Amount specified herein, Defendant shall not be obligated to pay the

Settlement Amount until ten (10) business days after the Settlement Fund Account is approved by the Court and established by the Settlement Administrator.

3. Any interest earned on monies in the Settlement Fund Account shall compound within the Settlement Fund Account and shall become part of the Gross Settlement Fund. Any taxes, fees, costs or expenses associated with the Settlement Fund Account or the Gross Settlement Fund shall be paid out of the Settlement Fund Account.

4. Plaintiffs, Class Counsel, Defendant, and Defendant's Counsel shall have no liability or responsibility for any taxes, fees, costs or expenses associated with the Settlement Fund Account or the Gross Settlement Fund, provided however Class Counsel, Plaintiffs and Eligible Class Members shall be responsible for any taxes, fees, costs or expenses associated with any payment received by them under this Settlement Agreement. The Settlement Administrator shall file all informational and other tax returns necessary or advisable with respect to the Gross Settlement Fund (including the returns described in Treasury Regulations Section 1.463B-2(k)).

5. Payment of the Settlement Amount shall constitute Defendant's sole monetary obligation under the Settlement Agreement, and under no circumstance shall Defendant be required to pay anything more than the Settlement Amount related to this Settlement Agreement.

6. The Settling Parties and their counsel make no representations to Settlement Class Members or anyone else concerning any tax consequences or tax treatment of any allocation or distribution of funds from the Gross Settlement Fund or Net Settlement Fund.

7. The Settling Parties and their counsel shall have no liability to Settlement Class Members or anyone else related to the allocation or distribution of the Gross Settlement Fund or Net Settlement Fund. In no event shall the Settling Parties or their counsel have any liability for

the administration of the Gross Settlement Fund or Net Settlement Fund by the Settlement Administrator or for acts or omissions of the Settlement Administrator.

C. Distribution of Net Settlement Fund to the Eligible Claimants. Pursuant to the terms set forth in this Settlement Agreement, including the terms regarding the disbursement of Undeposited Settlement Payments, the Net Settlement Fund shall be distributed to the Eligible Claimants, and pursuant to Section IV.C.4, any Residual Funds shall be donated to a charitable or not-for-profit organization mutually agreed upon by Class Counsel and Defendant's Counsel and approved by the Court.

1. Claim Process.

a. Each Settlement Class Member is eligible to submit a Claim For Payment. A Settlement Class Member may submit a Claim For Payment by submitting a completed Claim Form on or before the Claim Deadline. The Claim Form shall require the Claimant to acknowledge and agree to comply with the obligations of New Jersey law to disclose to any purchaser of the Class Property the existence of any then-existing CEA, which disclosure Plaintiffs allege negatively impacts property values, prior to transferring the Class Property to the purchaser and to identify and list the existence of any then-existing CEA affecting such property on any property condition disclosure statement required by N.J.A.C. 13:45A-29.1. The Claim Form shall be substantially in the form attached as **Exhibit A** to this Settlement Agreement. Claim Forms may be submitted electronically via the Settlement Website or by mail. For Claim Forms submitted by mail, the Claim Form shall be considered timely if postmarked on or before the Claim Deadline. The Notice shall identify both the Claim Deadline and the webpage address through which Claim Forms may be submitted electronically, and the Notice shall include unique personal identification numbers to facilitate the submission of Claims. The Notice shall also include a

hyperlink to the webpage address on the Settlement Website, where Claim Forms may be submitted electronically.

b. The Settlement Administrator shall review and process Claims For Payment. The Settlement Administrator shall promptly process and make eligibility determinations regarding all Claim Forms as they are received.

c. Eligible Claimants shall be issued Settlement Payments as described further herein. Only one Claim For Payment may be submitted by each Settlement Class Member.

d. Class Members that/who timely and validly request exclusion from the Settlement Class may not submit a Claim For Payment and shall not be eligible for a Settlement Payment. Only Settlement Class Members shall be eligible to submit a Claim For Payment.

e. The Settlement Administrator shall conduct reasonable audit(s) to ensure the integrity of the Claim Process, including that appropriate controls are in place to prevent fraud. If any fraud is detected or reasonably suspected, the Settlement Administrator may request further information from the Claimant or deny the Claim For Payment subject to the ultimate oversight of the Settling Parties and the Court. The Settlement Administrator will immediately notify and provide all details to Class Counsel and Defendant's Counsel if it suspects any person of committing fraud or impropriety related to the Claims Process at any time, so that the Settling Parties can meet and confer and advise the Settlement Administrator, and the Court, if necessary, concerning any response to be taken.

f. Beginning no later than two (2) weeks following the Notice Date and continuing until the processing of Claims For Payment is completed, the Settlement Administrator shall provide weekly written updates to Class Counsel and Defendant's Counsel

regarding Claims For Payment submissions and regarding its review and processing of Claims For Payment.

2. Settlement Payment. Payments to Eligible Claimants ("Settlement Payments") shall be allocated and calculated as follows:

a. A payment of $300 shall be allocated from the Net Settlement Fund to each Class Property located inside the Well Restriction Area and shall be paid to each Eligible Claimant that, as of the Execution Date, owns such Class Property pursuant to Sections IV.C.2.c. below.

b. A payment equal to no more than 7% of the 2025 tax assessed value of each Class Property[2] located outside the Well Restriction Area shall be allocated from the Net Settlement Fund to such Class Property and shall be paid to each Eligible Claimant that, as of the Execution Date, owns such Class Property pursuant to Section IV.C.2.c. below.

c. The Settlement Administrator shall first allocate Settlement Payments from the Net Settlement Fund to each Class Property located inside the Well Restriction Area. The Settlement Administrator shall then allocate the remaining funds in the Net Settlement Fund pro rata to each Class Property located outside the Well Restriction Area in an amount not to exceed 7% of the 2025 tax assessed value of each such Class Property. The amount of Settlement Payment allocated to each Class Property located outside the Well Restriction Area will depend on the number of Eligible Claimants and the funds remaining in the Net Settlement Fund after

[2] As indicated for the 2025 tax year per the online tax records available at https://taxrecords-nj.com/pub/cgi/prc6.cgi?district=0801&ms_user=ctb08 (Gloucester County addresses); and https://tax1.co.monmouth.nj.us/cgi-bin/prc6.cgi?&ms_user=ctb06&passwd=&srch_type=0&adv=0&out_type=0&district=0610 (Cumberland County addresses).

Settlement Payments have been allocated to Class Properties located inside the Well Restriction Area.

d. If there is only one Eligible Claimant for a Class Property, the Eligible Claimant shall be paid the full amount of funds allocated for that Class Property. If there is more than one Eligible Claimant for a Class Property, the amount of funds allocated for that Class Property shall be equally divided and equally paid to the Eligible Claimants for that Class Property.

e. A Claim Form may only be submitted by a Class Member identified in property tax records as the owner of the Class Property for which the Claim Form is submitted, as of the Execution Date.

f. Each Eligible Claimant will be issued a Settlement Payment in accordance with Section IV.C.2. The Settlement Administrator shall determine the validity of all Claimants, Claims For Payment, and Claim Forms, and shall calculate the Settlement Payment for each Eligible Claimant pursuant to this Settlement Agreement.

3. Creation of Payment List and Distribution of Settlement Payments

a. The Settlement Payee List. By no later than seven (7) days following the Effective Date or the Claim Deadline, whichever last occurs, the Settlement Administrator—using the class data, the timely and valid requests for exclusion from the Settlement Class, and the timely and valid Claims For Payment submitted—shall provide to Class Counsel and Defendant's Counsel a list that includes, for each Eligible Claimant: a unique identifying number; the name of the Eligible Claimant; the Eligible Claimant's last known mailing address; and the Class Property (hereinafter "Settlement Payee List").

b. Determination of Net Settlement Fund. By no later than twenty-eight (28) days following the Effective Date or the Claim Deadline, whichever last occurs, the Settlement Administrator shall determine the amount of the Net Settlement Fund by deducting from the Gross Settlement Fund: (i) the amount of any Court-approved attorneys' fees and costs award for Class Counsel; (ii) the amount of any Court-approved service awards for the Settlement Class Representatives; and (iii) the Administrative Costs (including both costs already incurred and an estimate of future costs necessary to effectuate this Settlement Agreement). By the same date, the Settlement Administrator shall inform Class Counsel and Defendant's Counsel of the amount of the Net Settlement Fund.

c. The Payment List. By no later than twenty-eight (28) days following the later of the Effective Date or Claim Deadline, the Settlement Administrator shall create and provide to Class Counsel and Defendant's Counsel a "Payment List," as a supplement to the Settlement Payee List, that includes all of the information on the Settlement Payee List and adds the Settlement Payment amount and the method of payment (i.e. whether by check or electronic payment, as elected by the Eligible Claimant) for each Eligible Claimant, as calculated pursuant to Section IV.C.2 herein.

d. Payments To Eligible Claimants. By no later than seventy-five (75) days following the later of the Effective Date or Claim Deadline (the "Payment Date"), the Settlement Administrator shall mail checks via first class U.S. Mail postage pre-paid, or provide an electronic payment, at the Eligible Claimant's election, to each Eligible Claimant on the Payment List, drawn from the Net Settlement Fund in the Settlement Fund Account in the Settlement Payment amount indicated for each Eligible Claimant on the Payment List. Settlement Payment checks or electronic payments, as applicable, shall be made payable to the Eligible Claimants as

indicated on the Payment List. Settlement Payment checks shall be sent to the mailing addresses indicated in the Payment List, and Settlement Payments made electronically shall be sent to the payment account indicated in the Payment List. The mailed Settlement Payment checks to Eligible Claimants shall be valid for a period of one hundred and eighty (180) days from date of issue ("Check-Cashing Period").

e. Undeliverable Settlement Payment Checks. For any mailed Settlement Payment checks that are returned as undeliverable with forwarding address information, the Settlement Administrator shall re-mail the check to the new address indicated. For any mailed Settlement Payment checks that are returned as undeliverable without forwarding address information, the Settlement Administrator shall conduct an industry standard "skip trace" to identify updated address information and re-mail checks to the extent an updated address is identified.

4. Residual Funds. Within 60 days after the Payment Date, pursuant to the Cy Pres Doctrine, Class Counsel and Defendant's Counsel shall notify the Administrator to direct all Residual Funds to a charitable or not-for-profit organization(s) mutually agreed upon by Class Counsel and Defendant's Counsel and approved by the Court. The Administrator, within 10 days of receiving the above-described notification, shall, on behalf of the Defendant, make payment in the amount of the Residual Funds to such charitable or not-for-profit organization(s). Any tax credit, tax deduction, tax benefit, or other tax treatment available from making a charitable donation to such charitable or not-for-profit organization(s) shall inure solely to the Defendant's benefit.

5. Undeposited Settlement Amounts. Any Undeposited Settlement Payments shall be treated as unclaimed property of the corresponding Claimant(s), subject to applicable New

Jersey unclaimed property procedures. Any Administrative Costs of the Settlement Administrator in connection with the distribution of Undeposited Settlement Payments pursuant to Section IV.C.5 shall be paid from the Undeposited Settlement Payments, shall not increase Defendant's contribution to the Gross Settlement Fund, shall not reduce the Residual Funds, shall not change any obligation of Defendant under this Settlement Agreement, and shall reduce *pro rata* the respective unclaimed property amounts for the Eligible Claimants with undeposited or undeliverable Settlement Payment checks or electronic payments.

V. THE SETTLEMENT ADMINISTRATOR

A. The duties of the Settlement Administrator, in addition to any other responsibilities that are described in this Settlement Agreement, shall include:

1. Providing Notice to Class Members as set forth in this Settlement Agreement;

2. Receiving, validating and processing Claims For Payment and making payments to Eligible Claimants pursuant to the Claim Process described in this Settlement Agreement, and providing updates to Class Counsel and Defendant's Counsel regarding the Claims For Payment and Claim Process, as provided in this Settlement Agreement;

3. Establishing and maintaining the Settlement Website;

4. Establishing and maintaining the Toll-Free Number;

5. Responding to inquiries from Class Members;

6. Keeping a clear and careful record of all communications with Class Members and all administration expenses;

7. Establishing and maintaining a post office box, or other address, for requests for exclusion, objections, and other correspondence from Class Members;

8. Establishing and maintaining an email address for correspondence from Class Members;

9. Processing and determining the timeliness and validity of any requests for exclusion by Class Members;

10. Receiving any objections mailed by Class Members to the Settlement Administrator;

11. Timely providing copies to Class Counsel and Defendant's Counsel of all requests for exclusion, objections, and other correspondence received from Class Members;

12. Providing interim reports to Class Counsel and Defendant's Counsel on request from Class Counsel and Defendant's Counsel;

13. Within ten (10) days after the Exclusion Deadline (as defined in Section IX.A herein), providing a written report to Class Counsel and Defendant's Counsel summarizing the number of requests for exclusion received, the names and addresses of Class Members who submitted a request for exclusion, and any other pertinent information requested by Class Counsel or Defendant's Counsel;

14. In advance of the Final Approval Hearing, preparing an affidavit, to submit to the Court, affirming its compliance with the Notice and settlement administration provisions of this Settlement Agreement, and identifying any Class Members who submitted timely and valid requests for exclusion;

15. Preparing and providing the Settlement Payee List and Payment List as provided in this Settlement Agreement;

16. Processing and transmitting distribution of funds from the Gross Settlement Fund and Net Settlement Fund from the Settlement Fund Account as provided in this Settlement Agreement;

17. Paying any Administrative Costs, including invoices, expenses, taxes, fees, and other costs associated with administration of this Settlement Agreement as contemplated by this Settlement Agreement or required by law; and

18. To the extent not identified above, performing any other settlement administration-related functions reasonably necessary to effectuate the Settlement Agreement, with the consent of both Class Counsel and Defendant's Counsel, or as approved by the Court.

B. Appropriately Handling Personal Information. The Settlement Administrator will (1) use personal information acquired in connection with the Settlement Agreement solely for purposes of administering the Settlement Agreement and evaluating and paying Claims For Payment under this Settlement Agreement; (2) assign a manager to oversee the protection and appropriate management of personal information and review its internal system to manage the protection of personal information to ensure consistent performance and constant improvement; (3) take security measures to prevent unauthorized access to personal information and the loss, destruction, theft, falsification, and leakage of personal information; (4) if outsourcing the handling of personal information, determine that such handlers take steps to ensure appropriate management of the information to prevent leaks of personal or confidential information, and prohibit reuse of information for any other purposes; (5) respond immediately with appropriate measures when necessary to disclose, correct, stop using, or eliminate contents of information; and (6) within one hundred and twenty (120) days after the completion of its duties under this Settlement Agreement, and in compliance with applicable retention law, destroy all personal

information obtained in connection with this Settlement Agreement in a manner that prevents such information from being obtained by unauthorized persons.

VI. NOTICE PLAN

A. Mail Notice.

1. By no later than the Notice Date, the Settlement Administrator shall mail the Notice to each owner, as of the Execution Date, of the Class Properties listed in **Exhibit B** via first class U.S. mail, postage pre-paid.

B. Settlement Website. By no later than one (1) day before the Notice Date, the Settlement Administrator shall establish and maintain an Internet website, at the URL www.VinelandShieldalloyLitigation.com ("Settlement Website") where Class Members can obtain further information about the terms of the Settlement Agreement, their rights, important dates and deadlines, and related information. The Settlement Website shall include the Notice substantially in the form attached as **Exhibit D** to this Settlement Agreement. The Settlement Website shall provide, at a minimum: (i) information concerning deadlines for filing a Claim Form, objecting to the Settlement Agreement, and requesting exclusion from the Settlement Class, and the dates and locations of relevant Court proceedings, including the Final Approval Hearing; (ii) the Toll-Free Phone Number for obtaining information about the Settlement Agreement; (iii) copies of the Settlement Agreement, the Claim Form, the operative Complaint in this Action, the Preliminary Approval Order entered by the Court, Class Counsel's fee and cost application (after it is filed), and other relevant Court documents as agreed upon by the Settling Parties and/or required by the Court; and (iv) information concerning the submission of Claim Forms, including the ability to submit Claim Forms electronically on the Settlement Website. The

Settlement Website shall remain operational until at least sixty (60) days after the conclusion of the Check-Cashing Period, or such other later date as the Settling Parties may agree.

Should any Class Members contact Defendant or Defendant's Counsel regarding the Notice, Defendant or Defendant's Counsel should be prepared to direct such Class Members to the Settlement Website.

C. Toll-Free Number. The Settlement Administrator shall establish and maintain a toll-free telephone number ("Toll-Free Number") which will provide Class Members with information about the Settlement Agreement and their rights and will direct them to the Settlement Website. The Toll-Free Number shall be operational by no later than one (1) day before the Notice Date, and it shall remain operational until at least sixty (60) days after the conclusion of the Check-Cashing Period, or such other later date as the Settling Parties may agree. The Toll-Free Number will not utilize a human operator, but rather will provide automated responses containing information about the Settlement Agreement.

D. Administrative Costs Incurred Prior to Final Approval Order. Prior to entry of the Final Approval Order, a portion of the Gross Settlement Fund not to exceed $30,000.00 will be used to pay Notice costs and other reasonable fees and expenses of the Settlement Administrator, regardless of whether the Effective Date occurs. These amounts shall not be repaid to Defendant even if the Effective Date does not occur.

VII. RELEASE, COVENANT NOT TO SUE, AND OTHER COVENANTS

A. The Settling Parties agree to the following release and waiver of the Released Claims, as defined herein, and covenant not to sue, which shall take effect upon the Effective Date and be binding on all Releasing Parties.

1. In consideration of and for the good and sufficient consideration, promises and covenants described in this Settlement Agreement, including Defendant's payment of the Settlement Amount, the Releasing Parties expressly, intentionally, voluntarily, fully, finally, irrevocably, and forever release, waive and discharge the Released Parties, to the fullest extent that the law permits their release, waiver and discharge, for, of and from any and all manner of past, present, and/or future claims, causes of action, cross-claims, counter-claims, charges, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, remedies, and/or liabilities, under any legal or factual theory, whether class or individual, in law or in equity, or arising under domestic or foreign law, constitution, statute, regulation, ordinance, contract, or otherwise in nature, for any and all fees, costs, penalties, fines, debts, expenses, attorneys' fees, damages (including but not limited to compensatory damages, economic damages, property damages, diminution in value damages, stigma damages, loss of use damages, loss of enjoyment damages, consequential damages, incidental damages, ancillary damages, statutory damages, exemplary damages, punitive damages, special damages, multiple damages, treble damages, restitution damages, and/or disgorgement damages), biomonitoring or medical monitoring, declaratory or injunctive relief, equitable relief, whenever or however incurred, and liabilities of any nature or kind whatsoever (including joint and several liability and strict liability), known or unknown, suspected or unsuspected, matured or unmatured, accrued or unaccrued, asserted or unasserted, arising from, concerning, or relating in any way to: (i) any conduct, act, event, omission, fact, legal or equitable theory alleged or that could have been alleged in the Action; (ii) any release, discharge, leak, spill, emission and/or dumping of any hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) at, on, under, above, from, and/or migrating from any property, parcel, building, plant, structure, business,

action, omission, conduct and/or operation at, on, under, about, adjacent to and/or near 35 South West Boulevard, Newfield, New Jersey 08344, also known or referred to as Block 1002, Lots 1, 4, and 18 on the tax map of the Borough of Newfield, Gloucester County, New Jersey and Block 502, Lots 1 and 2 and Block 505, Lot 23 on the tax map of the City of Vineland, Cumberland County, New Jersey ("SMC Property"); (iii) any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, touching, under, above, within and/or affecting the CEAs, any future classification exception area, Settlement Class and/or the Class Properties; and (iv) the investigation, remediation, and/or cleanup (including delineation, proposal and establishment of institutional controls such as a classification exception area or a well restriction area) of, for and/or related to any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, migrating from, migrating to, touching, under, above, within and/or affecting the SMC Property, the CEAs, any future classification exception area, and/or any and all of the Class Properties (the "Released Claims"). To avoid any doubt, the only claims and/or liabilities that are not Released Claims are personal injury claims for damages by the Releasing Parties concerning or relating to alleged human exposure to contamination from the SMC Property and are expressly excluded from this Release. The Released Parties expressly reserve all rights, arguments, remedies, objections, and defenses available under, based on, or as a result of, any fact, finding, law, statute, regulation, judicial or administrative order, plan of reorganization, bankruptcy plan, and/or bankruptcy discharge, related to or against any claims, demands and/or liabilities, including for personal injury, asserted or that may be asserted by Releasing Parties.

2. The Releasing Parties covenant not to sue and shall forever refrain from instituting, maintaining, prosecuting, pursuing, seeking or continuing any claim, suit, action, demand, arbitration or other proceeding against any of the Released Parties with respect to the Released Claims.

3. The relief provided for in this Settlement Agreement shall be the sole and exclusive remedy for all Releasing Parties with respect to the Action and any of the Released Claims, and the Released Parties shall not be subject to liability, responsibility, damages, or expense of any kind with respect to any of the Released Claims other than as expressly set forth in this Settlement Agreement.

4. This Settlement Agreement is, and may be pleaded as, a full and complete defense to, and may be used as the basis for an injunction against, any claim, action, suit, demand, arbitration, or other proceeding by any of the Releasing Parties (i) that may be instituted, prosecuted, pursued, sought or attempted in breach of or contrary to this Settlement Agreement, or (ii) that asserts any of the Released Claims against any of the Released Parties. The Releasing Parties agree and acknowledge that while the Settlement Agreement is a complete defense to any action or proceeding brought by the Releasing Parties in breach of or contrary to this Settlement Agreement, it is not the exclusive defense or remedy available to the Released Parties in such an action or proceeding.

B. Waiver of Statutory Rights: To the extent the provisions apply, the Releasing Parties expressly, knowingly, and voluntarily waive the provisions of Section 1542 of the California Civil Code, which provides as follows:

> **A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.**

To the extent the provisions apply, the Releasing Parties likewise expressly, knowingly, and voluntarily waive the provisions of Section 28-1-1602 of the Montana Code, which provides:

> **A general release does not extend to claims that the creditor does not know or suspect to exist in the creditor's favor at the time of executing the release, which, if known by the creditor, must have materially affected the creditor's settlement with the debtor.**

To the extent the provisions apply, the Releasing Parties likewise expressly, knowingly, and voluntarily waive the provisions of Section 9-13-02 of the North Dakota Century Code, which provides:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in the creditor's favor at the time of executing the release, which if known by the creditor, must have materially affected the creditor's settlement with the debtor.**

To the extent the provisions apply, the Releasing Parties likewise expressly, knowingly, and voluntarily waive the provisions of Section 20-7-11 of the South Dakota Codified Laws, which provides:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.**

To the extent the laws apply, the Releasing Parties expressly waive and relinquish all rights and benefits that they may have under, or that may be conferred upon them by, Section 1542 of the California Civil Code, Section 28-1-1602 of the Montana Code, Section 9-13-02 of the North Dakota Century Code, Section 20-7-11 of the South Dakota Codified Laws, and all similar laws of other states, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the Released Claims. In connection with such waiver and relinquishment, the Releasing Parties acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those that they now know or believe to exist with respect to the Released Claims, but that it is their intention to accept and assume that risk and fully, finally, and

forever release, waive, compromise, settle, and discharge all of the Released Claims against the Released Parties. The Release in this Section VII thus shall remain in effect notwithstanding the discovery or existence of any additional or different claims or facts.

C. Until such time as the CEAs are removed, withdrawn or discharged, any Releasing Party that attempts to convey a Class Property to a third party shall disclose the existence of the CEAs (as applicable) to such third party prior to the transfer of the Class Property.

D. Nothing in this Release shall preclude any action to enforce the terms of this Settlement Agreement.

VIII. PRELIMINARY SETTLEMENT APPROVAL

A. Preliminary Approval. Within twenty-one (21) days after the execution date of this Settlement Agreement, Class Counsel shall move the Court in this Action for entry of a Preliminary Approval Order in the form of **Exhibit E** to this Settlement Agreement, for the purposes of, among other things: (1) preliminarily approving the Settlement Agreement; (2) finding that the requirements for provisional certification of the Settlement Class have been satisfied; (3) certifying the Settlement Class as defined herein for settlement purposes only; (4) setting a date for a Final Approval Hearing; (5) approving the proposed Notice program described in Section VI herein (including the proposed forms and methods of notice), and directing dissemination of Notice to the Settlement Class in accordance with the terms of this Settlement Agreement; (6) determining that the Notice program, as set forth in this Settlement Agreement, complies with all legal requirements, including but not limited to the Due Process Clause of the United States Constitution; (7) approving the Claim Process, and directing that the Claim Process be implemented pursuant to the terms of this Settlement Agreement; (8) providing that any objections by any Settlement Class Member to the entry of the Final Approval Order, or to Class

Counsel's request for attorneys' fees, costs, or service awards, shall be heard and any papers submitted in support of said objections shall be considered by the Court at the Final Approval Hearing only if, on or before the Objection Deadline specified in the Notice and Preliminary Approval Order, such objector complies with the requirements for objections set forth in Section X of this Settlement Agreement; (9) establishing dates by which Class Counsel shall file and serve all papers in support of final approval of the Settlement Agreement and in support of their application for attorneys' fees, costs, and service awards, and by which the Settling Parties shall file and serve all papers in response to any objections; (10) providing that all Settlement Class Members will be bound by the Final Approval Order; (11) approving the procedure for Class Members to request exclusion from the Settlement Class described in Section IX, and directing that requests for exclusion be submitted pursuant to the terms of this Settlement Agreement by the Exclusion Deadline; (12) directing the Settling Parties, pursuant to the terms and conditions of this Settlement Agreement, to take all necessary and appropriate steps to establish the means necessary to implement the Settlement Agreement; (13) setting deadlines consistent with this Settlement Agreement for dissemination of Notice, requesting exclusion from the Settlement Class, and objecting to the Settlement Agreement; (14) appointing the Settlement Class Representatives and Class Counsel; (15) approving the appointment of the Settlement Administrator; (16) staying further proceedings in this Action, other than proceedings necessary to carry out and enforce the terms of the Settlement Agreement and prosecute the Defendant's crossclaims against TRC; and (17) enjoining Class Members, pending a ruling on the motion for final approval, from instituting, maintaining, prosecuting, continuing, or otherwise asserting any Released Claim without regard for any pending requests for exclusion. Class Counsel shall provide to Defendant's Counsel a copy of the motion for entry of the Preliminary Approval Order

for review and consent prior to filing such motion and Defendant's Counsel shall not oppose such motion after filing.

IX. REQUESTS FOR EXCLUSION

A. Class Members may exclude themselves from the Settlement Class by mailing to the Settlement Administrator, at the address provided in the Website Notice, a request for exclusion that is postmarked no later than sixty (60) days after the Notice Date (the "Exclusion Deadline"). To be effective, the request for exclusion must include (1) the Class Member's full name, telephone number, mailing address, and email address; (2) a clear statement that the Class Member wishes to be excluded from the Settlement Class; (3) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and (4) the Class Member's original signature. Requests for exclusion must be made on an individual basis; "mass," "class," or other purported group opt outs are not effective. Any Class Member who submits a timely and valid request for exclusion cannot object to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. If a Class Member submits both a timely and valid request for exclusion and an objection, the Class Member shall be treated as if they had only submitted a request for exclusion and the objection shall be deemed moot and invalid.

B. The Settlement Administrator shall promptly after receipt provide copies of any requests for exclusion, including any related correspondence, to Class Counsel and Defendant's Counsel.

C. By no later than fourteen (14) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Defendant's Counsel and Class Counsel for Class Counsel's filing with the Court) a declaration providing a complete and final list of Class Members who submitted timely and valid requests for exclusion.

D. Any Class Member that/who does not submit a timely and valid request for exclusion as provided in this Section IX shall be a Settlement Class Member and shall be bound by the terms of this Settlement Agreement and all proceedings, orders, and judgments in this Action, including, but not limited to, the Release, regardless of whether such Class Members have any pending claims or causes of action against Defendants.

E. Any Class Member who submits a timely and valid request for exclusion as provided in this Section IX may revoke the request by submitting to the Settlement Administrator a statement of revocation prior to the date of the Final Approval Hearing.

F. Plaintiffs agree not to submit a request for exclusion from the Settlement Agreement.

X. OBJECTIONS

A. Any Settlement Class Member that/who complies with the objection provisions set forth in this Section X shall have the right to object to the proposed Settlement Agreement and/or to Class Counsel's motion for attorneys' fees, costs, and service awards. Settlement Class Members that/who object shall remain Settlement Class Members and shall be subject to the Release and all other terms of this Settlement Agreement if this Settlement Agreement is approved by the Court and the Effective Date occurs. To be considered valid, an objection must be in writing, must be filed with the Court no later than eighty (80) days after the Notice Date (the "Objection Deadline"), and must include the following: (1) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; (2) the full name, mailing address, telephone number, and email address of the objector; (3) the objector's original signature; (4) a description of the specific reasons for the objection and any supporting authority or evidence; (5) the name, address, bar number and telephone number of counsel for the objector, if the objector is

represented by an attorney; and (6) a statement as to whether the objector intends to appear at the Final Approval Hearing either in person or through counsel. Objections must be made on an individual basis; "mass," "class," or other purported group objections are not valid. Any Settlement Class Member that/who does not timely submit an objection in accordance with this section shall waive the right to object and be heard at the Final Approval Hearing and shall be forever barred from making any objection to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. Any Settlement Class Member that/who objects to the Settlement Agreement shall nevertheless be eligible for all benefits of the Settlement Agreement if it receives final approval and the Effective Date occurs.

B. By no later than twenty-one (21) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Defendant's Counsel and Class Counsel for Class Counsel's filing with the Court) copies of any objections received by the Settlement Administrator.

C. By no later than seven (7) days before the Final Approval Hearing, the Settling Parties shall file any responses to any Settlement Class Member objections, and Plaintiffs shall file any papers in further support of the motion for final approval of the Settlement Agreement and/or in support of Class Counsel's motion for attorneys' fees, costs, and service awards.

XI. FINAL SETTLEMENT APPROVAL

A. Final Approval Order. By no later than seventy (70) days following the Notice Date, Class Counsel shall file a motion for final approval of the Settlement, requesting entry of the Final Approval Order to be agreed to by the Settling Parties to this Settlement Agreement, which shall specifically include provisions: (1) stating that the Court has personal jurisdiction over all Settlement Class Members, that the Court has subject matter jurisdiction over the claims

asserted in this Action, and that venue is proper; (2) finally approving the Settlement Agreement pursuant to New Jersey Court Rule 4:32-2 for settlement purposes only, and directing the Settling Parties and Settlement Administrator to implement the Settlement Agreement pursuant to its terms, including distributing Settlement Payments to Eligible Claimants and making such other disbursements from the Settlement Fund Account as provided by the Settlement Agreement; (3) finding that the Notice as distributed was the best notice practicable and fully satisfied the requirements of due process and New Jersey Court Rule 4:32-2; (4) finally certifying the Settlement Class pursuant to New Jersey Court Rule 4:32-2; (5) memorializing that Releasing Parties have released all Released Claims against the Released Parties; (6) permanently enjoining Releasing Parties from instituting, maintaining, prosecuting, continuing, pursuing or otherwise asserting any Released Claim against the Released Parties, irrespective of whether Settlement Payments to Settlement Class Members are deposited, cashed, or otherwise accepted by any Settlement Class Member; (7) retaining jurisdiction relating to the administration, consummation, validity, enforcement, and interpretation of this Settlement Agreement, the Final Approval Order, and any separate Order regarding Class Counsel's motion for attorneys' fees, costs, and service awards, and for any other necessary purpose; and (8) entering a judgment that dismisses all claims in this Action with prejudice, without costs to any Settling Party, except as provided in this Settlement Agreement, and subject to the Court's continuing jurisdiction over the Settling Parties and the Gross Settlement Funds and Net Settlement Funds for the purpose of enforcement of the terms of this Settlement Agreement. Class Counsel shall provide to Defendant's Counsel a copy of the motion for entry of the Final Approval Order for review and consent prior to filing such motion and Defendant's Counsel shall not oppose such motion after filing.

B. Actions Following the Effective Date. To the extent not dismissed by the Final Order, by no later than three (3) business days following the Effective Date, Plaintiffs and Class Counsel shall dismiss with prejudice the Action against all Defendants, with the Settling Parties bearing their own costs in the Action except as set forth in this Settlement Agreement.

C. Effect of Agreement if Settlement Is Not Approved. This Settlement Agreement is entered into only for the purpose of settlement. If the Settlement Agreement is not approved, or is terminated, cancelled, or fails to become effective for any reason, including without limitation in the event the Final Approval Order is reversed or vacated following any appeal taken therefrom, then this Settlement Agreement shall be *void ab initio*, shall have no force or effect, and shall impose no obligations on the Settling Parties. The intent of the previous sentence is that, in the event that a necessary approval is denied, the Settling Parties will revert to their positions immediately prior to the date this Settlement Agreement was executed, and the Action will resume without prejudice to any Settling Party. In that event, the Settling Parties further agree to cooperate in asking for a reasonable schedule for the resumption of the Action. In the event of such a reversion, the Settling Parties agree that the proposed or actual certification of the Settlement Class will be deemed void and will not be urged or considered as a factor in any further proceeding.

XII. ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

A. No later than seventy (70) days following the Notice Date, Class Counsel shall file a motion with the Court requesting an award of attorneys' fees not to exceed four hundred forty one thousand, six hundred twenty two dollars and fifty cents ($441,622.50) (*i.e.*, 33.33% of the Settlement Amount), plus reimbursement of their reasonable litigation costs incurred in an amount not to exceed fifty thousand dollars ($50,000.00) (*i.e.*, litigation expenses), with any such

amounts awarded to Class Counsel payable from the Gross Settlement Fund. Such motion shall be posted on the Settlement Website promptly after it is filed with the Court.

B. Class Counsel's entitlement to attorneys' fees and costs will be determined by the Court. The Settlement Agreement is not conditioned on Court approval of an award of attorneys' fees and costs. In the event the Court declines Class Counsel's request for attorneys' fees and costs, or awards less than the amounts sought, but otherwise approves the Settlement Agreement, the remaining provisions of this Settlement Agreement will continue to be effective and enforceable by the Settling Parties, and Class Counsel shall not object to, appeal, or otherwise seek reconsideration of, the Court's determination.

C. Any attorneys' fees and costs awarded by the Court to Class Counsel shall be paid from the Gross Settlement Fund.

D. The Settlement Administrator shall make full payment of the attorneys' fees and costs awarded by the Court to Class Counsel within three (3) business days after the Effective Date.

E. No later than seventy (70) days following the Notice Date, Class Counsel shall file a motion with the Court requesting payment from the Gross Settlement Fund to the Settlement Class Representatives of service awards not to exceed forty thousand dollars ($40,000), with $20,000 being awarded to Raymond and Diane Cavagnaro (jointly) and $20,000 being awarded to Anthony Alimenti. Any motion for service awards will be based on the Settlement Class Representatives' time, effort, expense, and commitment in this Action, and will not be based or conditioned upon the Settlement Class Representatives' support for the Settlement Agreement. Such motion shall be posted on the Settlement Website promptly after it is filed with the Court.

F. The Settlement Class Representatives' entitlement to service awards, if any, will be determined by the Court. The Settlement Agreement is not conditioned on Court approval of service awards for the Settlement Class Representatives. In the event the Court declines the request for service awards, or awards less than the amount sought, but otherwise approves this Settlement Agreement, the remaining provisions of this Settlement Agreement will continue to be effective and enforceable by the Settling Parties, including the Release set forth in this Settlement Agreement, and Settlement Class Representatives shall not object to, appeal, or otherwise seek reconsideration of, the Court's determination.

G. Any service awards for the Settlement Class Representatives awarded by the Court shall be paid from the Gross Settlement Fund.

H. To the extent awarded by the Court, the Settlement Administrator shall make full payment of service awards awarded by the Court within three (3) business days after the Effective Date. Defendant shall have no liability or responsibility to the Settlement Class Representatives or other parties arising from any claim regarding payment of any service awards.

I. The Settling Parties acknowledge that they negotiated and agreed upon all consideration to the Settlement Class before negotiating Class Counsel's proposed attorneys' fees and expenses and service awards as set forth in this Section XII. Class Counsel and the Settlement Class Representatives shall provide W-9 Forms to the Settlement Administrator prior to payment of attorneys' fees and expenses and service awards awarded by the Court.

XIII. ADDITIONAL PROVISIONS

A. No Admission of Liability or Wrongdoing. By negotiating and signing this Settlement Agreement, Defendant is not admitting any liability, fault, wrongdoing, or violation of law. Defendant denies all allegations and claims asserted against it and maintains that it has

good and meritorious defenses to Plaintiffs' claims, but is settling the Action to avoid the risk, burden, uncertainty and expense of continued litigation. This Settlement Agreement, and any and all negotiations, statements, documents, and/or proceedings in connection with this Settlement Agreement, shall not be construed or deemed to be an admission, a concession, or evidence of (1) the truth of any allegation by Plaintiffs in the Action; (2) any contention that any person suffered compensable harm or is entitled to any legal, injunctive, equitable, or other relief with respect to the matters asserted in the Action or any Released Claim; (3) any liability, negligence, fault, or wrongdoing by Defendant; or (4) that the Action or any other action was or may be properly certified as a class action for litigation, non-settlement purposes.

B. No Penalty or Fine. No amounts paid pursuant to this Settlement Agreement are being paid or incurred to, or at the direction of, any government or governmental entity in relation to the violation of any civil or criminal law or the investigation or inquiry by any government or governmental entity into the potential violation of any civil or criminal law, within the meaning of Section 162(f)(1) of the Internal Revenue Code of 1986, as amended, and Section 1.162-21(a) of the Treasury Regulations thereunder (hereinafter "Governmental Violation"). No portion of any amount paid under this Settlement Agreement constitutes the payment of a fine, penalty, or punitive damages, the disgorgement of profits, reimbursement for litigation or investigation costs or attorneys' fees or costs, or an amount paid in settlement of any claim for or related to any Governmental Violation; and if a determination were made to the contrary, the amounts paid would qualify under the exceptions in paragraphs (2) and (3) of Section 162(f).

C. Termination.

1. This Settlement Agreement may be terminated by any of the Settling Parties by serving on counsel for the opposing parties and filing with the Court a written notice of

termination within ten (10) days (or such longer time as may be agreed between Class Counsel and Defendant's Counsel) after any of the following occurrences:

a. the Court denies preliminary or final approval of the Settlement Agreement;

b. the Court conditions preliminary or final approval on changes to the Settlement Amount, the Release, or other material provisions of the Settlement Agreement other than attorneys' fees awarded to Class Counsel and/or service awards eligibility or payments to the Settlement Class Representatives;

c. an appellate court reverses, vacates, or otherwise overturns the Final Approval Order, and the Settlement Agreement is not reinstated and finally approved without material change by the Court on remand;

d. any of the Settling Parties materially breaches this Settlement Agreement before the Effective Date and fails to promptly cure the breach after receiving written notice of the breach; or

e. the Effective Date does not occur.

2. This Settlement Agreement may be terminated by the Defendant by serving on Class Counsel and filing with the Court a written notice of termination within ten (10) days after the Exclusion Deadline (or such longer time as may be agreed between Class Counsel and Defendant's Counsel) if the total number of Class Members validly excluding themselves from the Settlement Class exceeds 5% of the total number of Class Members.

3. If a Settling Party exercises a right to terminate this Settlement Agreement pursuant to Section XIII.C., (i) the Settling Parties shall have thirty (30) days to resume settlement

negotiations and determine if the Settling Parties can reach an amended settlement agreement, including without limitation with the assistance of a mediator; (ii) the Settling Parties shall jointly request a stay of all Court deadlines for the duration of the negotiations; and (iii) the Settling Parties shall jointly advise the Court of the status of this Settlement Agreement or any amendment to this Settlement Agreement within seven (7) days after the conclusion of the thirty-day negotiation period.

4. In the event of a termination pursuant to Section XIII.C., this Settlement Agreement shall become null and void *ab initio*.

5. In the event of a termination pursuant to Section XIII.C., this Settlement Agreement shall have no force or effect and the Settling Parties will return to the *status quo ante* in this Action as they existed prior to the date of execution of this Settlement Agreement. The Settling Parties will also be prohibited from using this Settlement Agreement or any settlement or mediation communications in connection with discovery or as evidence in the Action or any other action. The Settling Parties further agree to cooperate in asking for a reasonable schedule for the resumption of the Action. In addition, the Settlement Amount, including interest accrued, shall be returned promptly to the Defendant.

D. Non-Disparagement. The Eligible Claimants, Plaintiffs, and Class Counsel agree not to make any negative, derogatory, disparaging, and/or untruthful statements, either written or oral, to any person or entity nor do anything that derogates the Released Parties or their counsel. The Parties agree that this Paragraph is a material term of this Settlement Agreement, without which Defendant would not enter into this Settlement Agreement. Defendant maintains all claims, rights, and/or remedies as a result of a breach of this Paragraph, whether equitable or sounding in damages.

E. Confidentiality. The Settling Parties and their respective attorneys agree that prior to the filing of a motion for preliminary approval of the Settlement Agreement, the Settlement Agreement, including the terms and Settlement Amount set forth herein, is and shall be treated as confidential and shall not be disclosed, described, or characterized to any other person, attorney, entity, publication or member of the media, except as may be required by law, judicial process, or order of a court, to enforce the terms of the Settlement Agreement, or as otherwise agreed by the Settling Parties. The Settling Parties agree not to disclose the substance of the negotiations that led to this Settlement Agreement, including the merits of any positions taken by any Settling Party, except as may be necessary to provide the Court with information necessary to consider approval of the Settlement Agreement.

F. Voluntary Agreement. This Settlement Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of the Settling Parties, or of any other person, firm or entity.

G. Binding On Successors. This Settlement Agreement shall bind and inure to the benefit of the Settling Parties, the Settlement Class Members, and their respective successors, assigns, legatees, heirs, and personal representatives.

H. Parties Represented by Counsel. The Settling Parties hereby acknowledge that they have been represented in negotiations for and in the preparation of this Settlement Agreement by independent counsel of their own choosing, that they have read this Settlement Agreement and have had it fully explained to them by such counsel, and that they are fully aware of the contents of this Settlement Agreement and of its legal effect.

I. Authorization. Each Releasing Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or

causes of action released herein and, further, that each Releasing Party is fully entitled and duly authorized to give this complete and final release and discharge as set forth in Section VII.

J. Construction and Interpretation. No Settling Party shall be deemed the drafter of this Settlement Agreement for purposes of interpreting any provision hereof in any judicial or other proceeding that may arise.

K. Headings. The various headings used in this Settlement Agreement are solely for the convenience of the Settling Parties and shall not be used to interpret this Settlement Agreement.

L. Exhibits. The exhibits to this Settlement Agreement are integral parts of the Settlement Agreement and are hereby incorporated and made a part of this Settlement Agreement.

M. Effect of Weekends and Holidays. If any date or deadline in this Settlement Agreement falls on a Saturday, Sunday, or federal holiday, the next business day following the date or deadline shall be the operative date. Unless the Court orders otherwise, the Settling Parties may agree in writing (but shall not be required to agree) to any reasonable extensions of time to carry out any of the provisions of this Settlement Agreement.

N. Merger and Integration. This Settlement Agreement, together with its exhibits, contain the entire, complete, and integrated statement of each and every term and condition agreed to by, between, and among the Settling Parties, and are not subject to any term or condition not provided for therein. In entering into this Settlement Agreement, no Settling Party has made or relied on any warranty or representation not specifically set forth in the Settlement Agreement. This Settlement Agreement supersedes all prior and contemporaneous oral and written agreements and discussions among the Settling Parties regarding the subject matter of the Settlement Agreement.

O. No Waiver. There shall be no waiver of any term or condition absent an express writing to that effect by the Settling Party to be charged with that waiver. No waiver of any term or condition in this Settlement Agreement by any Settling Party shall be construed as a waiver of a subsequent breach or failure of the same term or condition, or waiver of any other term or condition of this Settlement Agreement.

P. Modifications and Amendments. No amendment, change, or modification of this Settlement Agreement or any part thereof shall be valid unless in writing signed by the Settling Parties and, if it occurs after entry of the Final Approval Order, with approval of the Court.

Q. Governing Law. This Settlement Agreement shall be governed by and interpreted in accordance with the laws of the State of New Jersey, without regard to its choice of law or conflict of law principles.

R. Further Assurances; Dispute Resolution. Each of the Settling Parties hereto shall execute and deliver any and all additional papers, documents and other assurances and shall do any and all acts or things reasonably necessary to obtain approval of this Settlement Agreement and in connection with the performance of its obligations hereunder to carry out the express intent of the Settling Parties hereto. The Settling Parties and their counsel undertake to implement the terms of this Settlement Agreement in good faith, and to use good faith in resolving any disputes that may arise in the implementation of the terms of this Settlement Agreement. If unable to resolve any disputes regarding this Settlement Agreement among themselves, the Settling Parties will consult the mediator, and, only if mediation fails to resolve such disputes, refer the disputes to the Court for resolution.

S. Severability. The provisions of this Settlement Agreement are not severable, except as provided in the Settlement Agreement or by subsequent agreement of the Settling Parties.

T. Third-Party Beneficiaries. The Settlement Agreement does not create any third-party beneficiaries, except for the Settlement Class Members, Defendants, and the Released Parties, all of whom are intended third-party beneficiaries.

U. Force Majeure. The failure of any Settling Party to perform any of its obligations hereunder shall not subject such Settling Party to any liability or remedy for damages, or otherwise, where such failure is occasioned in whole or in part by Acts of God, fires, accidents, pandemics, other natural disasters, war, labor disputes or shortages, shortages of material or supplies, governmental laws, rules or regulations.

V. Continuing Jurisdiction. The Parties to this Settlement Agreement stipulate that the Court shall retain personal and subject matter jurisdiction over the implementation and enforcement of this Settlement Agreement, the Preliminary Approval Order, the Final Approval Order, and any separate order regarding Class Counsel attorneys' fees and expenses and/or the Settlement Class Representatives' service awards.

W. Execution Date; Counterparts. This Settlement Agreement shall be deemed executed on the date that the last of the signatories for the Settling Parties provides its signature. This Settlement Agreement may be executed in counterparts, including via electronic signature, each of which shall constitute an original, but all of which together shall constitute one and the same instrument. The several signature pages may be collected and annexed to one or more documents to form a complete counterpart. Photocopies of executed copies of this Settlement Agreement may be treated as originals.

X. Notices. Notices to counsel for the Settling Parties required under this Settlement Agreement shall be sent by email and first-class mail or a nationally-recognized courier to:

For Plaintiffs:

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

For Defendant, Shieldalloy Metallurgical Corporation

DUANE MORRIS, LLP
Phil Cha, Esq.
Dana B Klinges, Esq.
Lindsay A. Brown, Esq.
James Hearon, Esq.
40 Lake Center Drive
401 Route 73 North, Suite 200
Marlton, NJ 08053
Telephone: (856) 874-4200
Facsimile: (856) 424-4367
pcha@duanemorris.com

Agreed to on the date indicated below.

APPROVED AND AGREED TO BY DEFENDANT SHIELDALLOY METALLURGICAL CORPORATION:

Dated: 7/15/26

By: _____

Title: President
Jackson Director

APPROVED AND AGREED TO BY COUNSEL FOR SHIELDALLOY METALLURGICAL CORPORATION:

Dated: 7/15/26

_____
Phil Cha
Duane Morris, LLP

APPROVED AND AGREED TO BY CLASS COUNSEL:

Dated: 7/14/26

Stephen P. DeNittis James Barry
DeNittis Osefchen Prince, P.C.

APPROVED AND AGREED TO BY PLAINTIFFS:

Dated: 07/13/26

Raymond Cavagnaro (Jul 14, 2026 12:40:47 EDT)

Raymond Cavagnaro

Dated: _____

Diane Cavagnaro

Dated: _____

Anthony Alimenti

APPROVED AND AGREED TO BY PLAINTIFFS:

Dated: _____

Raymond Cavagnaro

Dated: 07/14/26

Diane Cavagnaro
Diane Cavagnaro (Jul 14, 2026 12:39:07 EDT)

Diane Cavagnaro

Dated: _____

Anthony Alimenti

APPROVED AND AGREED TO BY PLAINTIFFS:

Dated: _____

Raymond Cavagnaro

Dated: _____

Diane Cavagnaro

Dated: 07/14/26

Anthony Alimenti (Jul 14, 2026 11:36:32 EDT)

Anthony Alimenti

Exhibit A

SHIELDALLOY SETTLEMENT CLAIM FORM

IMPORTANT -- All Settlement Class Members who sign and submit this claim form are certifying that, as of the Execution Date, they own residential property located partially or wholly within the geographical boundary defined by (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed by and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of properties located within one or both CEAs is attached to the Settlement Agreement and available online at www.VinelandShieldalloyLitigation.com.

If your property is located within one or both of the CEAs and is also located within the Well Restriction Area ("WRA") identified by the City of Vineland Ordinance No. 86-67 and established in 1986, a payment of $300 will be allocated to your property. If your property is located within one or both CEAs and is not located within the WRA, a payment equal to no more than 7% of the 2025 tax assessed value of your property will be allocated to your property. If multiple owners of a property file claim forms, allocated payments will be split equally among the Eligible Claimants.

Upon completing and submitting this claim form by the deadline, the Settlement Administrator will review your eligibility for payment under the Settlement Agreement. If the Court grants final approval of the Settlement Agreement, and the Settlement Administrator determines you are eligible for payment, your final payment amount may depend on the funds available for distribution and the number of Eligible Claimants. The Settlement Agreement is available at www.VinelandShieldalloyLitigation.com.

All claims will be paid by check or electronic payment.

To be eligible for a settlement payment, you must complete and file this Claim Form. You can either:

(1) File Online: File online at www.VinelandShieldalloyLitigation.com; or

(2) File by Mail: Fill out, sign, and return this form to: [ADDRESS]

You must file a claim to receive a settlement payment. THE DEADLINE TO FILE A CLAIM IS [DATE].

Unless otherwise defined herein, all capitalized terms have the same meaning as given in the Settlement Agreement.

Part 1: Provide Your Contact Information

Personal ID # ☐ ☐ ☐ ☐ ☐ ☐ ☐

(You can find this number on the front or top of the settlement notice you received.

If you no longer have the notice, and need your Personal ID #, email the Settlement Administrator at: [EMAIL ADDRESS]).

Your Name_____

Street Address_____

City_____ State _____ ZIP _____

Phone Number:_____ Email Address: _____

*If you submit a Claim Form without a unique personal identification number you must submit documentary proof of identification, proof of your ownership of the Class Property, and proof of the date you became the owner of the Class Property.

Part 2: Confirm Class Property

If the property you own in one or both of the CEAs is not the same as the address provided in Step 1, provide:

Street Address of
Class Property_____

City_____ State _____ ZIP _____

Part 3: Non-disparagement

I acknowledge and agree that I shall not make any negative, derogatory, disparaging, and/or untruthful statements, either written or oral, to any person or entity, about the Released Parties.

Part 4: CEA Disclosure to Purchasers

I acknowledge and agree to comply with the obligations of New Jersey law to disclose to any purchaser or transferee of my property the existence of any then-existing CEA prior to transferring the property. I further acknowledge and agree to identify and list the existence of any then-existing CEA affecting my property on any property condition disclosure statement required by N.J.A.C. 13:45A-29.1.

Part 5: Sign the Form

I hereby certify, under penalty of perjury, that the information stated herein is true and correct to the best of my knowledge. I also agree and acknowledge that I will comply with the non-disparagement requirement in Part 3 and that I will comply with the CEA Disclosure requirement in Part 4.

_____

Your Signature Date

_____ / [Toll-Free Number]

Exhibit B

Municipality	Block	Lot	Address	Inside or Outside WRA
614	401	18	799 W WEYMOUTH RD	OUTSIDE
614	401	24	619 W WEYMOUTH RD	INSIDE
614	401	25	581 W WEYMOUTH RD	INSIDE
614	401	26	573 W WEYMOUTH RD	INSIDE
614	401	27	557 W WEYMOUTH RD	INSIDE
614	401	28	3576 N WEST AVE	INSIDE
614	401	29	3564 N WEST AVE	INSIDE
614	401	30	3544 N WEST AVE	INSIDE
614	401	31	3468 N WEST AVE	INSIDE
614	401	32	3454 N WEST AVE	INSIDE
614	401	33	3430 N WEST AVE	INSIDE
614	401	34	3390 N WEST AVE	INSIDE
614	401	35	3350 N WEST AVE	INSIDE
614	401	36	588 W ARBOR AVE	INSIDE
614	401	37	608 W ARBOR AVE	INSIDE
614	401	38	632 W ARBOR AVE	INSIDE
614	401	39	650 W ARBOR AVE	INSIDE
614	401	40	670 W ARBOR AVE	INSIDE
614	401	41	714 W ARBOR AVE	INSIDE
614	401	42	738 W ARBOR AVE	INSIDE
614	401	43	756 W ARBOR AVE	INSIDE
614	401	44	778 W ARBOR AVE	INSIDE
614	401	45	3339 BRUUN AVE	INSIDE
614	401	46	3369 BRUUN AVE	INSIDE
614	401	46.01	824 ELTY AVE	INSIDE
614	401	47	828 ELTY AVE	INSIDE
614	401	48	830 ELTY AVE	INSIDE
614	401	49	850 ELTY AVE	INSIDE
614	401	50	868 ELTY AVE	INSIDE
614	401	51	888 ELTY AVE	INSIDE
614	401	53	926 ELTY AVE	INSIDE
614	401	54	950 ELTY AVE	INSIDE
614	401	55	GEROW AVE	INSIDE
614	401	58	3360 GEROW AVE	INSIDE
614	401	59	3324 GEROW AVE	INSIDE
614	401	60	3292 GEROW AVE	INSIDE
614	401	61	1032 W ARBOR AVE	INSIDE
614	401	62	1132 W ARBOR AVE	INSIDE
614	402	1	3361 GEROW AVE	INSIDE
614	402	2	947 ELTY AVE	INSIDE
614	402	3	931 ELTY AVE	INSIDE
614	402	4	913 ELTY AVE	INSIDE
614	402	5	893 ELTY AVE	INSIDE
614	402	6	873 ELTY AVE	INSIDE
614	402	7	853 ELTY AVE	INSIDE
614	402	8	829 ELTY AVE	INSIDE

614	402	9	820 W ARBOR AVE	INSIDE
614	402	10	848 W ARBOR AVE	INSIDE
614	402	11	874 W ARBOR AVE	INSIDE
614	402	12	900 W ARBOR AVE	INSIDE
614	402	17	3311 GEROW AVE	INSIDE
614	402	18	3339 GEROW AVE	INSIDE
614	403	18	1170 W ARBOR AVE	INSIDE
614	501	7	601 SALEM AVE	INSIDE
614	501	26	3826 N WEST BLVD	INSIDE
614	501	27	3814 N WEST BLVD	INSIDE
614	501	28	3788 N WEST BLVD	INSIDE
614	501	35	242 W WEYMOUTH RD	INSIDE
614	501	36	306 W WEYMOUTH RD	INSIDE
614	501	37	380 W WEYMOUTH RD	INSIDE
614	501	38	420 W WEYMOUTH RD	INSIDE
614	501	39	442 W WEYMOUTH RD	INSIDE
614	501	40	460 W WEYMOUTH RD	INSIDE
614	501	41	478 W WEYMOUTH RD	INSIDE
614	501	42	496 W WEYMOUTH RD	INSIDE
614	501	43	510 W WEYMOUTH RD	INSIDE
614	501	44	520 W WEYMOUTH RD	INSIDE
614	501	45	552 W WEYMOUTH RD	INSIDE
614	501	46	568 W WEYMOUTH RD	INSIDE
614	501	47	628 W WEYMOUTH RD	INSIDE
614	502	4	102 E WEYMOUTH RD	OUTSIDE
614	502	5	42 E WEYMOUTH RD	OUTSIDE
614	503	1	3595 N EAST BLVD	OUTSIDE
614	503	1.01	45 E WEYMOUTH RD	OUTSIDE
614	503	1.02	71 E WEYMOUTH RD	OUTSIDE
614	503	1.03	93 E WEYMOUTH RD	OUTSIDE
614	503	3	167 E WEYMOUTH RD	OUTSIDE
614	503	5	3558 PROSPECT AVE	OUTSIDE
614	503	6	3410 PROSPECT AVE	OUTSIDE
614	503	7	3431 N EAST BLVD	OUTSIDE
614	503	8	3451 N EAST BLVD	OUTSIDE
614	503	9	3471 N EAST BLVD	OUTSIDE
614	503	10	3487 N EAST BLVD	OUTSIDE
614	503	11	3509 N EAST BLVD	OUTSIDE
614	503	12	3527 N EAST BLVD	OUTSIDE
614	503	13	3541 N EAST BLVD	OUTSIDE
614	504	2	59 DIVISION ST	OUTSIDE
614	504	5	144 E ARBOR AVE	OUTSIDE
614	504	6	166 E ARBOR AVE	OUTSIDE
614	504	7	3406 PROSPECT AVE	OUTSIDE
614	504	8	218 E ARBOR AVE	OUTSIDE
614	504	10	120 E ARBOR AVE	OUTSIDE
614	504	12	74 E ARBOR AVE	OUTSIDE

614	504	15	3379 N EAST BLVD	OUTSIDE
614	504	16	3401 N EAST BLVD	OUTSIDE
614	505	1	3625 N WEST AVE	INSIDE
614	505	3	397 W WEYMOUTH RD	INSIDE
614	505	4	319 W WEYMOUTH RD	INSIDE
614	505	6	3492 N WEST BLVD	INSIDE
614	505	11	3526 N WEST BLVD	INSIDE
614	505	12	3454 N WEST BLVD	INSIDE
614	505	13	100 W ARBOR AVE	INSIDE
614	505	14	110 W ARBOR AVE	INSIDE
614	505	15	120 W ARBOR AVE	INSIDE
614	505	16	130 W ARBOR AVE	INSIDE
614	505	17	168 W ARBOR AVE	INSIDE
614	505	18	188 W ARBOR AVE	INSIDE
614	505	19	236 W ARBOR AVE	INSIDE
614	505	20	278 W ARBOR AVE	INSIDE
614	505	21	296 W ARBOR AVE	INSIDE
614	505	24	3457 N WEST AVE	INSIDE
614	505	25	3477 N WEST AVE	INSIDE
614	505	26	3539 N WEST AVE	INSIDE
614	505	27	3541 N WEST AVE	INSIDE
614	505	28	3595 N WEST AVE	INSIDE
614	603	4	1350 W FOREST GROVE RD	OUTSIDE
614	603	7	2808 N DELSEA DR	INSIDE
614	603	9	1452 W FOREST GROVE RD	INSIDE
614	603	11	1522 W FOREST GROVE RD	OUTSIDE
614	603	12	1550 W FOREST GROVE RD	OUTSIDE
614	603	13	1628 W FOREST GROVE RD	OUTSIDE
614	604	11	2672 N DELSEA DR	OUTSIDE
614	604	13	2608 N DELSEA DR	OUTSIDE
614	604	21	1200 W GARDEN RD	OUTSIDE
614	604	22	1242 W GARDEN RD	OUTSIDE
614	604	24	1360 W GARDEN RD	OUTSIDE
614	604	25	1414 W GARDEN RD	OUTSIDE
614	604	27	1528 W GARDEN RD	OUTSIDE
614	604	28	1590 W GARDEN RD	OUTSIDE
614	604	29	1632 W GARDEN RD	OUTSIDE
614	604	32	1726 W GARDEN RD	OUTSIDE
614	604	34	1814 W GARDEN RD	OUTSIDE
614	701	4	1089 W ARBOR AVE	INSIDE
614	701	8	940 ARBOR CT WEST	INSIDE
614	701	9	970 ARBOR CT WEST	INSIDE
614	701	10	996 ARBOR CT WEST	INSIDE
614	701	11	995 ARBOR CT WEST	INSIDE
614	701	13	929 ARBOR CT WEST	INSIDE
614	701	15	875 ARBOR CT EAST	INSIDE
614	701	16	876 ARBOR CT EAST	INSIDE

614	701	17	896 ARBOR CT EAST	INSIDE
614	701	19	871 W ARBOR AVE	INSIDE
614	701	20	839 W ARBOR AVE	INSIDE
614	701	21	813 W ARBOR AVE	INSIDE
614	701	22	3274 EGLANTINE DR	INSIDE
614	701	23	3240 EGLANTINE DR	INSIDE
614	701	24	800 DAMASK ROSE CT	INSIDE
614	701	26.01	825 DAMASK ROSE CT	INSIDE
614	701	27	795 DAMASK ROSE CT	INSIDE
614	701	28	3190 EGLANTINE DR	INSIDE
614	701	29	3160 EGLANTINE DR	INSIDE
614	701	31	3100 EGLANTINE DR	INSIDE
614	701	32	3135 EGLANTINE DR	INSIDE
614	701	33	3155 EGLANTINE DR	INSIDE
614	701	34	3185 EGLANTINE DR	INSIDE
614	701	35	3215 EGLANTINE DR	INSIDE
614	701	36	3245 EGLANTINE DR	INSIDE
614	701	37	3275 EGLANTINE DR	INSIDE
614	701	38	687 W ARBOR AVE	INSIDE
614	701	39	641 W ARBOR AVE	INSIDE
614	701	40	605 W ARBOR AVE	INSIDE
614	701	41	579 W ARBOR AVE	INSIDE
614	701	42	551 W ARBOR AVE	INSIDE
614	701	43	515 W ARBOR AVE	INSIDE
614	701	45	3178 N WEST AVE	INSIDE
614	701	46	3048 N WEST AVE	INSIDE
614	701	47	2968 N WEST AVE	INSIDE
614	701	48	2956 N WEST AVE	INSIDE
614	701	49	2936 N WEST AVE	INSIDE
614	701	50	2910 N WEST AVE	INSIDE
614	701	51	2884 N WEST AVE	INSIDE
614	701	52	2858 N WEST AVE	INSIDE
614	701	53	546 W FOREST GROVE RD	INSIDE
614	701	56	634 W FOREST GROVE RD	INSIDE
614	701	57	668 W FOREST GROVE RD	INSIDE
614	701	58	684 W FOREST GROVE RD	INSIDE
614	701	59	688 W FOREST GROVE RD	INSIDE
614	701	60	722 W FOREST GROVE RD	INSIDE
614	701	61	738 W FOREST GROVE RD	INSIDE
614	701	62	764 W FOREST GROVE RD	INSIDE
614	701	64	874 W FOREST GROVE RD	INSIDE
614	701	65	2821 NICOLETTE CT	INSIDE
614	701	67	2881 NICOLETTE CT	INSIDE
614	701	68	2929 NICOLETTE CT	INSIDE
614	701	70	2965 NICOLETTE CT	INSIDE
614	701	71	3001 NICOLETTE CT	INSIDE
614	701	72	2990 NICOLETTE CT	INSIDE

614	701	73	2956 NICOLETTE CT	INSIDE
614	701	74	2926 NICOLETTE CT	INSIDE
614	701	75	2880 NICOLETTE CT	INSIDE
614	701	76	2850 NICOLETTE CT	INSIDE
614	701	77	2810 NICOLETTE CT	INSIDE
614	701	78	990 W FOREST GROVE RD	INSIDE
614	701	79	1010 W FOREST GROVE RD	INSIDE
614	701	83	2911 N DELSEA DR	INSIDE
614	701	84	2935 N DELSEA DR	INSIDE
614	701	85	2955 N DELSEA DR	INSIDE
614	701	87	3011 N DELSEA DR	INSIDE
614	701	89	3131 N DELSEA DR	INSIDE
614	701	90	3161 N DELSEA DR	INSIDE
614	702	1	435 W ARBOR AVE	INSIDE
614	702	2	185 W ARBOR AVE	INSIDE
614	702	3	179 W ARBOR AVE	INSIDE
614	702	4	173 W ARBOR AVE	INSIDE
614	702	5	167 W ARBOR AVE	INSIDE
614	702	6	161 W ARBOR AVE	INSIDE
614	702	7	155 W ARBOR AVE	INSIDE
614	702	8	149 W ARBOR AVE	INSIDE
614	702	9	3360 N WEST BLVD	INSIDE
614	702	10	3346 N WEST BLVD	INSIDE
614	702	11	3326 N WEST BLVD	INSIDE
614	702	12	3306 N WEST BLVD	INSIDE
614	702	13	3266 N WEST BLVD	INSIDE
614	702	15	46 OLD FOREST RD	INSIDE
614	702	16	68 OLD FOREST RD	INSIDE
614	702	17	78 OLD FOREST RD	INSIDE
614	702	18	96 OLD FOREST RD	INSIDE
614	702	19	124 OLD FOREST RD	INSIDE
614	702	20	160 OLD FOREST RD	INSIDE
614	702	21	198 OLD FOREST RD	INSIDE
614	702	22	282 OLD FOREST RD	INSIDE
614	702	23	326 OLD FOREST RD	INSIDE
614	702	24	360 OLD FOREST RD	INSIDE
614	703	1	327 OLD FOREST RD	INSIDE
614	703	4	3120 N WEST BLVD	INSIDE
614	703	5	3082 N WEST BLVD	INSIDE
614	703	6.01	3070 N WEST BLVD	INSIDE
614	703	8	3030 N WEST BLVD	INSIDE
614	703	9	3014 N WEST BLVD	INSIDE
614	703	10	2984 N WEST BLVD	INSIDE
614	703	11	2954 N WEST BLVD	INSIDE
614	703	12	2930 N WEST BLVD	INSIDE
614	703	24	406 W FOREST GROVE RD	INSIDE
614	703	25	432 W FOREST GROVE RD	INSIDE

614	703	26	450 W FOREST GROVE RD	INSIDE
614	703	27	478 W FOREST GROVE RD	INSIDE
614	703	28	3023 N WEST AVE	INSIDE
614	703	29	3039 N WEST AVE	INSIDE
614	801	2	895 W FOREST GROVE RD	INSIDE
614	801	3	873 W FOREST GROVE RD	INSIDE
614	801	4	843 W FOREST GROVE RD	INSIDE
614	801	5	833 W FOREST GROVE RD	INSIDE
614	801	6	813 W FOREST GROVE RD	INSIDE
614	801	7	775 W FOREST GROVE RD	INSIDE
614	801	8	733 W FOREST GROVE RD	INSIDE
614	801	9	695 W FOREST GROVE RD	INSIDE
614	801	10	659 W FOREST GROVE RD	INSIDE
614	801	11	595 W FOREST GROVE RD	INSIDE
614	801	12	521 W FOREST GROVE RD	INSIDE
614	801	13	2740 N WEST AVE	OUTSIDE
614	801	14	2700 N WEST AVE	OUTSIDE
614	801	40	2511 N DELSEA DR	OUTSIDE
614	801	46	2639 N DELSEA DR	OUTSIDE
614	802	1	483 W FOREST GROVE RD	INSIDE
614	901	1	3351 N EAST BLVD	OUTSIDE
614	901	2	85 E ARBOR AVE	OUTSIDE
614	901	3	103 E ARBOR AVE	OUTSIDE
614	901	4	125 E ARBOR AVE	OUTSIDE
614	901	5	135 E ARBOR AVE	OUTSIDE
614	901	6	169 E ARBOR AVE	OUTSIDE
614	901	7.06	3320 PROSPECT AVE	OUTSIDE
614	901	7.08	3260 PROSPECT AVE	OUTSIDE
614	901	8	122 STRAWBERRY AVE	OUTSIDE
614	901	9	112 STRAWBERRY AVE	OUTSIDE
614	901	10	102 STRAWBERRY AVE	OUTSIDE
614	901	11	92 STRAWBERRY AVE	OUTSIDE
614	901	12	82 STRAWBERRY AVE	OUTSIDE
614	901	13	72 STRAWBERRY AVE	OUTSIDE
614	901	14	62 STRAWBERRY AVE	OUTSIDE
614	901	15	3255 N EAST BLVD	OUTSIDE
614	901	16	3297 N EAST BLVD	OUTSIDE
614	901	17	3311 N EAST BLVD	OUTSIDE
614	901	18	3327 N EAST BLVD	OUTSIDE
614	902	2	3501 PROSPECT AVE	OUTSIDE
614	902	11	3319 PROSPECT AVE	OUTSIDE
614	902	12	3391 PROSPECT AVE	OUTSIDE
614	902	13	3437 PROSPECT AVE	OUTSIDE
614	902	14	3451 PROSPECT AVE	OUTSIDE
614	914	1	3219 N EAST BLVD	OUTSIDE
614	914	2	61 STRAWBERRY AVE	OUTSIDE
614	914	3	85 STRAWBERRY AVE	OUTSIDE

614	914	4	101 STRAWBERRY AVE	OUTSIDE
614	914	5	121 STRAWBERRY AVE	OUTSIDE
614	914	7	149 STRAWBERRY AVE	OUTSIDE
614	914	8	165 STRAWBERRY AVE	OUTSIDE
614	914	9	181 STRAWBERRY AVE	OUTSIDE
614	914	10	197 STRAWBERRY AVE	OUTSIDE
614	914	50	3095 N EAST BLVD	OUTSIDE
614	914	51	3127 N EAST BLVD	OUTSIDE
614	914	52	3153 N EAST BLVD	OUTSIDE
614	914	53	3183 N EAST BLVD	OUTSIDE
614	1101	13	1803 W GARDEN RD	OUTSIDE
614	1101	14	1739 W GARDEN RD	OUTSIDE
805	7004.01	2	3651 PROSPECT AVE	OUTSIDE
805	7004.01	3	512 WEYMOUTH RD	OUTSIDE
805	7004.01	4	530 WEYMOUTH RD	OUTSIDE
813	106	18	36 SOUTHWEST BLVD	OUTSIDE
813	106	19	40 SOUTHWEST BLVD	OUTSIDE
813	106	23	54 SOUTHWEST BLVD	INSIDE
813	1002	19	313 WEYMOUTH RD	OUTSIDE
813	1002	19.01	309 WEYMOUTH RD	OUTSIDE

Exhibit C

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action **[PROPOSED] ORDER GRANTING FINAL APPROVAL OF CLASS SETTLEMENT AGREEMENT AND DISMISSAL OF ACTION WITH PREJUDICE**

The Court preliminarily approved the Settlement Agreement in this case on ___, 2026. Since that time, Plaintiffs and Shieldalloy Metallurgical Corporation (the "Settling Parties") have completed the Notice process and now seek final approval of the Settlement Agreement ("Settlement Agreement"). Through a Motion For Final Approval of Class Settlement Agreement and Motion for Fees and Costs (the "Motions"), the Settling Parties seek, among other things, from the Court: (1) a granting of final certification of the Settlement Class; (2) approval of the Settlement Agreement as fair, reasonable, and adequate; (3) a ruling that the Notice process was reasonable and the best practicable under the circumstances; and (4) a granting of Plaintiffs' unopposed request for attorneys' fees and costs and Settlement Class Representative awards. A hearing was held on the Motions on ____, 2026. For the reasons stated below, the Motions are granted.

On ____, 2026, the matter of the Court's final approval of the Settlement Agreement came before the Court for consideration by way of the unopposed Motions filed by Class Counsel. Appearing on behalf of Settlement Class Representatives, Raymond and Diane Cavagnaro and Anthony Alimenti, and the Settlement Class were Stephen P. DeNittis and James A. Barry of DeNittis Osefchen & Prince, P.C., 5 Greentree Centre, 525 Route 73 North, Suite 410, Marlton,

NJ 08053; appearing on behalf of Defendant, Shieldalloy Metallurgical Corporation were Phil Cha, Esq., Lindsay A. Brown, Esq. and James Hearon, Esq. of Duane Morris, LLP 40 Lake Center Drive 401 Route 73 North, Suite 200 Marlton, NJ 08053.

WHEREAS, the Settlement Class Representatives, Raymond and Diane Cavagnaro and Anthony Alimenti, on behalf of themselves and the proposed Settlement Class, and Defendant, Shieldalloy Metallurgical Corporation ("Defendant," as defined in the Settlement Agreement), have executed and filed the Settlement Agreement with the Court on ___, 2026; and

WHEREAS, unless otherwise defined herein, all capitalized terms used herein shall have the same meaning as set forth in the Settlement Agreement and are hereby incorporated by reference; and

WHEREAS, the Court, on ___, 2026, entered the Order Granting Preliminary Approval of Class Settlement and Directing Dissemination of Class Notice ("Preliminary Approval Order"), preliminarily approving the proposed Settlement Agreement and conditionally certifying this Action, for settlement purposes only, as a class action; and

WHEREAS, Raymond and Diane Cavagnaro and Anthony Alimenti were approved in the Preliminary Approval Order as the Settlement Class Representatives; and

WHEREAS, the Court, as part of its Preliminary Approval Order, directed that a plan for disseminating notice of the settlement ("Notice Plan") be implemented, and scheduled a hearing to determine whether the proposed settlement should be finally approved as fair, reasonable and adequate; and

WHEREAS, Class Counsel have satisfactorily demonstrated to the Court that the Notice Plan was followed; and

WHEREAS, all interested persons were given an opportunity to be heard, and all objections to the proposed Settlement Agreement, if any, were duly considered;

NOW, THEREFORE, the Court, having read and considered all submissions and having heard all arguments made in connection with the proposed Settlement Agreement, including the Motions, and having reviewed and considered the files and records herein, finds and concludes as follows:

1. The Complaint filed in this Action alleges generally that defendants diminished the value of Class Properties due to the establishment of groundwater Classification Exception Areas covering the Class Properties. As part of the Preliminary Approval Order, the Court certified the Settlement Class, for settlement purposes only, consisting of:

> All Persons that/who, as of the Execution Date, owns a Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as Exhibit B (the "Class Properties") to the Settlement Agreement.
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

2. The Court hereby affirms the Settlement Class for purposes of this Order Granting Final Approval of Class Settlement Agreement and Dismissal of Action With Prejudice ("Final Order").

3. For purposes of settlement, the Plaintiffs possess standing and the Settlement Class is adequately defined. The Settlement Class is adequately defined because the class definition is clear and precise, is based on objective criteria, and is not overbroad.

4. For purposes of settlement, the Settlement Class is sufficiently numerous, there are questions of law and fact common to the Settlement Class and Settlement Class Representatives' claims are typical of the Settlement Class. In addition, both Settlement Class Representatives and Class Counsel are adequate representatives of the Settlement Class and have fairly and adequately protected and will continue to protect the interests of the Settlement Class. Thus, the requirements to certify a class prescribed by the New Jersey Rules of Civil Procedure are satisfied as to the Settlement Class for purposes of settlement.

5. For purposes of settlement, the Settlement Class is certifiable under the New Jersey Rules because common issues predominate over individual issues and class treatment is superior to other alternatives for adjudicating the claims at issue.

6. The Settlement Class Representatives and Defendant have entered into the Settlement Agreement which has been filed with the Court. The Settlement Agreement provides for the settlement and dismissal of this Action with Defendant on behalf of the Settlement Class Representatives and the Settlement Class Members, subject to approval by the Court of its terms. The Court scheduled a hearing to consider the approval of the Settlement Agreement and directed that the Class Notice be disseminated in accordance with the terms of the Preliminary Approval Order.

7. In accordance with the terms of the Settlement Agreement and the Preliminary Approval Order, the Settling Parties implemented the Notice Plan approved by the Court. Class Counsel have confirmed to the Court that the Settling Parties complied with the Notice Plan.

8. The Court hereby finds that the Notice Plan and the Class Notice constituted the best notice practicable under the circumstances, and constituted valid, due and sufficient notice to the Settlement Class Members.

9. The Settlement Class Representatives have applied to the Court for final approval of the terms of the Settlement Agreement and for the entry of this Final Order and dismissal of Plaintiffs' claims in the Action on the merits with prejudice and without leave to amend.

10. The Court hereby finds that approval of the Settlement Agreement will result in substantial savings of time and money to the Court and the litigants and will further the interests of justice.

11. The Court hereby finds that the Settlement Agreement is the result of good faith arm's length negotiations by the Settling Parties thereto, and is fair, reasonable, and adequate.

NOW, THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED, ADJUDGED AND DECREED THAT:

12. The Court possesses jurisdiction over the subject matter of this Action, the Plaintiffs, the Settlement Class Members, Defendant, the Releasing Parties and the Released Parties.

13. [##] Class Members have filed requests for exclusion. All remaining Settlement Class Members are therefore bound by this Final Order and by the Settlement Agreement, including the Releases.

14. All provisions and terms of the Settlement Agreement are hereby found to be fair, reasonable and adequate as to the Settlement Class Members and the Settlement Class Representatives, are in compliance with due process and New Jersey law, and all provisions and terms of the Settlement Agreement are hereby finally approved in all respects.

15. The Settling Parties are hereby directed to consummate the Settlement Agreement in accordance with all its terms.

16. The Plaintiffs' Claims in this Action, individually and on behalf of the Settlement Class, as well as the Action itself, are dismissed in their entirety on the merits with prejudice and without leave to amend, and all members of the Settlement Class and all Releasing Parties shall be forever barred and permanently enjoined from asserting, either directly or indirectly, individually or in a representative capacity or on behalf of or as part of a class, whether under State or Federal statutory or common law, any Released Claim against any of the Released Parties.

17. As of the Effective Date, by operation of the entry of the Final Order, the Releasing Parties shall be deemed to have fully released, waived, relinquished and discharged, to the fullest extent permitted by law, all Released Claims that the Releasing Parties may have against all the Released Parties.

18. "Released Claims" means:

> to the fullest extent that the law permits their release, waiver and discharge, for, of and from any and all manner of past, present, and/or future claims, causes of action, cross-claims, counter-claims, charges, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, remedies, and/or liabilities, under any legal or factual theory, whether class or individual, in law or in equity, or arising under domestic or foreign law, constitution, statute, regulation, ordinance, contract, or otherwise in nature, for any and all fees, costs, penalties, fines, debts, expenses, attorneys' fees, damages (including but not limited to compensatory damages, economic damages, property damages, diminution in value damages, stigma damages, loss of use damages, loss of enjoyment damages, consequential damages, incidental damages, ancillary damages, statutory damages, exemplary damages, punitive damages, special damages, multiple damages, treble damages, restitution

damages, and/or disgorgement damages), biomonitoring or medical monitoring, declaratory or injunctive relief, equitable relief, whenever or however incurred, and liabilities of any nature or kind whatsoever (including joint and several liability and strict liability), known or unknown, suspected or unsuspected, matured or unmatured, accrued or unaccrued, asserted or unasserted, arising from, concerning, or relating in any way to: (i) any conduct, act, event, omission, fact, legal or equitable theory alleged or that could have been alleged in the Action; (ii) any release, discharge, leak, spill, emission and/or dumping of any hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) at, on, under, above, from, and/or migrating from any property, parcel, building, plant, structure, business, action, omission, conduct and/or operation at, on, under, about, adjacent to and/or near 35 South West Boulevard, Newfield, New Jersey 08344, also known or referred to as Block 1002, Lots 1, 4, and 18 on the tax map of the Borough of Newfield, Gloucester County, New Jersey and Block 502, Lots 1 and 2 and Block 505, Lot 23 on the tax map of the City of Vineland, Cumberland County, New Jersey ("SMC Property"); (iii) any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, touching, under, above, within and/or affecting the CEAs, any future classification exception area, Settlement Class and/or the Class Properties; and (iv) the investigation, remediation, and/or cleanup (including delineation, proposal and establishment of institutional controls such as a classification exception area or a well restriction area) of, for and/or related to any existing or projected hazardous substances, hazardous materials, radioactive materials, chemicals, products, pollutants and/or contaminants (including perchlorate) on, at, migrating from, migrating to, touching, under, above, within and/or affecting the SMC Property, the CEAs, any future classification exception area, and/or any and all of the Class Properties (the "Released Claims"). To avoid any doubt, the only claims and/or liabilities that are not Released Claims are personal injury claims for damages by the Releasing Parties concerning or relating to alleged human exposure to contamination from the SMC Property and are expressly excluded from this Release. The Released Parties expressly reserve all rights, arguments, remedies, objections, and defenses available under, based on, or as a result of, any fact, finding, law, statute, regulation, judicial or administrative order, plan of reorganization, bankruptcy plan, and/or bankruptcy discharge, related to or against any claims, demands and/or liabilities, including for personal injury, asserted by Releasing Parties.

19. "Released Parties" means:

Defendants Shieldalloy Metallurgical Corporation, AMG Critical Materials N.V., and TRC Companies, Inc. and each of their past, present, and/or future administrators, advisors, affiliated business entities, affiliates, agents, assigns, attorneys, constituent corporation or entity (including constituent of a constituent), counsel, directors, divisions, employee benefit plans, employee benefit plan participants or beneficiaries, employees, executors, heirs, insurers, managers, members, officers, owners, direct or indirect corporate parents, partners,

partnerships, predecessors, principals, resulting corporation or entity, servants, shareholders, subrogees, subsidiaries, successors, trustees, trusts, joint ventures, and any other representatives, individually or in their corporate or personal capacity, and anyone acting on their behalf, including in a representative or derivative capacity.

20. "Releasing Parties" means:

Plaintiffs and the Settlement Class Members that/who do not otherwise timely submit a valid request for exclusion from the Settlement Class, each of their respective heirs, predecessors, successors, assigns, family members, personal representatives, attorneys, officers, stockholders, shareholders, corporate parents, subsidiaries, affiliates, directors, managers, partners, principals, owners, agents, fiduciaries, spouses, children, dependents, parents, creditors, judgment creditors, representatives, employees, employers, executors, administrators, conservators, receivers, subrogees, trusts, trustees, members, servants, independent contractors, lessors, lessees, tenants, legally authorized representatives, insurers or reinsurers, and on behalf of anyone else who or which could or might assert any claim under or through any of the foregoing. Releasing Parties does not include government entities, including, without limitation, the United States, State of New Jersey, the NJDEP, and any other department of the State of New Jersey.

21. It is hereby determined that the Notice and method of distribution thereof constituted the best notice practicable under the circumstances to the Settlement Class Members and is therefore finally approved as reasonable. Due and adequate notice of the pendency of this Action and of the Settlement Agreement has been provided to all the Settlement Class Members, and this Court hereby finds that the Notice complied fully with the requirements of due process, the New Jersey Rules and all other applicable laws.

22. Within 30 days after all of Defendant's obligations under this Settlement Agreement are effectuated, Class Counsel and any Settlement Class Member or their counsel shall destroy all confidential information provided by Defendant to Class Counsel or anyone they employed or retained in this Action, either in discovery, during mediation, or in connection with this Settlement Agreement. Class Counsel shall deliver a letter to Defendant's Counsel certifying their compliance with this paragraph. Further, neither Class Counsel, nor anyone employed with, retained by, or otherwise associated with Class Counsel, nor any other attorney or Person who

shall have access to such confidential information, shall use any of such confidential information in any other litigation or proceeding, current or future, or for any other purpose whatsoever.

23. The Settlement Agreement and this Final Order are not to be deemed admissions of liability or fault by Defendant, or a finding of the validity of any claims in the Action or of any wrongdoing or violation of law by Defendant. The Settlement Agreement is not a concession by the Defendant and, to the extent permitted by law, neither this Final Order nor the Settlement Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be utilized or offered as evidence or received in evidence in any pending or future civil, criminal, or administrative action or proceeding, for any purpose including to establish any liability or admission by Defendant, except in any proceedings by Plaintiffs to enforce the Settlement Agreement or the Final Order or otherwise with the written consent of Defendant at its sole discretion; however, the Released Parties may use the Settlement Agreement and/or the Exhibits thereto, and/or any related document, in any action that may be brought by any of the Releasing Parties against any of the Released Parties in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion relating to the Released Claims set forth in the Settlement Agreement.

24. Only to the extent that it is otherwise not violative of any applicable rules governing the practice of law, Class Counsel agree that any representation, encouragement, solicitation or other assistance, including, but not limited to, referral to other counsel, of any Class Member that submitted a valid and timely request for exclusion, or any other person seeking to litigate with any of the Released Parties over any of the Released Claims or to represent any form of class of Persons that excluded themselves from the Settlement Agreement, could place Class Counsel in an

untenable conflict of interest with the Settlement Class Members. Accordingly, Class Counsel and their respective firms shall not (only to the extent that it is otherwise not violative of any applicable rules governing the practice of law) represent, encourage, solicit or otherwise assist, in any way whatsoever (including, but not limited to referrals to other counsel) any Class Member that submitted a valid and timely request for exclusion or any form of opt-out class, except that referring such person to the Notice or suggesting to any such person the option of obtaining separate counsel, without specifically identifying options for such counsel, shall be permitted.

25. The Court has considered the request for Settlement Class Representative service awards, and hereby approves and awards Raymond and Diane Cavagnaro an amount of $_____ and Anthony Alimenti an amount of $_____, to be paid out of the Gross Settlement Fund.

26. The Court has considered Class Counsel's request for an attorneys' fees award for the prosecution of this action and hereby makes an attorneys' fees award in the amount of $_____, to be paid out of the Gross Settlement Fund. Class Counsel shall also be reimbursed reasonable out-of-pocket costs in the amount of $_____, to be paid out of the Gross Settlement Fund.

27. This Final Order is a final order and judgment in the Action within the meaning and for the purposes of the New Jersey Rules of Civil Procedure as to all claims between Defendant on the one hand, and the Plaintiffs/Settlement Class Representatives and all Settlement Class Members, on the other hand, and there is no just reason to delay enforcement or appeal. This Final Order does not apply to the defendants' respective cross-claims, which shall continue and over which the Court shall retain jurisdiction.

28. The Clerk of this Court is directed to enter a judgment of dismissal with prejudice and without leave to amend and to close Plaintiffs' Action against the defendants.

29. Without in any way affecting the finality of this Final Order, this Court shall retain continuing jurisdiction over this Action for purposes of:

a. Enforcing this Final Order and the Settlement Agreement;

b. Hearing and determining any application by any Settling Party for a settlement bar order;

c. Presiding over the defendants' respective cross-claims; and

d. Any other matters related or ancillary to any of the foregoing.

IT IS SO ORDERED.

DATED: _____, 2026

_____

Exhibit D

Superior Court of the State of New Jersey

If you are an owner of a residential property contained within Shieldalloy Metallurgical Corp. Classification Exception Areas ("CEAS") for groundwater contamination approved in September 2020

YOU MAY BE ENTITLED TO A PAYMENT

from a class action settlement.

A court authorized this notice. It is not a solicitation from a lawyer. You are not being sued. Please do not contact the Court. Your legal rights are affected whether you act or don't act. ***Read this notice carefully****.*

OVERVIEW

- Certain residential property owners were notified in or about August 2018 that one or more Classification Exception Areas ("CEAs") were to be established for certain existing and projected groundwater contamination above groundwater quality standards. The CEAs were established by TRC Companies, Inc. ("TRC") and approved by the New Jersey Department of Environmental Protection ("NJDEP") in September 2020. Plaintiffs filed a class action lawsuit against Shieldalloy Metallurgical Corporation ("SMC" or "Defendant"), TRC and other defendants seeking damages for diminution of property value allegedly caused by the CEAs and the requirement to disclose the CEAs upon the sale of Plaintiffs' property. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit. Plaintiffs and Defendant have reached a proposed settlement to resolve the lawsuit on a class action basis against all defendants, as described below.
- If, as of [EXECUTION DATE], you own a residential property located within one or both of the CEAs, you are in the Settlement Class and are eligible to file a claim for a settlement payment.
- **IMPORTANT: You must file a claim by [DATE] to be eligible for payment from the settlement. Click here to file a claim.** (Read below or see Questions 6-7 for details)
- Your legal rights **are affected**, and you have a choice to make. Your options are explained here.

YOUR LEGAL RIGHTS AND OPTIONS	
FILE A CLAIM	File a claim by **[DATE]** to be eligible to receive a payment. See Questions 6-7.
DO NOTHING	Receive no payment and give up the right to sue defendants about the issues in the lawsuit.
OPT OUT	Receive no payment from the settlement and retain any right you may have to sue defendants about the issues in the lawsuit. To opt out, you must mail a signed request for exclusion by **[DATE]**. See Question 11 for details.
OBJECT OR COMMENT	Object or comment on the proposed settlement by **[DATE]**. See Question 12 for details. If you object or comment, you can still file a claim and be eligible to receive a payment.

- Questions? Read below or visit www.VinelandShieldalloyLitigation.com or call [TOLL-FREE NUMBER] for more information.

INFORMATION ABOUT THE LAWSUIT AND CLASS

1. What is this lawsuit about?

A class action lawsuit was filed in New Jersey State Court, seeking relief under New Jersey law on behalf of a class of residential property owners who own property located within one or more Classification Exception Areas ("CEAs") that were established as an institutional control for certain existing and projected groundwater contamination. The lawsuit sought to recover damages incurred by class members for the diminution of their property value as a result of the CEAs. The complaint is available at www.VinelandShieldalloyLitigation.com.

Plaintiffs and Defendant have now agreed to a Settlement Agreement to resolve the lawsuit on a class basis against all defendants, as described below. The Court has not decided whether Plaintiffs' claims and/or defendants' defenses are valid. By agreeing to the Settlement Agreement, neither Defendant nor Plaintiffs make any admissions regarding any liability by Defendant or the merits of the allegations, claims, or defenses in this case. Defendant has denied and continues to deny that it did anything wrong and that the lawsuit has any merit.

The Superior Court of the State of New Jersey is overseeing the lawsuit. The lawsuit is known as Cavagnaro v. Shieldalloy Metallurgical Corporation, et. al., GLO-L-816-24 (N.J. Super. Ct. Gloucester County)

2. Why is this a class action?

In a class action, one or more people sue on behalf of themselves and other people with similar claims. All of these people together make up the class and are class members. One court resolves the issues for all class members, except for those who exclude themselves from the class.

3. Who is in the Settlement Class?

The "Settlement Class" in this case includes:

> All Persons that/who, as of Execution Date, own Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** (the "Class Properties") to the Settlement Agreement and is available for review at www.VinelandShieldalloyLitigation.com.
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection, and any other department of the State of New Jersey or municipal entity are excluded from the Settlement Class.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

If you received this notice of settlement by mail, you were identified as being a Settlement Class Member. People in the Settlement Class are called "Settlement Class Members."

Information about the Settlement and About Filing a Claim for a Payment

4. What are the terms of the proposed settlement?

The complete terms of the proposed Settlement Agreement are available at www.VinelandShieldalloyLitigation.com This notice provides only a summary of the terms and benefits of the Settlement Agreement, which is set forth below.

5. What are the benefits of the proposed Settlement?

If the Settlement Agreement is approved and becomes final, Defendant will pay **$1,325,000.00** into a Settlement Fund Account. This money will be used to: (1) make settlement payments to Settlement Class Members, as described at Questions 6-9 below; (2) pay the costs of distributing notice and settlement checks and electronic payments to Settlement Class Members and other costs of administering the settlement; and (3) pay court-awarded attorneys' fees and expenses of the attorneys appointed by the Court to represent the Class ("Class Counsel") and any service awards granted to the Settlement Class Representatives. As explained below, if you file a claim by the deadline and are eligible for a payment, the amount of payment is dependent on your property's location and how many Settlement Class Members file valid claims.

6. How do I get a payment?

You must file a claim by [DATE] to be eligible for a settlement payment.

7. How do I file a claim for a payment?

File Online: To file a claim online, click here or visit www.VinelandShieldalloyLitigation.com

File By Mail: If you prefer, you can also print a paper claim form, available at www.VinelandShieldalloyLitigation.com, fill it out, and mail it to the address listed on the form. Or, if you received notice of this Settlement Agreement by mail you can fill out the claim form that is attached to that notice and mail it to the address listed on the form.

The deadline to file a claim online or by mail is [DATE]. The Settlement Administrator will review all claim forms and determine your eligibility and final payment.

8. How much will the payments be?

An Eligible Claimant that, as of [EXECUTION DATE], owns Class Property located within the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment of $300. An Eligible Claimant that, as of [EXECUTION DATE], owns a Class Property located outside of the well restriction area delineated by Vineland Ordinance No. 86-67 shall be entitled to a payment equal to no more than 7% of the 2025 tax assessed value of the Eligible Claimant's Class Property[1]. Depending on the number of Claims For Payment filed, the amount of this payment may be pro-rata adjusted downward.

Claim Forms may only be submitted by Class Members identified in property tax records as owning the Class Property for which the Claim Form is submitted, as of [EXECUTION DATE]. If multiple Claim Forms are submitted by Eligible Claimants for the same Residential Property, then any payment shall be divided equally between the Eligible Claimants.

You must submit a claim by the deadline [DATE] to be eligible to receive a payment.

[1] As indicated for the 2025 tax year per the online tax records available at https://taxrecords-nj.com/pub/cgi/prc6.cgi?district=0801&ms_user=ctb08 (Gloucester County addresses); and https://tax1.co.monmouth.nj.us/cgi-bin/prc6.cgi?&ms_user=ctb06&passwd=&srch_type=0&adv=0&out_type=0&district=0610 (Cumberland County addresses).

9. How and when will payments be sent?

Settlement payments will be issued to Eligible Claimants by check or electronic payment after the Settlement Agreement is approved and becomes final.

For any settlement payments that are uncashed or deemed undeliverable by the Settlement Administrator, those amounts will be treated as unclaimed property of the corresponding Eligible Claimant, subject to applicable state unclaimed property procedures (the additional administrative costs of such unclaimed property process will be deducted from the unclaimed property amounts on a *pro rata* basis).

Your other rights and options

10. What happens if I do nothing?

If you do nothing, you will not receive any settlement payment. **You must file a claim by [DATE] to be eligible to receive a payment.**

If you do nothing, you will release and give up any right you may have to sue defendants about the issues in this lawsuit as set forth in the Settlement Agreement. You will also be legally bound by all of the orders that the Court issues and judgments the Court makes in this class action lawsuit.

11. How do I exclude myself (opt out) from the Settlement Class?

To exclude yourself from the Settlement Class, you must mail a signed request for exclusion to: [SETTLEMENT ADMINISTRATOR ADDRESS].

To be effective, your request for exclusion must be postmarked no later than **[DATE]**, and must include the following information:

(a) your full name, telephone number, mailing address, and email address;

(b) a clear statement that you wish to be excluded from the Settlement Class;

(c) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and

(d) your original signature.

12. How do I object or comment?

If you have not excluded yourself from the Settlement Class, you can comment on or object to the settlement, Class Counsel's request for attorneys' fees and litigation expenses, and/or the request for service awards for the Settlement Class Representatives. To object or comment, you must file with the Court a signed, written objection/comment including the following:

(a) the name of this lawsuit: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al.";

(b) your full name, mailing address, telephone number, and email address;

(c) your original signature;

(d) a description of the specific reasons for the objection;

(e) the name, address, bar number and telephone number of your attorney if you are represented by an attorney; and

(f) a statement about whether or not you intend to appear at the Final Approval Hearing either in person or through an attorney.

To be considered by the Court, your comment or objection must be in writing and electronically filed with the Court no later than **[DATE],** or mailed to the Clerk of Court at the below address, so that it may be

received by the Clerk of Court and filed on your behalf by **[DATE]**.

THE COURT
Superior Court of New Jersey Gloucester County Clerk of Court 70 Hunter Street Woodbury, New Jersey 08096

Note that you can ask the Court to deny approval of the Settlement by filing an objection, but you cannot ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval of the settlement, no settlement payments will be sent out and the lawsuit will continue. If you would like to request that the Court deny approval, you must object. You have the right to consult with your own attorney, at your own expense, before deciding how best to proceed.

13. What claims will be released by this Settlement?

If you are in the Settlement Class and do not exclude yourself from the Settlement Class, and the settlement is approved and becomes final, the settlement will be legally binding on you and you will be bound by all judgments entered in the case. In exchange for the settlement benefits, you will release all claims against defendants and the "Released Parties" listed in the Settlement Agreement about the issues in the lawsuit, except for personal injury claims. The Settlement Agreement, available at www.VinelandShieldalloyLitigation.com, describes the claims you are releasing (giving up) by staying in the Settlement Class (called "Released Claims").

14. Do I have a lawyer in this class action?

Yes. The Court has appointed the following attorneys and law firms to represent the Settlement Class Members. These lawyers are called "Class Counsel":

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

You do not have to pay Class Counsel for their time or expenses incurred in this case out of your pocket. Instead, Class Counsel will petition the Court for an award of their fees and expenses; any amount awarded to Class Counsel will be paid from the Gross Settlement Fund.

The Court has also appointed Raymond Cavagnaro, Diane Cavagnaro, and Anthony Alimenti as Settlement Class Representatives to represent the Settlement Class.

15. How will the lawyers be paid?

Class Counsel (see Question 14) will file a motion on or before [DATE] asking the Court to award them attorneys' fees of up to $441,622.50 (which is 33.33% of the $1,325,000.00 Settlement Amount) plus reimbursement of their reasonable litigation expenses. The attorneys' fees and expenses awarded by the Court will be the only payment to Class Counsel for their efforts in achieving the settlement and for their risk in undertaking this representation on a wholly contingent basis. In addition, Class Counsel will ask the Court on or before [DATE] to award the Settlement Class Representatives representing the Settlement Class a service award

of up to $40,000.00 total to be shared by the Settlement Class Representatives to compensate them for their efforts and commitment on behalf of the Settlement Class in this lawsuit.

The Court will determine the amount of attorneys' fees, expenses, and service awards to award. Class Counsel's application for attorneys' fees, expenses, and service awards will be available at www.VinelandShieldalloyLitigation.com when it is filed.

16. Should I hire my own lawyer for this case?

You do not need to hire your own lawyer because Class Counsel represents you and the other members of the Settlement Class already. However, you have the right to hire your own lawyer. If you want your own lawyer, you will have to pay that lawyer.

The Court's Final Approval Hearing

17. When and where will the Court decide whether to approve the settlement?

The Court will hold a Final Approval Hearing, currently scheduled for [__:__] a.m. on [DATE], in the New Jersey Superior Court, located at 70 Hunter Street, Woodbury, New Jersey 08096. The hearing may be moved to a different date or time without additional notice and/or may be held remotely or telephonically. Please check www.VinelandShieldalloyLitigation.com for updates or changes.

At the Final Approval Hearing, the Court will consider whether the settlement should be approved as fair, reasonable and adequate. The Court will also consider Class Counsel's application for attorneys' fees, expenses, and service awards. If there are timely objections, the Court will consider them. After the hearing, the Court will decide whether to approve the settlement. We do not know how long these decisions will take.

18. Do I have to come to the hearing?

No. Class Counsel will answer questions the Court may have. But you are welcome to come at your own expense. If you submit an objection, you do not have to come to the Court to talk about it. So long as you submitted your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

19. May I speak at the hearing?

You may ask the Court for permission to speak at the Final Approval Hearing. You cannot speak at the hearing if you exclude yourself from the Settlement Class.

Getting more information

20. Where can I get more information?

More information can be found at www.VinelandShieldalloyLitigation.com. That website includes important case deadlines, links to case documents including the full Settlement Agreement, the complaint in this lawsuit, and other information about the lawsuit and the settlement. You can also get more information by calling [TOLL-FREE NUMBER].

PLEASE DO NOT CONTACT THE COURT ABOUT THE SETTLEMENT

Exhibit E

RAYMOND CAVAGNARO and DIANE CAVAGNARO, on behalf of themselves, and all others similarly situated, Plaintiffs, v. SHIELDALLOY METALLURGICAL CORPORATION, AMG CRITICAL MINERALS, N.V., TRC COMPANIES, INC.; ABC Corporations (1-10), DEF Corporations (1-10), and JOHN and/or JANE DOES (1-10), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY DOCKET NO. GLO-L-000816-24 Civil Action **[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF CLASS SETTLEMENT AGREEMENT AND DIRECTING DISSEMINATION OF CLASS NOTICE**

Before the Court is the Motion for Preliminary Approval of Class Settlement Agreement and for Direction of Class Notice Pursuant to N.J. Ct. R. 4:32-2 ("Motion"), filed by Plaintiffs. Plaintiffs and Defendant Shieldalloy Metallurgical Corporation (the "Settling Parties") have entered into a Class Action Settlement Agreement, dated [DATE] ("Settlement Agreement"). Having thoroughly reviewed the Settlement Agreement, including the proposed forms of class notice and other exhibits thereto, the Motion, and the papers and arguments in connection therewith, and good cause appearing, the Court hereby ORDERS as follows:

1. Capitalized terms not otherwise defined herein have the meanings set forth in the Settlement Agreement.

2. This Court has subject matter jurisdiction over this matter and has personal jurisdiction over the Settling Parties and the Settlement Class Members for purposes of this settlement. Venue is proper in this Court.

PRELIMINARY APPROVAL

3. The Motion is GRANTED.

4. The Court hereby preliminarily approves the Settlement Agreement and the terms

embodied therein pursuant to N.J. Ct. R. 4:32-2.

5. The Court finds that it will likely be able to approve the Settlement Agreement under N.J. Ct. R. 4:32-2 and to certify the Settlement Class for purposes of judgment on the Settlement Agreement.

6. The Court preliminarily finds that the Settlement Agreement is fair, reasonable, and adequate as to the Settlement Class Members under the relevant considerations. The Court finds that Plaintiffs and Class Counsel have adequately represented, and will continue to adequately represent, the Settlement Class. The Court further finds that the Settlement Agreement is the product of arms' length negotiations by the Settling Parties with the assistance of an experienced mediator, Hon. Peter E. Doyne, A.J.S.C. (Ret.), and comes after significant litigation and investigation. The Court preliminarily finds that the relief provided—a non-reversionary common settlement fund of $1,325,000.—is adequate taking into account, *inter alia*, the costs, risks, and delay of trial and appeal for the Settling Parties, the legal issues presented in this Action, the interests of the Settlement Class, and the method of distributing payments to the Settlement Class (*i.e.*, direct payments by checks or electronic payments). The Court preliminarily finds that the Settlement Agreement treats the Settlement Class Members equitably relative to each other, and that the allocation of settlement funds to Settlement Class Members is reasonable and equitable. Under the terms of the Settlement Agreement, all Settlement Class Members are eligible to submit claims for settlement payments via a simple claim form. The Court will fully assess any request for attorneys' fees and litigation expenses after receiving a motion from Class Counsel supporting such request. At this stage, the Court finds that the plan to request fees and litigation expenses to be paid from the common settlement fund creates no reason not to direct notice to the Settlement Class; should this Court find any aspect of the requested attorneys' fees or expenses unsupported

or unwarranted, such funds will not revert to Defendant.

7. The Court hereby provisionally certifies, for settlement purposes only, the following Settlement Class, pursuant to N.J. Ct. R. 4:32-1(b)(3) and 4:32-2, consisting of:

> All Persons that/who, as of the Execution Date, own Residential Property or Residential Properties located, partially or wholly, within the geographical boundary defined by the following classification exception areas established for groundwater contamination other than perchlorate: (a) the Shieldalloy Metallurgical Corp. OU1 CVOC Classification Exception Area proposed and established by TRC and approved on or about September 2, 2020 and/or (b) the Shieldalloy Metallurgical Corp. NW TCE PCE Plume Classification Exception Area proposed and established by TRC and approved on or about September 9, 2020 (each a "CEA" and collectively the "CEAs"). A list of all properties located within either CEA (or both CEAs) is attached as **Exhibit B** to the Settlement Agreement (the "Class Properties").
>
> Government entities, including, without limitation, the United States, State of New Jersey, the New Jersey Department of Environmental Protection ("NJDEP"), and any other department of the State of New Jersey or municipal entity are not Class Members.
>
> Also excluded from the Settlement Class are those Persons who submit a timely and valid request for exclusion in accordance with the procedures set forth in the Settlement Agreement and in this Court's Preliminary Approval Order.

8. The Court finds that, for settlement purposes only, the Settlement Class, as defined above, meets the requirements for class certification under N.J. Ct. R. 4:32-1—namely, that (1) the Settlement Class Members are sufficiently numerous such that joinder is impracticable; (2) there are common questions of law and fact; (3) Plaintiffs' claims are typical of those of the Settlement Class Members; (4) Plaintiffs and Class Counsel have adequately represented, and will continue to adequately represent the interests of the Settlement Class Members; and (5) for purposes of settlement only, the Settlement Class meets the predominance and superiority requirements of N.J. Ct. R. 4:32-1(b)(3).

9. Certification of the Settlement Class and appointment of the Settlement Class Representatives and Class Counsel shall be solely for settlement purposes and without prejudice to the Settling Parties in the event the Settlement Agreement is not finally approved by this Court or otherwise does not take effect. If the Settlement Agreement is not finally approved by this Court or otherwise does not take effect for any reason, certification of the Settlement Class and any Settlement Class Representative or Class Counsel appointments, and all findings in support thereof, shall be deemed void and vacated. The Settling Parties reserve all rights and defenses as they existed prior to the execution of the Settlement Agreement and this Order in the event the Settlement Agreement is not finally approved by this Court or otherwise does not take effect.

10. The Court hereby appoints Raymond Cavagnaro, Diane Cavagnaro, and Anthony Alimenti as Settlement Class Representatives to represent the Settlement Class.

11. The Court hereby appoints the following attorneys as Class Counsel for the Settlement Class:

DeNITTIS OSEFCHEN PRINCE, P.C.
Stephen P. DeNittis, Esq.
James A. Barry, Esq.
525 Route 73 North, Suite 410
Marlton, NJ 08053
Telephone: (856) 797-9951
Facsimile: (856) 797-9978
Email: sdenittis@denittislaw.com
Email: jbarry@denittislaw.com

12. The Court hereby appoints [INSERT] as Settlement Administrator and directs [INSERT] to carry out all duties and responsibilities of the Settlement Administrator as specified in the Settlement Agreement and herein.

NOTICE PROGRAM

13. Pursuant to N.J. Ct. R. 4:32-2(b), the Court approves the Notice Plan set forth at Section VI of the Settlement Agreement. The Court finds that the Notice Plan meets the

requirements of Due Process under the U.S. Constitution and N.J. Ct. R. 4:32-2; and that such Notice Plan, which includes individual direct notice to Settlement Class Members via mail, and the establishment of a Settlement Website and Toll-Free Number is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

14. The Court further finds that the form and content of the Notice (including Exhibit D to the Settlement Agreement) are adequate and will give the Settlement Class Members sufficient information to enable them to make informed decisions as to the Settlement Class, the right to object or exclude themselves from the Settlement Class (i.e., opt out), and the Settlement Agreement. The Court finds that the Notice clearly and concisely states in plain, easily understood language, inter alia: (i) the nature of the Action; (ii) the definition of the Settlement Class; (iii) the class claims and issues; (iv) that a Settlement Class Member may enter an appearance through an attorney if the member so desires; (v) that the Court will exclude from the Settlement Class any member who timely and validly requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on Settlement Class Members under N.J. Ct. R. 4:32-1 and 4:32-2.

15. The Court directs the Settlement Administrator and the Settling Parties to implement the Notice Plan as set forth in the Settlement Agreement.

CLAIM PROCEDURE

16. The Court approves the form and content of the Claim Form attached as Exhibit A to the Settlement Agreement, approves the Claim Process set forth in the Settlement Agreement for Settlement Class Members to submit a Claim For Payment, and directs the Settling Parties and the Settlement Administrator to implement the Claim Process.

PROCEDURES FOR REQUESTING EXCLUSION OR OBJECTING TO THE SETTLEMENT

17. Settlement Class Members may exclude themselves from the Settlement Class by mailing to the Settlement Administrator, at the address provided in the Website Notice, a request for exclusion that is postmarked no later than sixty (60) days after the Notice Date (the "Exclusion Deadline").

18. To be effective, the request for exclusion must include (1) the Settlement Class Member's full name, telephone number, mailing address, and email address; (2) a clear statement that the Settlement Class Member wishes to be excluded from the Settlement Class; (3) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; and (4) the Settlement Class Member's original signature. Requests for exclusion furthermore must be made on an individual basis; "mass," "class," or other purported group opt-outs are not effective.

19. Any Settlement Class Member who submits a timely and valid request for exclusion is foreclosed from objecting to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. If a Settlement Class Member submits both a timely and valid request for exclusion and an objection, the request shall be treated as a request for exclusion.

20. Any Settlement Class Member who does not submit a timely and valid request for exclusion as set forth in the Settlement Agreement shall be bound by all subsequent proceedings, orders, and judgments in this Action, including, but not limited to, the Release as defined in the Settlement Agreement, regardless of whether the Settlement Class Member has any pending claims or causes of action against Defendant.

21. Any Settlement Class Member who does not submit a timely and valid request for exclusion shall have the right to object to the Settlement Agreement and/or to Class Counsel's motion for attorneys' fees, costs, or service awards, only by complying with the objection

provisions set forth herein and in the Settlement Agreement.

22. Settlement Class Members who object shall remain Settlement Class Members and shall be subject to the Release set forth in this Settlement Agreement if this settlement is approved by the Court and becomes effective. To be considered valid, an objection must be in writing, must be filed with the Court or mailed to the Court at the address listed in the Website Notice, postmarked/filed no later than eighty (80) days after the Notice Date (the "Objection Deadline"), and must include the following: (1) the name of this Action: "Cavagnaro v. Shieldalloy Metallurgical Corporation, et al."; (2) the full name, mailing address, telephone number, and email address of the objector; (3) the objector's original signature; (4) a description of the specific reasons for the objection; (5) the name, address, bar number and telephone number of counsel for the objector, if the objector is represented by an attorney; and (6) statement on whether the objector intends to appear at the Final Approval Hearing either in person or through counsel. Any Settlement Class Member who does not timely submit an objection in accordance with this section shall waive the right to object or to be heard at the Final Approval Hearing and shall be forever barred from making any objection to the Settlement Agreement or to Class Counsel's motion for attorneys' fees, costs, and service awards. Any Settlement Class Member who objects to the Settlement Agreement shall nevertheless be eligible for all benefits of the Settlement Agreement if it is approved and becomes final.

FINAL APPROVAL HEARING

23. The Court will hold a Final Approval Hearing on [DATE] at the Superior Court of New Jersey, Gloucester County located at 70 Hunter Street Woodbury, New Jersey.

24. The purposes of the Final Approval Hearing will be to: (i) determine whether the Settlement Agreement should be finally approved by the Court as fair, reasonable, adequate, and

in the best interests of the Settlement Class; (ii) determine whether judgment should be entered pursuant to the Settlement Agreement, dismissing the Action with prejudice and releasing all Released Claims; (iii) determine whether the Settlement Class should be finally certified; (iv) rule on Class Counsel's motion for attorneys' fees, costs, and service awards; (v) consider any properly filed objections; and (vi) consider any other matters necessary in connection with the final approval of the Settlement Agreement.

25. By no later than seventy (70) days after the Notice Date, Plaintiffs and Class Counsel shall file their: (a) motion for final approval of the Settlement Agreement, requesting entry of the Final Approval Order and Judgment; and (b) motion for attorneys' fees, costs, and service awards. Promptly after they are filed, these document(s) shall be posted on the Settlement Website.

26. By no later than twenty-one (21) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Class Counsel for filing with the Court) copies of any objections received by the Settlement Administrator.

27. By no later than seven (7) days before the Final Approval Hearing, the Parties shall file any responses to any Settlement Class Member objections, and any reply papers in support of the motion for final approval of the Settlement Agreement and/or in support of Class Counsel's motion for attorneys' fees, costs, and service awards.

28. By no later than fourteen (14) days before the Final Approval Hearing, the Settlement Administrator shall file with the Court (or provide to Class Counsel for filing with the Court) a declaration providing a complete and final list of Class Members who submitted timely and valid requests for exclusion.

29. The Court may, in its discretion, modify the date and/or time of the Final Approval Hearing, and may order that this hearing be held remotely or telephonically. In the event the Court

changes the date, time, and/or the format of the Final Approval Hearing, Class Counsel shall ensure that the updated information is posted on the Settlement Website.

30. Only Settlement Class Members who have submitted timely and valid objections, in accordance with the requirements of this Preliminary Approval Order, may be heard at the Final Approval Hearing.

OTHER PROVISIONS

31. If the Settlement Agreement, including any amendment made in accordance therewith, is not approved by the Court or shall not become effective for any reason whatsoever, the Settlement Agreement and any actions taken or to be taken in connection therewith (including this Preliminary Approval Order and any judgment entered herein), shall be terminated and shall become null and void and of no further force and effect except for (i) any obligations to pay for any expense incurred in connection with Notice and administration as set forth in the Settlement Agreement, and (ii) any other obligations or provisions that are expressly designated in the Settlement Agreement to survive the termination of the Settlement Agreement, including the Settling Parties' agreement to cooperate in asking the Court to set a reasonable schedule for the resumption of this Action.

32. Other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement Agreement, all proceedings in this Action are hereby stayed and suspended until further order of this Court.

33. Pending final determination of whether the Settlement Agreement should be finally approved, Plaintiffs and all members of the Settlement Class are barred and enjoined from instituting, maintaining, prosecuting, continuing, or otherwise asserting any Released Claim against the Released Parties, excluding any efforts in furtherance of the Settlement Agreement.

This bar and injunction are necessary to protect and effectuate the Settlement Agreement and this Preliminary Approval Order, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction.

34. The Court retains jurisdiction over this Action to consider all further matters arising out of or connected with the Settlement Agreement, including enforcement of the Release provided for in the Settlement Agreement.

35. The Settling Parties are directed to use all reasonable efforts to implement and accomplish the terms and conditions of the Settlement Agreement should it be finally approved.

36. The Court may, for good cause, extend any of the deadlines set forth in this Preliminary Approval Order without further notice to Settlement Class Members. Without further order of the Court, the Settling Parties may agree to make non-material modifications in implementing the Settlement Agreement that are not inconsistent with this Preliminary Approval Order.

IT IS SO ORDERED.

Date: _____

_____

Exhibit 3

Caution
As of: March 26, 2026 6:50 PM Z

Bredbenner v. Liberty Travel, Inc.

United States District Court for the District of New Jersey

April 8, 2011, Decided; April 8, 2011, Filed

Civil Action No. 09-905 (MF); Civil Action No. 09-1248 (MF); Civil Action No. 09-4587 (MF)

Reporter
2011 U.S. Dist. LEXIS 38663 *; 2011 WL 1344745

DEANNA BREDBENNER, PAUL GILBERT, and BELINDA SERRANO, both individually and on behalf of all other similarly situated persons, Plaintiffs, v. LIBERTY TRAVEL, INC., Defendant. CAROL CONNELL, WILLIAM KRUMPHOLZ, CORRINE ORCHIN, NICOLE REID, and LEIGH ANNE HUBBS, both individually and on behalf of all other similarly situated persons Plaintiffs, v. LIBERTY TRAVEL, INC., FLIGHT CENTRE USA, INC., GILBERT HAROCHE, and MICHELLE KASSNER, Defendants.

Prior History: *Bredbenner v. Liberty Travel, Inc., 2009 U.S. Dist. LEXIS 67122 (D.N.J., July 31, 2009)*

Core Terms

settlement, class member, overtime, class action, discovery, class certification, named plaintiff, certificate, negotiate, formula, state law, lodestar, notice, travel, class representative, attorney's fees, terms of the settlement, common fund, predominate, calculate, collective action, weigh, putative class member, skill, settlement negotiations, wage-and-hour, deposition, prevail, payout, contingent

Counsel: **[*1]** For **CAROL CONNELL**, **WILLIAM KRUMPHOLZ**, **CORRINE ORCHIN**, **NICOLE REID**, *both individually and behalf of all other similarly situated persons* (2:09-cv-01248), **Plaintiffs**: **PATRICK JOSEPH MONAGHAN, JR.**, *LEAD ATTORNEY*, MONAGHAN, MONAGHAN, LAMB & MARCHISIO, MONTVALE, NJ.

For **LEIGH ANNE HUBBS**, **Consol Plaintiff**: **PATRICK JOSEPH MONAGHAN, JR.**, *LEAD ATTORNEY*, MONAGHAN, MONAGHAN, LAMB & MARCHISIO, MONTVALE, NJ.For **LIBERTY TRAVEL, INC.**, **FLIGHT CENTRE USA, INC.**, **GILBERT HAROCHE**, **MICHELLE KASSNER**, **Defendants**: **MICHAEL T. GROSSO**, *LEAD ATTORNEY*, LITTLER MENDELSON, P.C., NEWARK, NJ.

For **DEANNA BREDBENNER**, **PAUL GILBERT**, **BELINDA SERRANO**, *both individually and behalf of all other similarly situated persons* (2:09-cv-00905), **Plaintiffs**: **PATRICK JOSEPH MONAGHAN, JR.**, *LEAD ATTORNEY*, MONAGHAN, MONAGHAN, LAMB & MARCHISIO, MONTVALE, NJ.

For **LIBERTY TRAVEL, INC.**, **Defendant**: **MICHAEL T. GROSSO**, *LEAD ATTORNEY*, LITTLER MENDELSON, P.C., NEWARK, NJ.

Judges: MARK FALK, United States Magistrate Judge.

Opinion by: MARK FALK

Opinion

FALK, U.S.M.J.

This case and the companion actions described below arise from a series of complaints initiated against Liberty Travel, Inc. by former employees

for unpaid overtime. On July 9, 2010, the parties reached a global settlement **[*2]** in principle. The Court provisionally certified a settlement class and granted preliminarily approval of the class action settlement on November 19, 2010. CM/ECF No. 97. Presently before the Court are three related motions seeking (a) final certification of the settlement class; (b) final approval of the class action settlement; (c) approval of the collective action settlement; (d) attorneys' fees and costs; and (e) service payments for named Plaintiffs. CM/ECF Nos. 98, 102, 105. A fairness hearing was held on March 14, 2011. CM/ECF No. 113. For the reasons set forth below, Plaintiffs' motions are **granted** in their entirety.

I. BACKGROUND

Defendant Liberty Travel, Inc. ("Liberty") operates a network of retail stores throughout the country that offer travel services (Answer ¶¶ 2, 29). The company employs travel agents to service its customers (Id. ¶ 2). Travel agents as part of their job description are required to work in excess of forty (40) hours as the position may demand (Pls.' Brief in Supp. of Mot. to Certify a FLSA Action Attach. 3, Ex. 3 ("Employment Agmt.") ¶ 2.2 [CM/ECF No. 15]; see also Decl. of Michael J.D. Sweeney in Supp. of Pls.' Renewed Mot. for Expansion of the FLSA Collective **[*3]** Action Class ("Aug. 28, 2009, Sweeney Decl.") Ex. D, at 25 ("There will be times when you will need to work overtime . . . .") [CM/ECF No. 53]). Plaintiffs are generally a group of former Liberty employees that worked as travel agents in the Northeastern United States.

A. Compensation Scheme for Liberty Travel Agents

Travel agents working for Liberty are compensated through a mix of weekly base pay, commissions, bonuses, and overtime for hours worked in excess of forty (40) per week (Employment Agmt. ¶¶ 3.1-3.4; Aug. 28, 2009, Sweeney Decl. Ex. A ("Joint Stip."), at 1). Overtime pay specifically is calculated using a formula that is appended to Liberty's form employment agreement as Exhibit A (Employment Agmt. ¶ 3.2; Joint Stip. 1). Employees eligible for overtime receive one-half (1/2) their effective hourly rate, derived from a composite of their weekly base pay and the total number of hours worked that week, for each overtime hour (Employment Agmt. Ex. A; Joint Stip. 1). The employment contract also specifies that their compensation scheme would "convert" to a fixed hourly rate once the employee exhausts all previously allocated personal time for each hour that they work under forty **[*4]** (40) in any given week (Employment Agmt. ¶ 3.3; Joint Stip. 1). Liberty apparently changed to a different payment model at some point in September 2008 (Pls.' Brief in Supp. of Mot. to Certify a FLSA Action Attach. 3 ("Fiorenzo Decl.") ¶ 12 [CM/ECF No. 15]).

B. Summary of Claims

Plaintiffs in these matters maintain that the formula used by Liberty to calculate overtime establishes a "diminishing" pay structure (Compl. ¶ 2). Because the overtime rate of pay is not fixed and instead dependent on the sum total of hours accumulated each week, they argue that overtime pay progressively decreases as the number of hours spent working overtime increases (Id.). Liberty contends that it properly paid overtime under applicable law by using the widely-accepted "fluctuating work week" ("FWW") method to determine the amount of overtime due to each employee (Def.'s Brief in Opp. to Pls.' Mot. to Certify FLSA Representative Action and to Issue Notice 11-13). See *29 C.F.R. § 778.114* (Department of Labor interpretive rule codifying Supreme Court jurisprudence on the FWW approach to overtime); see also *Urnikis-Negro v. Am. Family Prop. Serv., 616 F.3d 665, 673 (7th Cir. 2010)* (discussing background and **[*5]** construction of *§ 778.114*); *Hunter v. Sprint Corp., 453 F. Supp. 2d 44, 55 (D.D.C. 2006)* (same).

C. Procedural History

Plaintiffs initially brought suit against Liberty and its parent company, Flight Centre USA, Inc., in the U.S. District Court for the Southern District of New York under the caption Reid v. Liberty Travel, Inc. on November 17, 2008. That action was dismissed without prejudice to re-filing in the District of New Jersey for improper venue on February 20, 2009 (Decl. of Michael J.D. Sweeney in Sup. of Pls.' Mot. for Final Certification of the Settlement Class ("March 4, 2011, Sweeney Decl.") ¶ 1 [CM/ECF No. 100]).

On February 27, 2009, Deanna Bredbenner, Paul Gilbert and Belinda Serrano filed this putative collective action against Liberty Travel, Inc. under the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 201 et seq. (2006)*, for unpaid overtime. CM/ECF No. 1. On March 19, 2009, Carol Connell, William Krumpholz, Corrine Orchin, and Nicole Reid, filed a class action on behalf of a putative class comprised of Maryland, Massachusetts, and New York residents, against Liberty, Flight Centre, and two high-ranking Liberty executives, Gilbert Haroche and Michelle Kassner, under **[*6]** state labor law for similar reasons. Docket No. 09-1248, CM/ECF No. 1. [1] The Connell complaint was amended to include a cause of action under *29 U.S.C. § 216(b)* for violation of the overtime provisions of the FLSA. Docket No. 09-1248, CM/ECF No. 4. On September 4, 2009, Leigh Anne Hubbs filed suit against Liberty Travel, Inc., Flight Centre, Gilbert Haroche, and Michelle Kassner, under the FLSA and New Jersey wage and hour law, individually and on behalf of all others similarly situated. Docket No. 09-4587, CM/ECF No. 1.

Because many of the issues involved in the Connell case were similar to those raised in Bredbenner, the Connell action was stayed pending resolution of the legal issues in Bredbenner (Sept. 2 Order, at 3 [Docket No. 09-1248, CM/ECF No. 31]). The Court ordered that "the final determination of those issues **[*7]** in Bredbenner will apply with equal force and effect to the FLSA claims in [Connell]" (Sept. 2 Order, at 3). For similar reasons, the Hubbs case was consolidated and stayed with Connell. Docket No. 09-1248, CM/ECF No. 43. [2]

Only July 31, 2009, the Honorable William J. Martini conditionally certified the FLSA claim in Bredbenner as a collective action for all persons employed by Liberty as a travel agent in Delaware, Maryland, and New York, between August 13, 2006, and September 1, 2008. See *Bredbenner v. Liberty Travel, Inc., No. 09-905, 2009 U.S. Dist. LEXIS 67122, 2009 WL 2391279 (D.N.J. July 31, 2009)*; see also *White v. Rick Bus Co., 743 F. Supp. 2d 380, 2010 U.S. Dist. LEXIS 102471 (D.N.J. 2010)* (describing two-tiered approach to class certification of FLSA claims). In all, one hundred and forty-three (143) individuals eventually opted-in to the Bredbenner **[*8]** action, nine (9) opted-in to the Connell action, and two (2) opted-in to the Hubbs action (March 4, 2011, Sweeney Decl. ¶¶ 6, 14, 16).

D. Joint Statement of Facts and Discovery

Prior to entering settlement negotiations, the parties had conducted an extensive investigation into the underlying claims. The parties represent that they recognized that liability could likely be resolved on summary judgment and both sides were amenable to stipulating to certain core facts (March 4, 2011

[1] All references to docket entries standing alone relate to submissions made in the lead Bredbenner case, and all references to docket entries preceded by a case number relate to submissions made in the case assigned to that case number. For example, the above-noted reference indicates entry number one (1) on the Connell docket, which is assigned case number 09-1248.

[2] The Hubbs case, which at that point was consolidated with Connell ("Hubbs/Connell"), was subsequently consolidated with Bredbenner, CM/ECF No. 82, but the Court later unconsolidated the Hubbs/Connell matter from Bredbenner and re-stayed the Hubbs/Connell action. CM/ECF No. 84. Thus, the cases were on the same procedural posture as they were before Hubbs was consolidated with Bredbenner.

Sweeney Decl. ¶ 9). Beginning in July 2009, they worked together on crafting a joint statement of facts pursuant to *Local Civil Rule 56.1* (Id.). Discovery proceeded on disputed matters.

As part of discovery, Plaintiffs' counsel received and analyzed a large amount of electronic discovery (Id. ¶ 19). In January 2010, Defendant deposed each of the named parties, and Plaintiffs held a 30(b)(6) deposition of Defendant (Id. ¶ 10). Plaintiffs also noticed other depositions as well, (Id. ¶ 11), and filed a motion to compel further discovery, CM/ECF No. 90. Plaintiffs also informally interviewed several putative class members and opt-in plaintiffs to gather additional information (March 4, 2011 Sweeney Decl. ¶ 19). The **[*9]** parties also had the benefit of previously-obtained discovery from a distinct lawsuit against Liberty that involved twenty-nine (29) depositions, dispositive motion practice, and trial decisions (Id. ¶ 19).

E. Settlement Negotiations

The Court held in-person settlement conferences on five separate occasions since February of 2010. See CM/ECF Nos. 80, 83, 86-88. After nearly six months of negotiations, and numerous settlement conferences, the parties reached a global settlement in principle on July 9, 2010, that resolves all claims in each of the pending overtime suits (March 4, 2011 Sweeney Decl. ¶ 21). The Court oversaw the negotiation process (Id. ¶ 62). The salient terms of the settlement were memorialized on the record on July 9, 2010. See CM/ECF No. 94.

F. Terms of Settlement

The settlement agreement creates a common fund of $ 3,000,000 for: (1) settlement payments as consideration for the release of all class claims; (2) attorneys' fees for class counsel; (3) enhancements or "service payments" for class representatives; (4) payroll taxes associated with the settlement; and (5) claims administration expenses (Pls.' Mot. for Prelim. Approval of Class Settlement and Other Relief Ex. **[*10]** A ("Settlement Agmt.") § III.B.1 [CM/ECF No. 96]). It contemplates the prospective certification of a state law settlement class (Id. § II.OO). Workers eligible to receive a payout under the settlement include all named plaintiffs, all state law class members who do not affirmatively opt-out, and all class members who affirmatively opted-in to one of the FLSA actions (Id. § II.OO (cross-referencing § II.N)).

The common fund will be distributed in the first instance to qualifying class members, less their pro-rata share of attorneys' fees, and to satisfy any "service payments" approved by the Court (Id. § III.B. 1.f-e). All class members who timely file a valid claim will receive one and a half (1.5) times their hourly rate, based on a forty (40) hour work week, for each overtime hour they worked during the class period less overtime already paid to them by Liberty (Id. § II.S). All original opt-in plaintiffs will also receive a premium equal to twenty-five percent (25%) of their total overtime claim (Id. § II.S). The minimum payout is $50 (Id. § II.S). Fifty percent (50%) of the total payment will constitute wages, subject to income taxation, and the other fifty percent (50%) will constitute **[*11]** liquidated damages (Id. § III.B.1.c). The remaining money will be used to satisfy claims administration expenses and payroll taxes associated with the settlement payout (Id. § III.B. 1.g). Finally, Liberty will retain any unused funds (Id. § III.B. 1.g).

G. Preliminary Approval and Notice

On November 19, 2010, the Court provisionally certified for purposes of settling the state law claims only, see *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods Liability Litig., 55 F.3d 768, 792 (3d Cir.)*, cert. denied, *516 U.S. 824, 116 S. Ct. 88, 133 L. Ed. 2d 45 (1995)* (discussing and approving use of settlement-only classes), a class consisting of all individuals who worked as full-time Liberty travel agents:

(1) in Maryland between March 19, 2006, and

August 31, 2008;

(2) in Massachusetts between March 19, 2007, and August 31, 2008;

(3) in New Jersey between September 4, 2007, and August 31, 2008; and

(4) in New York between March 19, 2003, and August 31, 2008

(Nov. 19 Order ¶ 31 [CM/ECF No. 97]). The Court also appointed Getman & Sweeney, PLLC as class counsel, preliminarily approved the class action settlement of state claims as fair, and approved the notice and claim forms used to apprise potential class members about the **[*12]** lawsuit and fairness hearing (Id. ¶¶ 21, 38, 41).

Following preliminary approval of the settlement class and the proposed settlement agreement, Liberty provided a list of possible class members to the claims administrator (Declaration of Bernella Lenhart in Supp. of Mot. for Final Approval of Class Action Settlement ("Lenhart Decl.") ¶ 2 [CM/ECF No. 101]). A notice package was mailed out on December 3, 2010 (Id. ¶ 3). The notice contained information on the underlying claims in each case, the terms of the settlement, the period of time within which to file objections, the ability to opt-out, and the date of the fairness hearing (Id. Ex. A "Settlement Notice")). Out of the one thousand two hundred and eighty-three (1,283) members that were mailed a package, five hundred and thirty two (536) returned a claim form to the claim administrator (Lenhart Decl. ¶¶ 2, 9). [3] Only six class members chose to opt-out of the settlement (Id. ¶ 10). The claims administrator received no objections whatsoever (Id. ¶ 11). The Court held a fairness hearing on Monday, March 14, 2011. See CM/ECF No. 113.

II. DISCUSSION

A. Certification of Settlement Class

In order to obtain class certification, a party must show that all four prerequisites of *Rule 23(a)* are met and that the case qualifies as at least one of the matters identified in *Rule 23(b)*. See *Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 55 (3d Cir. 1994)* (citing *Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.)*, cert. denied, *421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1975)*). Class certification calls for a "rigorous analysis" of the factual and legal allegations. See *Beck v. Maximus, Inc., 457 F.3d 291, 297 (3d Cir. 2006)* (quoting *Gen. Tele. Co. of Sw. v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*); 5 James Wm. Moore et al., *Moore's Federal Practice § 23.61[1]* (3d ed. 2008). The Court therefore may conduct a "preliminary **[*14]** inquiry" into the merits before it determines that the requirements for class certification are satisfied. See *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316-17 (3d Cir. 2008)* (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001)*).

A party that seeks to certify a settlement class must satisfy the same requirements necessary to maintain a litigation class. *In re Gen. Motors Corp., 55 F.3d at 778*. The substantive terms of the settlement agreement may factor into certain aspects of the certification calculus. See *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

Plaintiffs move under *Rule 23(b)(3)*. The Court preliminarily found that the requirements of *Rules 23(a)* and *23(b)(3)* were met. The Court now finds that all the requirements for class certifications are

---

[3] Of the returned forms, four (4) were postmarked after the deadline to file a valid claim and seven (7) **[*13]** contained various deficiencies (Lenhart Decl. ¶¶ 2, 9). The parties advised the Court that they would still treat the four (4) late filings as eligible under the settlement (Transcript of Mar. 14, 2011 Fairness Hearing ("Tr."), at 28:10-19 [CM/ECF No. 113]). In addition, the Court ordered that all members who filed an inadequate claim form should be provided (10) additional days to cure any deficiencies in their previously filed form (Tr., at 28:5).

in fact satisfied.

i. *Rule 23(a) of the Federal Rules of Civil Procedure*

A case may be certified as a class action under *Rule 23* only when:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the **[*15]** class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Weiss v. York Hosp., 745 F.2d 786, 807 (3d Cir. 1984)*, cert. denied, *470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985)*. These four threshold requirements are commonly referred to as "numerosity," "commonality," "typicality," and "adequacy of representation," respectively. See, e.g., *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004)*.

a. Numerosity

Rule 23(a)(1) requires that the size of the class is so large that joinder of all potential parties is impracticable. Impracticability does not mean impossibility. *Dewey v. Volkswagen of Am., 728 F. Supp. 2d 546, 565 (D.N.J. 2010)*. Rather, it means that joinder would be "extremely difficult or inconvenient." *Szczubelek v. Cendant Mortgage Corp., 215 F.R.D. 107, 116 (D.N.J. 2003)* (citing *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 73 (D.N.J. 1993))*. While no minimum number is required, the Third Circuit has stated that numerosity is generally met where the moving party "demonstrates that the potential number of plaintiffs exceeds 40 . . . ." *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* (citing **[*16]** 5 James Wm. Moore et al., *Moore's Federal Practice § 23.22[3][a]* (3d ed. 1999)), cert. denied, *536 U.S. 958, 122 S. Ct. 2661, 153 L. Ed. 2d 836 (2002)*. The Court should also take into account other factors, such as the geographic dispersion of the anticipated class. See *Osgood v. Harrah's Entm't, Inc., 202 F.R.D. 115, 122 (D.N.J. 2001)* (citing Herbert B. Newberg & Alba Conte, 1 Newberg on Class Actions (hereinafter Newberg on Class Actions) § 3.06, at 3-27 (3d ed. 1992)).

The numerosity requirement is satisfied in this case. The class approved by this Court contains over 1,200 putative class members, at least 526 of which have expressed interest in participating in this litigation. The members of the class are dispersed throughout four different states and the sheer number of potential plaintiffs would make joinder impracticable. See 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.05, at 3-25 (4th ed. 2002) (observing that classes "numbering in the hundreds" will alone satisfy numerosity); see also *NAACP v. N. Hudson Regional Fire & Rescue, 255 F.R.D. 374, 382 (D.N.J. 2009)*, remanded on other grounds, *367 Fed. Appx. 297 (3d Cir. 2010)* ("Even if all of the approximately 850 members of the proposed class **[*17]** here still live in Essex, Union or Southern Hudson County, joinder of over 800 additional plaintiffs would simply be impracticable.").

b. Commonality

Next, Plaintiffs must demonstrate that there are questions of fact or law that are common to the members of the class. *Fed. R. Civ. P. 23(a)(2)*. Commonality exists where the named plaintiffs share at least one question of fact or law with the grievances of the proposed class. See *In re Warfarin, 391 F.3d at 527-28*. Indeed, "*Rule 23(a)(2)* does not require that class members share every factual and legal predicate . . . ." *In re Gen. Motors Corp., 55 F.3d at 817*. Thus, the commonality requirement is easily met in most

cases because all that is required is one common issue. *Baby Neal, 43 F.3d at 56*.

Plaintiffs clearly meet the low commonality threshold. All class members worked over forty hours and allege that they did not receive a proper amount of overtime pay for that time. Factually, Liberty's overtime formula is central to the claims of all class members. Legally, the class would implicate the substantive law of four different states. However, the claims all class members will turn on whether the FWW method of calculating overtime is compatible **[*18]** with applicable state wage and hour laws. In particular a common question across all four sub-classes would be whether Liberty's compensation regime qualifies as a FWW payment model. Courts regularly find commonality in similar wage and hour suits in which class certification is sought. See, e.g., *Bernhard v. TD Bank, N.A., No. 08-4392, 2009 U.S. Dist. LEXIS 92308, 2009 WL 3233541, at *3 (D.N.J. Oct. 5, 2009)*; *In re Janney Montgomery Scott LLC Fin. Consultant Litig., No. 06-3202, 2009 U.S. Dist. LEXIS 60790, 2009 WL 2137224, at *4 (E.D. Pa. July 16, 2009)*; *Lenahan v. Sears Roebuck and Co., No. 02-0045, 2006 U.S. Dist. LEXIS 60307, 2006 WL 2085282, at *7 (D.N.J. July 10, 2006)*.

c. Typicality

The claims of the representatives must also be typical of the claims of the class. *Fed. R. Civ. P. 23(a)(3)*. The Third Circuit recently identified three interrelated considerations relevant to this inquiry: "(1) the claims of the class representative must be generally the same as those of the class in terms of both (a) the legal theory advanced and (b) the factual circumstances underlying that theory; (2) the class representative must not be subject to a defense that is both inapplicable to many members of the class and likely to become a major focus of the litigation; and (3) the interests **[*19]** and incentives of the representative must be sufficiently aligned with those of the class." *In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 599 (3d Cir. 2009)*. This component of *Rule 23* is designed to ensure that "the [class representatives] will work to benefit the entire class through the pursuit of their own goals." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions (Prudential II), 148 F.3d 283, 311 (3d Cir. 1998)* (citing *Baby Neal, 43 F.3d at 57*), cert. denied, *525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 789 (1999)*.

The typicality prong does not require that all putative class members share identical claims or underlying facts. See *Barnes v. Am. Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998)*, cert. denied *526 U.S. 1114, 119 S. Ct. 1760, 143 L. Ed. 2d 791 (1999)*. All that is required is a strong similarity in legal theories or a showing that the claims arise from the same course of conduct. See *Prudential II, 148 F.3d at 311-12*; *Grasty v. Amalgamated Clothing & Textile Workers Union, 828 F.2d 123 (3d Cir. 1987)* (citing 1 Newberg on Class Actions § 3.15, at 168 (2d ed. 1985)), abrogated in part on other grounds by *Reed v. United Transp. Union, 488 U.S. 319, 109 S. Ct. 621, 102 L. Ed. 2d 665 (1989)*.

All class members allege that they were improperly compensated as **[*20]** a result of Liberty's overtime compensation formula. The injury sustained by the class representatives is the same as the injury sustained by the class as a whole. They seek same relief as all putative class members. Because the class representatives challenge the same underlying conduct as do all members in the putative class, the interests of the class representatives are completely aligned with the interests of the entire class. See *Newton, 259 F.3d at 183-84* ("If the claims of the named plaintiffs and putative class members involve the same conduct by defendant, typicality is established regardless of factual differences."). Moreover, the named Plaintiffs are subject to the same overarching FWW defense as are all class members. The claims of the class representatives are therefore typical of the absentees.

d. Adequacy of Representation

Adequate representation focuses on two criteria: "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel, 508 F.2d at 247*. These distinct inquiries assess the adequacy of class counsel and the adequacy **[*21]** named plaintiffs, respectively, to represent the rest of the class. See *Prudential II, 148 F.3d at 312*; *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630 (3d Cir. 1996)*, aff'd sub nom. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. Plaintiffs clearly meet both of these prongs.

First, class counsel is comprised of competent and experienced class action attorneys that are readily capable of prosecuting Plaintiffs' claims. Class counsel is highly experienced in wage-and-hour litigation (March 4, 2011, Sweeney Decl. ¶¶ 58, 63). In fact, they are involved in nineteen (19) pending federal and state wage-and-hour cases (Id. ¶58). The Court observes that class counsel have competently and vigorously pursued the interests of the class throughout the litigation. For example, class counsel undertook a private investigation to identify potential class members, proposed a draft statement of stipulated facts to reduce costs, and efficiently reviewed a tremendous amount of electronic discovery to help evaluate the case.

Second, there are no conflicts between class representatives and other class members. The second prong serves to uncover conflicts of interest between the named parties and the **[*22]** class they seek to represent. See *Amchem, 521 U.S. at 626 n.20* (citing *Falcon, 457 U.S. at 157-58 n.13*). Indeed, the absence of collusion or undue pressure assumes a "crucial" role in the context of settlement class certification. See *In re Gen. Motors Corp., 55 F.3d at 799 n.21*. Plaintiffs must prove the same wrongdoing as the absent class members in order to establish liability in this matter. The named Plaintiffs held identical positions while employed by Liberty and allege the same harm as other Plaintiffs (March 4, 2011, Sweeney Decl. ¶57). Further, the settlement allocation formula poses no conflict because damages are calculated in the same way for the named Plaintiffs as for all other class members (Settlement Agmt. § II.S). See *Lenahan, 2006 U.S. Dist. LEXIS 60307, 2006 WL 2085282, at *8*. Given the absence of any conflict, and the stellar qualifications of class counsel, the Court finds that the adequacy requirement is easily met.

In light of the foregoing, the class plainly satisfies each of the four prerequisites to class certification contained in *Rule 23(a)*. The Court therefore now turns to *Rule 23(b)(3)*.

ii. *Rule 23(b)(3) of the Federal Rules of Civil Procedure*

Federal Rule of Civil Procedure 23(b)(3) **[*23]** permits the court to certify a class in cases where "questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. These dual requirements are commonly referred to as "predominance" and "superiority," respectively. See, e.g., *In re Constar Int'l, Inc. Sec. Litig., 585 F.3d 774, 780 (3d Cir. 2009)*.

a. Predominance

Predominance probes whether the proposed class is sufficiently cohesive to warrant adjudication by representation. See *Amchem, 521 U.S. at 623* (citing 7A Charles Alan Wright et al., Federal Practice & Procedure § 1777, at 518-19 (2d ed. 1986)). Although it tends to merge with the concept of commonality, it imposes a more exacting standard. See *Newton, 259 F.3d at 186*. To establish predominance, issues common to the class must predominate over individual issues.

Prudential II, 148 F.3d at 313-14. Common issues do not "predominate," and the case in inappropriate for certification, if "proof of the essential elements of a cause of action require individual treatment." *Newton, 259 F.3d at 172* **[*24]** (citing *Binder v. Gillespie, 184 F.3d 1059, 1063-66 (9th Cir. 1999)*, cert. denied, *528 U.S. 1154, 120 S. Ct. 1158, 145 L. Ed. 2d 1070 (2000)*). Whether an element requires individual or common treatment depends nature of the evidence that will suffice to resolve it. See *In re Hydrogen Peroxide, 552 F.3d at 311* (quoting *Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005)*). When an issue requires both individual and common proofs, the Court must determine which proof is key to its outcome. See *In re Lineboard, 305 F.3d at 162-163*. Indeed, the presence of some individual issues "does not per se rule out a finding of predominance." *Prudential II, 148 F.3d at 315*.

Liberty's overtime formula was applied uniformly to all class members in these cases. Plaintiffs contend that it violated applicable state law and Liberty claims that it did not. Whether Liberty's formula was compatible with state wage and hour law is "about the most perfect question[] for class treatment." *Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 373 (S.D.N.Y. 2007)*. This issue is clearly susceptible to class-wide proof. Whether the formula itself violated the law is the central issue in these cases and would determine Liberty's liability. Factual **[*25]** differences between class members, such as their base salary and their amount of unpaid overtime, are incidental matters that only impact damages. The Third Circuit has cautioned that "obstacles in calculating damages may not preclude class certification." *Newton, 259 F.3d at 189*. Where, as here, "common issues which determine liability predominate," calculating damages on an individual basis does not prevent an otherwise valid certification. *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977)* (citations omitted); see also *In re Community Bank of N. Va., 418 F.3d 277, 306-07 (3d Cir. 2005)*; *In re Lineboard, 305 F.3d at 163*.

Differences in the substantive state laws at issue will similarly pose no obstacle. Normally, a court must determine whether variances in applicable state law may be so substantial as to defeat predominance. See *In re LifeUSA Holding Inc., 242 F.3d 136, 147 (3d Cir. 2001)*; *Prudential II, 148 F.3d at 315*; *Georgine, 83 F.3d at 627*; *In re Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986)*. However, variations in state laws are "irrelevant" when a case will come to fruition with the certification of a settlement class. See *In re Warfarin, 391 F.3d at 529* **[*26]** (citing *Amchem, 521 U.S. at 620*). Thus, issues common to the class predominate over individual issues.

b. Superiority

The non-exhaustive list of factors that a court may consider in evaluating the superiority of a class action include:

> (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). This prong of *Rule 23(b)(3)* 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." *Georgine, 83 F.3d at 632* (quoting *Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.)* (en banc), cert. denied, *519 U.S. 957, 117 S. Ct. 379, 136 L. Ed. 2d 297 (1974)*).

A class action in New Jersey is the "superior" method of adjudicating this controversy. First, the

relatively modest size of each individual claim counsels that independent actions would likely be impracticable. See *Georgine, 83 F.3d at 633* **[*27]** (citing *Fed. R. Civ. P. 23(b)(3)* advisory note to 1966 amendment). The class action procedure would serve to spread the costs of litigation across a greater pool of injured parties, *In re Gen. Motors, 55 F.3d at 783-84*, and the total amount of potential liability is not so significant as to impose "hydraulic pressure" on Liberty to settle in the face of marginal claims. See *Newton, 259 F.3d at 167 n.8* (citing *In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.)*, cert. denied, *516 U.S. 867, 116 S. Ct. 184, 133 L. Ed. 2d 122 (1995)*). Any potential interest in maintaining individual actions is further diminished by the fact that there are no other pending lawsuits arising from the same allegations beyond those involved in the settlement. See *In re Warfarin, 391 F.3d at 534* (citing *Prudential II , 148 F.3d at 316*). Second, New Jersey is also the most appropriate forum for the class. A forum selection clause found in the employment contract of each class member limits the disposition of their claim to the jurisdiction of New Jersey (Employment Agmt. ¶¶ 3.1). Concentrating litigation in New Jersey is also desirable because it is home to Liberty's corporate headquarters. See *In re Warfarin, 391 F.3d at 534* (citing *Prudential II, 148 F.3d at 316*). **[*28]** Finally, the class consists of a fully-matured set of claims; the class itself closed at the point in time when Liberty stopped using the overtime formula at issue in this case. See *Newton, 259 F.3d at 192*. The class action mechanism is both fair and efficient in these cases.

Having determined that the class satisfies each of the requirements of *Rule 23(a)* and *Rule 23(b)(3)*, final certification of the settlement class is warranted.

B. Final Approval of the Class Action Settlement

Under *Rule 23(e)*, the claims of a certified class may be settled only with the Court's approval. The Court acts in a protective capacity as fiduciary for absent class members by assuring that the settlement terms are "fair, reasonable, and adequate" in exchange for the release of the class claims. *Fed. R. Civ. P. 23(e)(2)*; see *In re Gen. Motors Corp., 55 F.3d at 805*. The Court must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *In re Gen. Motors Corp., 55 F.3d at 785* (quoting 2 Newberg on Class Actions § 11.41, at 11-88 (3d ed. 1992)). Where settlement negotiations **[*29]** precede class certification, and settlement and class certification are sought simultaneously, the Court must be "even more scrupulous" than usual to safeguard against abuses. *Id. at 805*. This "heightened standard" is intended to ensure that the class counsel has engaged in sustained advocacy throughout the proceedings and protected the interests of all putative class members. See *Prudential II, 148 F.3d at 317*. The fairness determination is ultimately committed to the sound discretion of the Court. *Bryan v. Pittsburg Plate Glass Co., 494 F.2d 799, 801 (3d Cir.)*.

For the reasons that follow, the settlement is entitled to a presumption of fairness and is fair, reasonable, and adequate for purposes of *Rule 23(e)*.

i. Presumption of Fairness

A class settlement is entitled to an "initial presumption of fairness" when "(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 Gen. Motors, 55 F.3d at 785* (citing 2 Newberg on Class Actions § 11.41 at 11-88 (3d ed. 1992)); Manual for Complex Litigation (Third) § 30.42, at 238 (1997). This **[*30]** presumption may attach even where, as here, settlement negotiations precede class certification. See *In re Warfarin, 391 F.3d at*

535.

The settlement here clearly satisfies these criteria. The class settlement was the product of nearly six months of negotiations between highly experienced counsel, and after years of discovery, investigation, legal analysis, and motion practice. In addition, not one class member objected to the terms of the settlement agreement and only six affirmatively opted-out. This alone should be enough for the presumption of fairness to attach. See *McCoy v. Health Net, Inc., 569 F. Supp. 2d 448, 458-59 (D.N.J. 2008)*; *Varacallo v. Ma. Mut. Life Ins. Co., 226 F.R.D. 207, 235 (D.N.J. 2005)*. In addition, the Court directly oversaw the negotiations during which the settlement was reached. Participation of an independent mediator in settlement negotiations "virtually insures that the negotiations were conducted at arm's length and without collusion between the parties." *Bert v. AK Steel Corp., No. 02-467, 2008 U.S. Dist. LEXIS 111711, 2008 WL 4693747 (S.D. Ohio Oct. 23, 2008)* (internal citations omitted); see also *Milliron v. T-Mobile USA, Inc., No. 08-4149, 2009 WL 3345762, at *5 (D.N.J. Sept. 14, 2009)* **[*31]** (finding presumption applies when negotiations occurred before federal judge); *In re LG / Zenith Rear Projection Tel. Class Action Litig., No. 06-5609, 2009 U.S. Dist. LEXIS 13568, 2009 WL 455513, at *6 (D.N.J. Feb. 18, 2009)* (same).

ii. Fairness of the Class Settlement

In *Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975)*, the Third Circuit identified nine factors that a court should consider in evaluating whether a proposed class action settlement is "fair, reasonable, and adequate." The nine Girsh factors include:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 156-17 (citing *City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974)*). However, due to **[*32]** the "sea-change" in the way class actions have evolved since Girsh was decided, the Third Circuit has instructed courts to address other concerns as they may arise in each case:

> the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved-or likely to be achieved-for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

Prudential II, 148 F.3d at 324. These set of considerations embody a substantive inquiry into the terms of the settlement itself and a procedural inquiry into the negotiation process. *In re Prudential Ins. Co. of Am. Sales Practice Litig. (Prudential I), 962 F. Supp. 450 (D.N.J. 1997)* **[*33]** (citing *In re Gen. Motors, 55 F.3d 768, 796*).

a. Complexity, Expense, and Duration of Litigation

This factor is intended to "capture 'the probable

cost, in both time and money, of continued litigation.'" *In re Gen. Motors, 55 F.3d at 812* (quoting *Bryan, 494 F.2d at 801*). Where the complexity, expense, and duration of litigation are significant, the Court will view this factor as favoring settlement. *Prudential I, 962 F. Supp. at 536*.

If this action were to continue, the parties would expend considerable time and money pursuing their claims. For start, these cases involve claims that arise under several state and federal statutes. While the differences in substantive law are not unmanageable, supra, it would undoubtedly make the process of litigation complex. See *In re Gen. Motors, 55 F.3d at 812* (finding complexity arising from a "web of state and federal warranty, tort, and consumer protection claims"). The previously-litigated action against Liberty Travel in Pennsylvania spanned over thirteen (13) years and was extremely adversarial. Here, the parties would be forced to confront fairly technical legal issues regarding the FWW overtime model to prevail on the merits. Continued prosecution **[*34]** of this case both before and at trial would therefore require extensive involvement by experts. Heavy dispositive motion practice would be a certainty. The expected factual and legal issues at trial are complex. Based on the history of the Pennsylvania action, an appeal would likely follow. By reaching a settlement prior to the time for dispositive motions, the parties "avoid□ the costs and risks of a lengthy and complex trial." *Ehrheart v. Verizon Wireless, 609 F.3d 590, 595 (3d Cir. 2010)*. Since continued litigation would be time-consuming and expensive, settlement makes consummate sense.

b. Reaction of the Class to Settlement

The second factor seeks to gauge whether members of the class actually support the settlement. *Prudential II, 148 F.3d at 318*. Courts generally assume that silence constitutes "tacit consent" to the settlement terms. *Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1314 n.15 (3d Cir. 1993)* (citing *Shlensky v. Dorsey, 574 F.2d 131, 148 (3d Cir. 1978))*. Thus, courts looks to the "number and vociferousness of the objectors." *In re Gen. Motors, 55 F.3d at 812*.

Here, not one single member from the class objected to the terms of the settlement, and less than one percent of the **[*35]** class opted out. While this type of response weighs in clear favor of the settlement, *Weber v. Gov't Emp. Ins. Co., 262 F.R.D. 431, 445 (D.N.J. 2009)*; *In re Cendant Corp., Derivative Action Litig., 232 F. Supp. 2d 327, 333-34 (D.N.J. 2002)*, the Third Circuit has cautioned that the inference of silent approval may be unwarranted in cases where the settlement and class action notice are sent in tandem. This is because class members are not in a position to weigh the relative strengths and weaknesses of the settlement terms. See *In re Gen. Motors, 55 F.3d at 812-13*. While mindful of this admonition, the inference of approval is still warranted in this case. Unlike *General Motors*, the notice that was mailed out to potential class members included a clear and informative summary about the claims in each of the underlying cases, placing potential class members in a better position to judge the terms of the settlement agreement. The class reaction strongly supports the settlement.

c. Stage of the Proceedings and Amount of Discovery Completed

This factor considers the degree of case development accomplished by counsel prior to settlement. See *In re Gen. Motors, 55 F.3d at 813*. For the proceedings **[*36]** to be sufficiently developed to foster a fair settlement, the parties must have "an adequate appreciation of the merits of the case before negotiating." Id. Courts therefore endeavor into "the type and amount of discovery the parties have undertaken." *Prudential II, 148 F.3d at 319*. In general, post-discovery settlements are more likely to be fair and reflective of the true value of the claims in the case. See *Bolger, 2 F.3d at 1314*.

The parties entered the settlement armed with much discovery. Over the course of one year, initial disclosures were exchanged, a tremendous volume of documents were produced, and the depositions of all named parties were taken. Plaintiffs' counsel also informally interviewed potential class members, and coordinated with defense counsel to draft a joint stipulation of facts. Numerous conferences addressing discovery and case management were conducted by the Court. The parties were also aided in substantial part by discovery already gained from prior litigation, which involved over twenty-nine (29) depositions, dispositive motions, and an appeal. The Third Circuit has explicitly recognized that discovery in a parallel proceeding can be beneficial to settlement **[*37]** negotiations. See *In re Gen. Motors, 55 F.3d at 813* (citations omitted).

This case settled just sixty (60) days before the close of fact discovery. CM/ECF No. 89. Thus, both parties were in an excellent position to enter negotiations based on their unique knowledge of the underlying facts. See *In re Cendant Corp. Litig., 264 F.3d at 236* (finding appreciation for merits despite settlement at an early stage of discovery). With extensive discovery and due diligence, class counsel clearly possessed sufficient information to assess the relative strengths and weaknesses of their case and reach a fair bargain. The stage of proceedings factor thus weighs in favor of approving the settlement.

d. Risks of Establishing Liability and Damages

The fourth and fifth *Girsh* factors survey the "possible risks of litigation" by balancing the likelihood of success, and the potential damages award, against the immediate benefits offered by settlement. *Prudential II, 148 F.3d at 319*. Where the risks of litigation are high, these factors weigh in favor of the settlement. See id. Because damages are contingent on establishing liability, "the same concerns animate both of these elements." *McCoy, 569 F. Supp. 2d at 461*. **[*38]** To properly weigh these considerations, the Court should not press into the merits of the case and instead rely to a certain extent on the estimation provided by class counsel, who is experienced with the intricacies of the underlying case. See *Dewey v. Volkswagen of Am., 728 F. Supp.2d 546, 584 (D.N.J. 2010)* (citing *In re Ikon Office Solutions, Inc. Sec. Litig., 209 F.R.D. 94, 105-06 (E.D. Pa. 2002)*); *Weber, 262 F.R.D. at 445* (quoting *Perry v. FleetBoston Fin. Corp., 229 F.R.D. 105, 115 (E.D. Pa. 2005)*). The immediate cash payout provided by the class settlement offers a substantial benefit over the many risks and costs Plaintiffs would face in litigating their claims to a conclusion.

First, it is not clear that Plaintiffs could maintain their state claims for unpaid overtime alongside the federal causes of action under the FLSA. In *De Asencio v. Tyson Foods, 342 F.3d 301, 309 (3d Cir. 2003)*, the Third Circuit directed courts to analyze, on a case-by-case basis, whether the joinder of state law overtime claims with a claim under the FLSA is a proper exercise of supplemental jurisdiction. Where state law issues "substantially predominate," the state claims may be dismissed without prejudice **[*39]** for resolution by state tribunals. Id. (quoting *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*).

Second, even assuming the state law claims could remain, Plaintiffs' ability to succeed on those claims depends on whether the FWW method of overtime pay provides a sufficient defense under state law. This determination would have to be made with respect to each state law involved. For those states that embrace the FWW approach to overtime pay, Plaintiffs would need to establish that Liberty's overtime formula was not a proper application of the FWW method.

Third, any issues that survived summary judgment would go to trial before a jury. A trial on the merits always entails considerable risk. *Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1301 (D.N.J. 1995)*. This is particularly true here, given the technical nature of the FWW method and

the need to rely on expert testimony. See *In re Cendant Corp., 264 F.3d at 239* (recognizing the increased risk of establishing liability when a jury is presented with competing expert testimony).

Finally, even if Plaintiffs were to succeed on the merits, the quantum of damages that they could collect is also uncertain. For example, under **[*40]** the FLSA a party may collect on three years of back pay, instead of the two year default, only if they can prove that the opposing party acted willfully. See, e.g., *Pignataro v. Port Auth. of N.Y. and N.J., 593 F.3d 265, 273 (3d Cir. 2010)*; *Brock v. Claridge Hotel and Casino, 846 F.2d 180, 188 (3d Cir.)*, cert. denied, *488 U.S. 925, 109 S. Ct. 307, 102 L. Ed. 2d 326 (1988)*. Throughout, Defendants could be expected to continue their zealous defense and would likely appeal if plaintiffs prevailed. In the fact of such considerable risks, an immediate cash settlement provides certainty and offers a significant benefit to all class members.

e. Risks of Maintaining the Class Action Through Trial

The sixth *Girsh* factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *In re Warfarin, 391 F.3d at 538*. This factor is important because the prospects for obtaining certification impact the range of recovery that a party can reap from the action. *In re Gen. Motors, 55 F.3d at 817*.

The Court has found that class certification is appropriate for purposes of settlement, and suspects the result would be the same for a litigation class. However, Liberty would strenuously contest **[*41]** certification if the case were to proceed (March 4, 2011, Sweeney Decl. ¶¶ 70, 72). Confronted with a motion to certify a litigation class, instead of a settlement class, the Court would additionally need to consider whether the case would pose intractable management problems. See *Amchem, 521 U.S. at 620*. It is also possible that Liberty would seek an interlocutory appeal of any order granting class certification. See *Fed. R. Civ. P. 23(f)*. In addition, class certification can always be modified at any time before final judgment. *Fed. R. Civ. P. 23(c)(1)(C)*. All in all, the risk of decertification is small. However, this is not an obstacle to approval. The Third Circuit cast some doubt on how "significant" this factor is in cases where a settlement class is sought, *Prudential II, 148 F.3d at 321*, and some courts in this district have discredited the importance of this factor in settlement-only classes, e.g., *In re Schering-Plough/Merck Merger Litig., No. 09-1099, 2010 U.S. Dist. LEXIS 29121, 2010 WL 1257722, at *11 (D.N.J. March 26, 2010)*.

f. Ability of Defendant to Withstand a Greater Judgment

This factor "is concerned with the whether the defendants could withstand a judgment for an amount significantly greater **[*42]** than the settlement." *In re Cendant Corp., 264 F.3d at 240*. The Court is not in a position to determine whether Liberty could withstand a greater judgment than the substantive settlement. However, a settlement amount greater than the payouts provided under the settlement would likely be difficult to attain given that they are largely based on figures from payroll records. This factor therefore does not favor or disfavor settlement. See *In re Warfarin, 391 F.3d at 538* ("[T]he fact that [defendant] could afford to pay more does not mean that it is obligated to pay any more than what the ... class members are entitled to under the theories of liability that existed at the time the settlement was reached."). Indeed, courts in this district regularly find a settlement to be fair even though the defendant has the practical ability to pay greater amounts. See, e.g., *McCoy, 569 F. Supp.2d at 462-63*; *Weber, 262 F.R.D. at 446*; *Varacallo, 226 F.R.D. at 239*.

g. Reasonableness of the Settlement in Light of the Best Possible Recovery and All Attendant Risks of Litigation

The final two *Girsh* factors collectively "evaluate whether the settlement represents a good value for a weak case or a poor value **[*43]** for a strong case." *In re Warfarin, 391 F.3d at 538*. To make this determination, the Court analyzes the reasonableness of the settlement against the best possible recovery and the risks the parties would face if the case went to trial. *Prudential II, 148 F.3d at 322*. In cases where monetary relief is sought, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Gen. Motors, 55 F.3d at 806* (quoting Manual for Complex Litigation (Second)) § 30.44, at 252 (1985)). Precise value determinations, however, are not necessary. *In re Pet Food Prods. Liability Litig., 629 F.3d 333, 355 (3d Cir. 2010)* (citing *In re Warfarin, 391 F.3d at 538*).

These factors likewise weigh in favor of approving the settlement. The settlement establishes a fund of $3 million to compensate class members for unpaid overtime. Each state law class member will receive a payout dependent on the number of overtime hours that they worked. The total amount each class member receives should put them in roughly the same position as if they received one and a half times their **[*44]** hourly rate for each overtime hour worked. In other words, the settlement payout basically restores each class member to where they would have been had Liberty paid overtime at one and one half times each employee's regular rate. Compensating the class members at close to one hundred percent (100%) of their alleged actual damage "obviously represents a good value for the class members' claims, and is well within the range of reasonableness." *Weber, 262 F.R.D. at 447*.

Plaintiffs acknowledge that recovery "could be greater" if they prevailed on all claims at trial. Plaintiffs do seek liquidated damages under some of the state law claims involved. But winning on any claim is far from certain and hitting a grand slam would be unlikely. Plaintiffs would face considerable risk were the case to proceed. Defendants have certain credible defenses and strongly presented them. The settlement, on the other hand, offers an immediate and substantial benefit given the significant risks of litigation. See *Varacallo, 226 F.R.D. at 240*. In short, the recovery of each class member under the settlement "exceeds the value of the best possible recovery discounted by the risks of litigation." *Prudential I, 962 F. Supp. at 540*.

h. [*45] Additional Factors

Several additional factors identified by the Third Circuit in *Prudential, 148 F.3d at 323*, also counsel in favor of approving the settlement. The underlying substantive issues are fully matured for adjudication given that Liberty ceased using the disputed method of overtime pay in August of 2008, which is when the state classes close. In addition, the parties were guided by extensive discovery that was obtained in the prior Liberty litigation. See *McCoy, 569 F. Supp. 2d at 469*. Class counsel are highly qualified and experienced in wage and hour class action litigation and consider the terms of the settlement to be fair, reasonable, and adequate. See *Varacallo, 226 F.R.D. at 240* (citing *Prudential I, 962 F. Supp. at 543*). Finally, the settlement was premised on Liberty payroll records. See *McCoy, 569 F. Supp. 2d at 469*.

After careful consideration of the Girsh factors, and the presumption of fairness, the Court concludes that the substantive terms of the settlement are eminently fair and that the negotiation process was unassailable. The majority of the *Girsh* factors, and several additional considerations, strongly favor approval. The settlement provides a significant **[*46]** benefit to all class members, which is substantiated by the overwhelmingly positive response from the class. Accordingly, the Court approves the terms of the settlement that resolve the state law class claims.

C. Approval of the Collective Action Settlement

Plaintiffs also ask the Court to approve the balance of the settlement agreement that resolves the collective action claims under the FLSA. Previously, the Court conditionally certified an FLSA class. See CM/ECF No. 41. Courts in this district, however, use a two-stage procedure to certify classes under the FLSA. See, e.g., *White, 743 F. Supp. 2d at 383*; *Morisky v. Pub. Serv. Elec. & Gas Co., 111 F. Supp. 2d 493, 497 (D.N.J. 2000)*. [4] The Court must therefore reach a final determination as to the FLSA class before addressing the terms of the settlement. See *Burkholder v. City of Fort Wayne, 750 F. Supp.2d 990, 2010 U.S. Dist. LEXIS 116205, 2010 WL 4457310, at *2 (N.D. Ind. 2010)* (collecting cases); *Vasquez v. Coast Valley Roofing, Inc., 670 F. Supp. 2d 1114, 1124 (E.D. Cal. 2009)* ("Subject to final approval at a later date, conditional certification of a settlement class under the FLSA is appropriate.").

i. Final Class Certification Under the FLSA

To certify a case as a collective action under the FLSA, the Court must determine that employees in the class are "similarly situated," within the meaning of *§ 16(b)* of the Act. See *Sperling v. Hoffman-La Roche, Inc., 862 F.2d 439, 444 (3d Cir. 1888)*, aff'd, *493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)*; *Morisky, 111 F. Supp. 2d at 496*. Courts impose a stricter standard for final class certification than they do for conditional certification because the factual record is more fully developed. See *Morisky, 111 F. Supp. 2d at 497* (citing *Thiessen v. Gen. Elec. Capital Corp., 996 F. Supp. 1071, 1080 (D. Kan. 1998)*); 7B Federal Practice & Procedure § 1805, at 497. In **[*48]** *Lockhart v. Westinghouse Credit Corp., 879 F.2d 43 (3d Cir. 1989)*, the Third Circuit tacitly endorsed the factors identified in *Plummer v. General Electric Co., 93 F.R.D. 311 (E.D. Pa. 1981)*, and *Lusardi v. Xerox Corp. (Lusardi I), 118 F.R.D. 351 (D.N.J. 1987)* to make this determination. It explicitly approved a "balancing" of these factors in a later decision. See *Ruehl, 500 F.3d at 388 n.17* ("[W]e have approved of the balancing of factors in Plummer and Lusardi." (citing *Lockhart, 879 F.2d at 51*)). Courts in this district regularly use the Lusardi factors to reach a final determination on class certification under the FLSA. See, e.g., *Aquilino v. Home Depot, U.S.A., Inc., No. 04-4100, 2011 U.S. Dist. LEXIS 15759, 2011 WL 564039, at *5 (D.N.J. Feb. 15, 2011)*; *Zavala v. Wal-Mart Stores, Inc., No. 03-5309, 2010 U.S. Dist. LEXIS 63530, 2010 WL 2652510, at *2 (D.N.J. June 25, 2010)*. They include "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [defendants] which appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations." *Lusardi I, 118 F.R.D. at 359*, vacated in part sub nom. *Lusardi v. Lechner (Lusardi II), 855 F.2d 1062 (3d Cir. 1988)*. This **[*49]** list is neither exhaustive nor mandatory to grant certification. *Ruehl, 500 F.3d at 388 n.17*.

There is no doubt that the FLSA class should be certified. Because the analysis required for final certification, "largely overlap[s] with class certification analysis under *Federal Rule of Civil Procedure 23(a)*," the Court need only address the Lusardi factors in passing. *Murillo v. Pac. Gas & Elec. Co., No. 08-1974, 2010 U.S. Dist. LEXIS 73427, 2010 WL 2889728, at * 3 (E.D. Cal. July 21, 2010)*; see also *Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001)* (noting "there is little difference [between the two] approaches"). The factual circumstances underlying the claims of each putative class members are very similar, not disparate. Each held the same job,

---

[4] The two stages consist of a preliminary or "conditional" certification **[*47]** and then, after notice issues and pertinent discovery is obtained, a "reconsideration" phase during which the Court will either grant final certification or decertify the class. See *Ruehl v. Viacom, Inc., 500 F.3d 375, 388 n.17 (3d Cir. 2007)* (recognizing use of two-tier certification process in ADEA collective action that incorporates *section 16(b) of the FLSA*). See generally 7B Charles Alan Wright et al., Federal Practice & Procedure § 1805, at 487 (3d ed. 2005) (hereinafter Federal Practice & Procedure).

signed the same employment contract, worked overtime during the relevant class period, received overtime pay pursuant to a common formula, and each claims the same relief under the FLSA. The class as a whole is therefore "similarly situated" to the class representatives. Second, the Court cannot envision any individualized defenses that would interfere with final certification. In any case, the concern with individualized defenses is that they **[*50]** may pose case management problems. See *Ruehl, 500 F.3d at 388*. However, the Court need not account for case management issues because, much like the Rule 23 analysis, the class is being certified for purposes of settlement. See *Amchem, 521 U.S. at 620*.

ii. Fairness of the Collective Action Settlement

Unlike a traditional class action under Rule 23, potential class members in an FLSA collective action must affirmatively opt-in to be bound by the judgment. See *Lusardi II, 855 F.2d at 1070*. Their failure to do so does not prevent them from bringing their own suit at a later date. Id. (citing *Pentland v. Dravo Corp., 152 F.2d 851, 853 (1945)*). This differs markedly from a class action instituted under *Rule 23(b)(3)*. See 5 Newberg on Class Actions § 16.20 (noting tension between res judicata effect of FLSA collective action and *Rule 23(b)(3)* class action). Thus, the Court does not assume the same "fiduciary" role to protect absent class members as it would under *Rule 23* when assessing a proposed settlement resolving FLSA claims.

To approve a settlement resolving claims under the FLSA, the Court must scrutinize its terms for fairness and determine that it resolves a bona fide dispute. See *Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1354 (11th Cir. 1982)*; **[*51]** see also H.R. Rep. No. 101-664, at 18-19 (1990). In so doing, the Court ensures that the parties are not "negotiating around the clear FLSA requirements" via settlement. *Collins v. Sanderson Farms, Inc., 568 F. Supp. 2d 714, 720 (E.D. La. 2008)*. Its obligation "is not to act as caretaker but as gatekeeper." *Goudie v. Cable Commc'n, Inc., No. 08-507, 2009 U.S. Dist. LEXIS 1907, 2009 WL 88336, at *1 (D. Or. Jan. 12, 2009)*. As set forth above, the Court has detailed the reasons the settlement is fair.

The "bona fide dispute" requirement is not an issue here. The dispute between the parties centers on whether the overtime formula used by Liberty was compatible with the FLSA. Liberty argues that its formula provided proper overtime wages under the FWW approach to compensation. Plaintiffs on the other hand contend that they were entitled to more. A disagreements over "hours worked or compensation due" clearly establishes a bona fide dispute. *Hohnke v. United States., 69 Fed. Cl. 170, 175 (Fed. Cl. 2005)*. The institution of a federal court litigation followed aggressive prosecution and strenuous defense demonstrates the palpable bona fides of this dispute. See *Lynn's Food, 679 F.2d at 1354*; see also *D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 113 n.8, 66 S. Ct. 925, 90 L. Ed. 1114 (1946)*. **[*52]** The settlement, which provides time and one half each employee's hourly rate, represents "a reasonable compromise of disputed issues [rather] than a mere waiver of statutory rights brought about by an employer's overreaching." *Lynn's Food, 679 F.2d at 1354*. Accordingly, the Court approves the portion of the settlement resolving the FLSA claims.

D. Attorneys' Fees and Expenses

Class counsel also seeks an award of attorneys' fees and reimbursement of expenses in the amount of $990,000. This is a common fund case in which fees and costs come directly out of the recovery to the class. See generally *In re Cendant Corp. Litig., 264 F.3d at 256*. More specifically, class counsel seeks $978,353.16 in fees and $11,646.84 in out-of-pocket expenses. These amounts represent 32.61% and .39%, respectively, of the common fund. The Court notes preliminarily that it has received not a single objection pertaining to the proposed amount

of fees. See *Lenahan, 2006 U.S. Dist. LEXIS 60307,2006 WL 2085282, at *19* ("The lack of significant objections from the Class supports the reasonableness of the fee request.").

Courts in the Third Circuit employ the percentage-of-recovery method to award attorneys' fees in common fund cases. See *In re Gen. Motors, 55 F.3d at 821* **[*53]** (citing *Court Awarded Attorney Fees, 108 F.R.D. 237, 255 (1985)* (hereinafter Task Force Report)); see also Manual for Complex Litigation (Fourth) § 14.121, at 186 (2004). Indeed, it is the prevailing methodology used by courts in this Circuit for wage-and-hour cases. See, e.g., *In re Janney, 2009 U.S. Dist. LEXIS 60790, 2009 WL 2137224, at *14*; *Chemi v. Champion Mortg., No. 05-1238, 2009 U.S. Dist. LEXIS 44860, 2009 WL 1470429, at *10 (D.N.J. May 26, 2009)*; *Lenahan, 2006 U.S. Dist. LEXIS 60307, 2006 WL 2085282, at *19*. Under the percentage-of-recovery approach, the Court must determine whether the percentage of total recovery that the proposed award would allocate to attorneys fees is appropriate "based on the circumstances of the case." *In re Cendant Corp. Litig., 264 F.2d at 256*. The Court is primarily guided by seven factors identified by the Third Circuit:

> (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) **[*54]** the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (citations omitted); see also *In re AT&T Corp., 455 F.3d 160, 166 (3d Cir. 2006)* (noting that courts should also consider any other factors that are "useful and relevant" under the facts of each case) (citations omitted). Each case is different, however, and in some circumstances one single factor may outweigh the rest. See *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 301 (3d Cir. 2005)* (citing *Gunter, 223 F.3d at 195 n.1*). In addition to the Gunter factors, the Third Circuit has suggested that courts "cross-check" its fee calculation against the lodestar award method. *Gunter, 223 F.3d at 195 n.1*. Based on the reasons that follow, the Court finds that the fees requested by Class Counsel are appropriate given the facts of this case.

i. Size of Fund and Number of Persons Benefitted

As a general rule, the appropriate percentage awarded to class counsel decreases as the size of the fund increases. See *In re Cendant Corp. Prides Litig., 243 F.3d 722, 736 (3d Cir. 2002)* (citing Task Force Report, *108 F.R.D. at 256*). The inverse relationship is predicated on the belief that increases in recovery **[*55]** are usually a result of the size of the class and not a result of the efforts of counsel. See *Prudential II, 148 F.3d at 339* (quoting *In re First Fidelity Bancorp. Sec. Litig., 750 F. Supp. 160, 164 n.1 (D.N.J. 1990))*. The settlement achieved in this case, while substantial, does not create a "mega-fund." See *In re Cendant Corp. Prides Litig., 243 F.3d at 736-37*. Moreover, the results obtained represent a significant benefit in the face of the many legal and factual risks posed by litigation. The common fund is substantial in that it creates a common fund of $3 million for over one thousand class members. Smaller common funds have been found significant for classes of roughly the same size in other wage-and-hour cases. See, e.g., *In re Janney, 2009 U.S. Dist. LEXIS 60790, 2009 WL 2137224, at *14* ($2.9 million for 1,310 class members); *Chemi, 2009 U.S. Dist. LEXIS 44860, 2009 WL 1470429, at *10* ($1.2 million for 917 class members). The benefit to each class member is all the more significant in that it approximates 100% of the actual damages that they would collect if they prevailed at trial. See *Gunter, 223 F.3d at 199 n.5* (noting it may be prudent for courts to "to determine what percentage

of the plaintiffs' and class members' approximated **[*56]** actual damages the settlement figure represents" in light of the risk of non-recovery). The settlement therefore creates a substantial benefit for a large group of class members.

ii. Presence or Absence of Substantial Objections

The Notice sent out to each class member expressly advised them that class counsel would apply for an attorney fee award in the amount of 33% of the settlement fund. It also set out the procedure for objecting to the fee request. To date, the claims administrator has received no objections—either to the settlement terms generally or to the fee request specifically. The absence of any objection weighs in favor of the fee request. See *In re Rite Aid, 396 F.3d at 305*; *In re Janney, 2009 U.S. Dist. LEXIS 60790, 2009 WL 2137224, at *14*; *Chemi, 2009 U.S. Dist. LEXIS 44860, 2009 WL 1470429, at *11*.

iii. Skill and Efficiency of Class Counsel

The skill and efficiency of class counsel is "measured by 'the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel.'" *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D.Pa.2000)* **[*57]** (quoting *In re Computron Software, Inc., 6 F. Supp. 2d 313, 323 (D.N.J. 1998)*). As noted earlier, class counsel is highly experienced in complex wage-and-hour class action litigation. Based on the Court's experience in supervising this litigation, class counsel has demonstrated the utmost skill and professionalism in effectively managing these consolidated actions and bringing them to a successful conclusion. Defendants counsel are also savvy, experienced defense attorneys in wage-and-hour cases (March 4, 2011 Sweeney Decl. ¶ 9), and the ability to achieve a favorable result in a case involving such formidable defense counsel is a clear indication of the skill with which class counsel handled these cases. See *In re Elec. Carbon Prods. Antitrust Litig., 447 F. Supp. 2d 389, 407 (D.N.J. 2006)*. Class counsel's success in bringing this litigation to a conclusion prior to trial is another indication of the skill and efficiency of the attorneys involved. See *Gunter, 223 F.3d at 198* (noting that the percentage method encourages early settlements by efficient counsel (citing Manual on Complex Litigation (Third) § 24.121, at **[*58]** 207 (1997))). This factor therefore weighs in favor of the fee request.

iv. Hours Worked and Risk of Non-Payment

Courts consider the risk of non-payment in light of the Defendant's ability to satisfy an adverse judgment, *Yong Soon Oh v. AT&T Corp., 225 F.R.D. 142, 152 (D.N.J. 2004)*, or the risk of establishing liability at trial, *In re Cendant Corp., 232 F. Supp. 2d at 339*. Although the Court has no reason to believe Defendant could not satisfy an adverse judgment, supra, class counsel faces a risk of non-payment due to the difficulty of establishing liability at trial. Class counsel has prosecuted this case on a contingent basis, with no retainer. As described above, the case poses a number of genuine factual and legal risks. Liberty presents a strong defense that, if successful, could relieve the company from any liability. In short, class counsel undertook substantial risk that the litigation would yield little or no recovery and leave them completely uncompensated for their time.

Class counsel has expended over 1,800 hours in bringing this case to a favorable resolution. As reflected in the Sweeney declaration, the hours recorded were incurred investigating claims, interviewing putative **[*59]** class members, reviewing documents produced by Liberty, taking and defending depositions, drafting and defending several formal motions, responding to two motions

to dismiss, and engaging in extensive settlement negotiations. Given the complexity of the issues involved in this case and the activities performed to date, the hours incurred are entirely reasonable. The considerable amount of time devoted to this case, coupled with the risk of non-payment, also weighs in favor of the fee request.

v. Awards in Similar Cases

The requested fee is also consistent with awards in similar cases. To address this factor, the Court should (1) compare the actual award requested to awards in comparable settlements, and (2) ensure that the award is consistent with what an attorney would have likely received if the fee was negotiated on the open market. *Dewey, 728 F. Supp. 2d at 604*. In common fund cases, fee awards generally range anywhere from nineteen percent (19%) to forty-five percent (45%) of the settlement fund. See *In re Gen. Motors, 55 F.3d at 822* (citing *In re SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 533 (E.D. Pa. 1990)*). The fee requested in this case, which represents 32.6% **[*60]** of the settlement fund, clearly falls within this range and is entirely consistent with fee awards for similar wage-and-hour cases in this Circuit and throughout the country. See, e.g., *Lenahan, 2006 U.S. Dist. LEXIS 60307, 2006 WL 2085282, at *19* (thirty percent (30%)); *In re Janney, 2009 U.S. Dist. LEXIS 60790, 2009 WL 2137224, at *16* (thirty percent (30%)); Adeva v. Intertek USA Inc., No. 09-1096, ECF Entry No. 228 (D.N.J. Dec. 22, 2010) (thirty-four percent (34%)); Bernhard, No. 08-4392, ECF Entry No. 40 (D.N.J. Feb. 3, 2010) (thirty-three percent (33%)); see also, e.g., *Rotuna v. West Customer Mgmt. Group, LLC, No. 09-1608, 2010 U.S. Dist. LEXIS 58912, 2010 WL 2490989, at *7-*8 (N.D. Ohio June 15, 2010)* (thirty-three percent (33%)); *Khait v. Whirlpool Corp., No. 06-6381, 2010 U.S. Dist. LEXIS 4067, 2010 WL 2025106, at *8 (E.D.N.Y. Jan. 20 2010)* (thirty-three percent (33%)); *Stefaniak v. HSBC Bank USA, N.A., No. 05-720, 2008 U.S. Dist. LEXIS 53872* (thirty-three percent (33%)); *Gilliam v. Addicts Rehab. Ctr. Fund, No. 05-3452, 2008 U.S. Dist. LEXIS 23016, 2008 WL 782596, at *5 (S.D.N.Y. Mar. 24, 2008)* (thirty-three percent (33%)). The percentage award in this case is also consistent with prevailing contingent fee rates in non-class action cases. See *In re Lucent Tech., Sec. Litig., 327 F. Supp. 2d 426, 442 (D.N.J. 2006)* **[*61]** (observing "the customary contingent fee would likely range between 30% and 40% of the recovery."); *In re Ikon Office Solutions, 194 F.R.D. at 194* (same).

vi. Lodestar Cross-check

Finally, the requested fee is also supported by the Lodestar cross-check. The crosscheck is performed by calculating the "lodestar multiplier." *In re AT&T Corp., 455 F.3d at 164*. The multiplier is determined by dividing the requested fee award, determined from the percentage-of-recovery method, by the lodestar. Id. This figure represents "the contingent nature or risk involved in a particular case and the quality of the attorneys' work." *In re Rite Aid, 396 F.3d at 306* (citing Task Force Report, *108 F.R.D. at 243*). The Third Circuit has recognized that multiples "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *Prudential II, 148 F.3d at 341* (citing 3 Newberg on Class Actions § 14.03, at 14-5 (3d ed.1992)). However, the Court may consider reducing the percentage-of-recovery award when the multiplier is too high. See *In re Rite Aid, 396 F.3d at 306*.

In determining the lodestar for cross-check purposes, the Court need not engage in a "full-blown lodestar **[*62]** inquiry," *In re AT&T, 455 F.3d at 169 n.6* (citing *In re Rite Aid Corp., 396 F.3d at 307 n.16*), or "mathematical precision," *In re Rite Aid Corp., 396 F.3d at 306-07* (citing *Prudential II, 148 F.3d at 342*). Indeed, where, there have been no objections to the lodestar calculations, "a full-blown lodestar analysis is an unnecessary and inefficient use of judicial resources." *Dewey, 728 F. Supp. 2d at 592-93*

(citing *Weber, 262 F.R.D. at 451 n.10*). Counsel submits that their fees as calculated under the lodestar method are $520,142.75. The fee request under the percentage of recovery method represents 1.88 times the lodestar. The Third Circuit has approved a cross-check multiplier of 3 in a "relatively simple" case that did not involve the application of several state laws or carry risks as to liability. See *In re Cendant Corp. Prides Litig., 243 F.3d at 742*. The 1.88 multiplier in this case is therefore quite reasonable. It is a reflection of the risks assumed by class counsel in taking the case on a contingency basis and the level of skill they bring to this complex litigation. It was through their diligence that the parties were able to reach a favorable settlement prior to dispositive **[*63]** motion practice. The Court therefore finds that the requested fee is also supported by the Lodestar method.

vii. Expenses

The Court likewise finds that class counsels' request for reimbursement of $11,646.84 in actual out-of-pocket litigation expenses is appropriate given that such expenses have been adequately documented and are reasonable based on the circumstances of this case. See generally *In re Safety Components, Inc. Sec. Litig., 166 F. Supp. 2d 72, 108 (D.N.J. 2001)* ("Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." (citing *Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995)*)).

E. Service Payments to Named Plaintiffs

Class counsel also seeks incentive awards from the common fund in the amount of $10,000 for each named Plaintiff, totaling $80,000. Service payments are fairly common in class action lawsuits involving a common fund for distribution to the class. See *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 145 (E.D. Pa. 1990)* (quoting *In re S. Ohio Correctional Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997)*). The purpose of these payments **[*64]** is to compensate named plaintiffs for "the services they provided and the risks they incurred during the course of class action litigation," id., and to "reward the public service" of contributing to the enforcement of mandatory laws, see *In re Cendant, 232 F. Supp. 2d at 344* (citing *In re SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 535 (E.D. Pa. 1990)*; see also *Rodriguez v. West Publ'g Corp., 563 F.3d 948, 958-59 (9th Cir. 2009)* (describing utility of incentive awards). An incentive award that comes out of the payment allocated for attorneys fees need not be subject to intense scrutiny because the interests of the public and the defendants are not directly affected. See *In re Cendant, 232 F. Supp. 2d at 344* (citing *In re Presidential Life Sec., 857 F. Supp. 331, 337 (S.D.N.Y. 1994)*). Where the payments come out of the common fund independent of attorneys' fees, the Court must "carefully review" the request for fairness to other class members. See *Varacallo, 226 F.R.D. at 257*.

Courts have ample authority to award incentive or "service" payments to particular class members where the individual provided a benefit to the class or incurred risks during the course of litigation. **[*65]** See, e.g., *In re Elec. Carbon Prods. Antitrust Litig., 447 F. Supp. 2d at 412* ((citations omitted)); *Varacallo, 226 F.R.D. at 258*; *In re Cendant Corp., 232 F. Supp. 2d at 327* (citing *Brotherton v. Cleveland, 141 F. Supp. 2d 907, 913 (S.D. Ohio 1991)*; see also *Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)* (identifying factors relevant to awarding incentive payments (citing *Spicer v. Chicago Bd. Options Exchange, Inc., 844 F. Supp. 1226, 1267 (N.D. Ill. 1993)*).

Each of the named Plaintiffs devoted considerable time and effort into the prosecution of these cases. They provided detailed information on the job duties, contacted witnesses, set up meetings between class counsel and putative class members, executed declaration that were publicly filed with

the Court, produced personal documents, and relayed information to class members during the pendency of the litigation (Decl. of Michael J. Sweeney in Supp. of Pls.' Mot. for Service Payments ("Sweeney Decl. for Service Payments") ¶ 2 [CM/ECF No. 104]). Several prepared and sat for depositions (Id. ¶ 3). All prepared with class counsel for settlement negotiations, and several attended the mediation sessions in person (Id. ¶¶ 5, 8). **[*66]** None of the other class members engaged in similar activity. In fact, class counsel indicates that these cases would not have been possible without the initial groundwork performed by the lead Plaintiffs (Id. ¶ 10). The benefits that accrue to all class members under the settlement agreement are therefore a direct result of the services rendered by named Plaintiffs. See *Cullen, 197 F.R.D. at 146* ("[T]he assistance of the plaintiffs provided the foundation upon which this case was built."). In bringing these actions, named Plaintiffs also took on certain risks. By bringing suit against a major company in the travel business, they risk their good will and job security in the industry for the benefit of the class as a whole. See *Frank v. Eastman Kodak, Co., 228 F.R.D. 174, 187 (W.D.N.Y. 2005)* ("In employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers." (citing *Roberts v. Texaco, Inc., 979 F. Supp. 185, 201 (S.D.N.Y. 1997)*)).

In addition, the service payments sought are consistent, if **[*67]** not lower, than awards regularly provided in similar cases. See, e.g., *Dewey, 728 F. Supp.2d at 610* ($10,000); *In re Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Practice Litig., 263 F.R.D. 226, 245 (E.D. Pa. 2009)* (between $5,000 and $10,000); *Mehling v. N.Y. Life Ins. Co., 248 F.R.D. 455, 467 (E.D. Pa. 2008)*; *In re Elec. Carbon, 447 F. Supp. 2d at 412* ($12,000); *Varacallo, 226 F.R.D. at 259* ($3,000 to $10,000 for active plaintiffs); *In re Remeron End-Payor Antitrust Litig., No. 02-2007, 2005 U.S. Dist. LEXIS 27011, 2005 WL 2230314, at *32-*33 (D.N.J. Sept. 13, 2005)* ($30,000); see also 4 Newberg on Class Actions § 11.38, at 11-80 (citing empirical study from 2006 that found average award per class representative to be $16,000).

While the Court might normally compare the size of the service payment total to the size of the common fund in order to assess the impact of the award on other class members, it is unnecessary to do so in this case. Unlike other cases, the settlement is distributed on a claim-by-claim basis. Under the terms of the settlement, any unused funds revert to Liberty (Settlement Agmt. § III.B.1.g). With only 41.5% of the class participating, any decrease in the service payments would revert back **[*68]** to Liberty rather than be distributed to the class. Moreover, not one class member has filed an objection to the service enhancements despite a clear message in the claims notice that counsel would apply for "service payments" in the amount of $10,000 for each named Plaintiff (Settlement Notice 3). Accordingly, the Court awards service payments to each of the eight (8) named Plaintiffs in the amount of $10,000 each.

III. Conclusion

Based on the reasons set forth above, the Court: (a) certifies the state class for purposes of this settlement; (b) certifies the FLSA class for purposes of this settlement; (c) approves the proposed settlement agreement in its entirety; (d) awards class counsel the attorneys' fees and costs requested; and (e) awards the service payments requested. A separate Order accompanies this Opinion.

/s/ Mark Falk

MARK FALK

United States Magistrate Judge

Dated: April 8, 2011

End of Document

Exhibit 4

Positive
As of: March 26, 2026 6:49 PM Z

Chemi v. Champion Mortg.

United States District Court for the District of New Jersey

May 26, 2009, Decided; May 26, 2009, Filed

2:05-cv-1238 (WHW)

Reporter
2009 U.S. Dist. LEXIS 44860 *; 2009 WL 1470429

CHRISTOPHER CHEMI, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. CHAMPION MORTGAGE, KEYBANK NATIONAL ASSOCIATION AND KEYCORP, Defendants.

Notice: NOT FOR PUBLICATION

Prior History: *Chemi v. Champion Mortg., 2006 U.S. Dist. LEXIS 100917 (D.N.J., June 19, 2006)*

Core Terms

settlement, class member, Plaintiffs', attorney's fees, mortgage, factors, certification, final approval, class action, risks, expenses, overtime, parties, weighs, lodestar, predominance, named plaintiff, class certification, settlement agreement, similarly situated, consolidated, negotiated, courts, cases, collective action, common fund case, cross-check, estimation, skill, member of the class

Counsel: [*1] For **CHRISTOPHER CHEMI,** *Individually, and on Behalf of All Others Similarly Situated,* **BRIAN GAGLIARDI, Mary INTILE, MICHAEL LAURETT, SCOTT MOODY, Plaintiffs: JONATHAN I. NIRENBERG,** *LEAD ATTORNEY,* RESNICK, NIRENBERG & CASH, PC, EAST HANOVER, NJ.

For **DAVID CROCKETT, Plaintiff: JONATHAN I. NIRENBERG,** RESNICK, NIRENBERG & CASH, PC, EAST HANOVER, NJ.

For **CHAMPION MORTGAGE, KEYBANK NATIONAL ASSOCIATION, KEYCORP, Defendants: AMY L. VENTRY,** *LEAD ATTORNEY,* NIXON PEABODY LLP, JERICHO, NY.

Judges: William H. Walls, United States Senior District Judge.

Opinion by: William H. Walls

Opinion

FINAL APPROVAL OF CLASS SETTLEMENT

OPINION

Walls, Senior District Judge

THIS MATTER comes before the Court upon the motion of Christopher Chemi, Brian Gagliardi. Mary Intile, Michael Lauretti, Stefan Libert, David Crockett and Scott Moody individually and on behalf of the classes they represent and on behalf of all mortgage agents similarly situated (collectively "Plaintiffs") for an Order Certifying the Settlement Classes, Granting Incentive Awards to the named Plaintiffs. Granting Attorney's Fees to Plaintiffs' Counsel and Granting Final Approval of the Stipulation and Settlement Agreement between Plaintiff's and Defendants Champion Mortgage, **[*2]** Keybank National Association, and Keycorp. The Court grants Plaintiffs' motions.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Chemi filed his initial complaint on March 1, 2005, pursuant to the Fair Labor Standards Act of 1938 (the "FLSA"), *29 U.S.C. § 216(b)*, as a nationwide collective action to recover unpaid overtime compensation and related expenses allegedly owed to him and all other loan officer employees of Defendants. Plaintiffs and Defendants jointly moved for preliminary approval of class settlement on October 24, 2007. but the Court denied their motion on December 20, 2007. On January 24, 2008, Plaintiffs filed a renewed motion for preliminary approval of class settlement. On April 17, 2008, the Court sent counsel for all parties a letter with comments regarding certain amendments to the settlement agreement that the Court believed were necessary to enable preliminary approval. On June 24, 2008, the parties submitted a renegotiated settlement agreement ("Settlement"). The Court granted preliminary approval of the settlement agreement on July 31, 2008 with instructions to begin the process of notifying members of the class. On March 17, 2009, a final approval hearing was held **[*3]** where Plaintiffs' presented the results of the class notification process. No objections to final approval were raised by Defendants or any class members.

A. Settlement Agreement

The settlement agreement ("Settlement") defines the settlement class ("Class") as:

> All individuals who were employed as a Champion Loan Officer at any time from March 1, 2002 through February 28. 2007.

For purposes of the Settlement and the full and final resolution of the litigation, the parties stipulate to the certification of that Class under *Fed. R. Civ. P. 23(b)(3)* and *29 U.S.C. § 216(b)*. Defendants have agreed to pay the Class a maximum total settlement of $ 1.2 million. [1] Of this amount, the parties have agreed to allocate $ 250,000.00 for attorneys' fees and costs (approximately 20.83% of the total settlement), leaving $ 950,000.00 for payment to the Class. Plaintiffs also petition the Court for the payment of incentive awards to named Plaintiffs (i.e., $ 5,000.00 to Chemi, $ 3,000.00 each to Gagliardi and Intile, $ 2,000.00 to Libert, and $ 1,000.00 each to Lauretti, Moody, and Crockett).

Each Class member will receive a settlement payment which will be calculated by allocating to each of them a Share of the settlement, pursuant to a formula based on length of employment and regular rate of pay. In accordance with this Court's recommendation in its April 17, 2008 letter, the parties reorganized the Settlement to divide each Class Member's claim into two parts, each representing 50% of the Class Member's Share. The first part is each Class Member's Share under the consolidated state actions incorporated into the Settlement. All Class Member were deemed members of this claim unless they opted out. The second part of each Class Member's Share is their claim under the FLSA action incorporated into the Settlement. In order to receive this portion of their Share, each Class **[*5]** Member was required to sign and return a FLSA opt-in form ("Claim Form").

B. Notification of the Class

All Claim Forms and notices regarding the proposed settlement and pending class action were mailed by the claims administrator by August 20, 2008. According to Plaintiffs, 917 persons were mailed notices and claims forms using addresses provided by the Defendants. Of these 917

---

[1] This settlement amount was determined in the following manner. Based upon discovery, Plaintiffs estimated that loan **[*4]** officer employees of Defendants worked, on average, 7.5 overtime hours per two-week pay period. Using Class members' rates of pay, liquidated damages were determined by multiplying total unpaid wages by 2, yielding potential damages of $ 4,801,010.73. The settlement amount was then reduced during settlement negotiations based upon a series of factors, including likelihood of success and cost of litigation.

members, Plaintiffs inform the Court that 405 have opted-in to the FLSA settlement class. Opt-out notices and objections to the Settlement were required to be returned by November 17, 2008 and December 17, 2008, respectively. At the final approval hearing, Plaintiffs informed the court that no Class Member's had objected and only one member had opted-out.

Shares of Class members who did not timely submit Claim Forms will be allocated to a residual fund. The money from the residual fund will be used, first, to pay the incentive payments to named Plaintiffs and, then, to pay the administrative fees of the claim administrator in an amount not to exceed $ 10,000.00. If the residual fund is insufficient to cover the incentive awards or administrative fees, these expenses will be deducted from Class counsel's attorneys' **[*6]** fees. If, after these expenses, money remains in the residual fund, however, it will be distributed to each Class member as a Supplemental Share in the following manner:

> 1. Each Class member's Share will be divided by the total Shares for all Class members, in order to determine each Class member's respective percentage of the total Shares; and
>
> 2. That percentage will then be multiplied by the total Shares remaining in the residual fund, yielding each Class member's Supplemental Share.

Each Class member will receive a settlement payment in the amount of his Share plus his Supplemental Share.

STANDARDS

A. Class Certification

Fed. R. Civ. P. 23(e)(2) states the following:

> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> ***
>
> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

The Third Circuit has identified nine factors that bear on the fairness, reasonableness and adequacy of a settlement agreement:

> (1) [T]he complexity and **[*7]** duration of the ligation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785-86 (3d Cir. 1995) (citing *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*).

When certifying a settlement class, courts must follow the general requirements of *Rule 23* and, therefore, "a settlement class must satisfy the *Rule 23(a)* requirements of numerosity, commonality, typicality, and adequacy of representation and the *Rule 23(b)* requirements." *Prudential I, 962 F. Supp. at 508*. Additionally, where, as here, a settlement class is sought to be certified under *Rule 23(b)(3)*, the class must satisfy the Rule's superiority and predominance requirements.

B. Attorney's Fees

The Third Circuit has established two methods for

evaluating **[*8]** the award of attorneys' fees: (1) the lodestar approach, and (2) the percentage of the recovery approach. *General Motors, 55 F.3d at 820-21*; *Prudential II, 148 F.3d at 333*. The Third Circuit has emphasized that "[t]he percentage of recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)* (quoting *Prudential II, 148 F.3d at 333*).

In *Gunter v. Ridgewood Energy Corp., 223 F.3d 190. 195 (3d Cir. 2000)*, the Third Circuit set forth with specificity the factors that a court should consider in evaluating attorneys' fees:

> (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, 223 F.3d at 195 n.1*.

these factors **[*9]** regarding final approval of the Settlement, class certification and attorney's fees are considered in detail.

DISCUSSION

A. Final Approval of the Settlement

To determine whether Plaintiffs request for final approval of the Settlement should be granted, the Court must consider the 9 *General Motors* factors.

I. The complexity and duration of the ligation

This factor is "intended to capture 'the probable costs, in both time and money, of continued litigation.'" *General Motors. 55 F.3d at 811*. The Court must compare the Settlement to the time and expense of achieving a potentially more favorable result through further litigation. Where the complexity, expense and likely duration of litigation are significant, a Court should view this factor as weighing in favor of settlement. *In re The Prudential Insurance Co. of America Sales Practices Litig. ("Prudential I"), 962 F. Supp. 450, 536 (D.N.J. 1997).*

Due to the multi-jurisdictional nature of this dispute there is little doubt that litigation of each individual class member's claims would be complex and costly. Each claim would require significant time for both motions practice and trial. It is also likely that additional time for appeals would also **[*10]** be required. The Settlement, however, provides substantial and immediate benefits for the Class, undiminished by further expenses and without the risk and uncertainty of continued litigation. This factor weighs in favor of approving the Settlement.

II. The reaction of the class to the settlement

This factor instructs the Court to look to the reaction of the class to the settlement in determining whether to grant final approval. See *In re Cendant Corp. Litig., 264 F.3d 201, 231-32 (3d Cir. 2001)*. A largely positive reaction from the class is persuasive evidence of the fairness and adequacy of the Settlement. See *In re Prudential Insurance Co. America Sales Practice Agent Actions ("Prudential II"), 148 F.3d 283, 318 (3d Cir. 1998)* (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected).

Plaintiff's report in their brief that 405 of the 917 Class Members have opted into the FLSA settlement and that only one member has opted out of the state law settlement. No objections to the Settlement have been received. Plaintiffs argue that the "utter absence of objections from the class itself militates strongly in favor of approval **[*11]** of the Settlement." *Sala v. National R. Passenger Corp., 721 F. Supp. 80, 83 (E.D. Pa. 1989)* see also *In re*

Cendant, 264 F.3d at 231-32. The Court agrees with Plaintiffs and finds that the lack of objections and single opt-out weigh in favor of final approval of the Settlement.

III. The stage of the proceedings

This factor requires the Court to examine the level of case development that transpired prior to settlement. The aim of this factor, therefore, is to ensure that class counsel has an "adequate appreciation of the merits of the case before negotiating" a settlement. *Prudential II, 148 F.3d at 319* (quoting *General Motors, 55 F.3d at 813*).

Plaintiffs argue that they have already conducted a considerable amount of discovery in this case, including depositions of key witnesses and the review of documentary evidence. The parties have also conducted lengthy negotiation and renegotiation of the Settlement. In light of this considerable investigation and negotiation, the Court finds that all parties have an "adequate appreciation of the merits of the case."

IV. The risks of establishing liability and damages

The fourth and fifth *General Motors* factors consider the risk of establishing liability **[*12]** at trial in order to balance the parties' relative likelihood of success against the immediate benefits derived from a settlement. See *Prudential II, 148 F.3d at 319*. Additionally, these factors "attempt[ ] to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant, 264 F.3d at 239*. To the extent that establishing damages is contingent upon liability, many of the same risks will be present in each analysis.

Here, Plaintiffs face the initial hurdle of proving Defendants' liability under both FLSA and state wage and hour laws. The Settlement terms do not include any admission of liability by Defendants. If this matter were to proceed to trial, it is likely that Defendants would present numerous affirmative defenses regarding the Class Members claims to uncompensated overtime pay. The lack of documentation regarding overtime hours also creates a significant risk that Plaintiffs' assumptions in regards to uncompensated overtime would be vehemently questioned by Defendants. Weighing these risks of litigation against the definite and immediate resolution of these claims through the Settlement, the Court concludes that litigation is unlikely **[*13]** to produce any additional "value" to the Class Members.

V. The risks of maintaining a class action

"[T]he prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed at trial." *Warfarin, 391 F.3d at 537*. This factor is relevant since the Court has thus far only approved *preliminary* certification of the Class.

Plaintiffs argue that although they are confident they could obtain and maintain class certification throughout litigation of this case, there are significant risks that de-certification could occur. Plaintiffs first point to the fact that Defendants "could challenge both the *Rule 23* class certification and the FLSA collective certification." (Pls' Brief at 15). Plaintiffs' also note that "because of prior rulings… the law could change insofar as the perception of a potential conflict… between the opt-in… and opt-out procedures." (Id.).

Plaintiffs' first argument regarding a possible challenge by Defendants to certification is persuasive since considerable negotiation regarding the scope of the Class **[*14]** has already occurred, suggesting that certification would be hotly contested if this matter were to proceed to further litigation. However, Plaintiffs' second argument regarding the prospect of decertification due to a change in the law of this Circuit is entirely speculative. In sum, there is a risk that obtaining certification may be unsuccessful but minimal risk that, once obtained, decertification would occur. Viewed together, these risks weigh slightly in favor of final approval.

VI. The ability of the defendants to withstand a greater judgment

This factor considers "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *In re Cendant, 264 F.3d at 240*. There has been no evidence presented to this Court regarding Defendants ability to pay. However, as Plaintiffs point out, there is considerable financial turmoil in the mortgage industry, creating some doubt about Defendants ability to withstand a larger judgement in the future. Defendants inability to withstand a greater judgement is speculative at best. This factor neither supports nor erodes final approval of the Settlement. See *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 538 (3d. Cir. 2004)*.

VII. **[*15]** The range of reasonableness of the settlement in light of the best recovery and all the attendant risks of litigation

The last two *General Motors* factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. These factors examine "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Warfarin, 391 F.3d at 538*.

Plaintiffs estimate that the Settlement amount is "estimated at 50% of possible recover." (Pls' Brief at 17). While this is significantly less than the "best recovery" the Class could obtain if this matter were to continue to trial, it is not such a significant difference that this Court should bar approval of the Settlement. See *Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 628 (9th Cir. 1982)* ("there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery"). Given the magnitude of the risks in litigation discussed above, the Settlement represents a fair and adequate recovery.

In summary, the majority of the *General Motors* **[*16]** factors weigh in favor of approving the Settlement.

B. Class Certification

The Court has up until now only approved a preliminary certification of the Class for the purposes of settlement negotiations. The parties now seek final approval of the Class as defined in the Settlement. The Class is divided into two parts, the first being the class of members seeking compensation under the consolidated state wage and hour claims and the second being the class of members seeking compensation under FLSA. The state claims class ("State Class") is subject to the requirements of *Federal Rule of Civil Procedure 23*. The FLSA claims class ("Federal Class") is subject to the collective action requirements in *29 U.S.C. § 216(b)*. Each set of requirements is considered in detail below.

I. The State Class

Rule 23 of the Federal Rules of Civil Procedure allows this Court to certify a class for settlement purposes only. *Prudential I, 962 F. Supp. 450, 508 (D.N.J. 1997)*. A settlement class is "a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments **[*17]** against certification." *General Motors, 55 F.3d 768, 786 (3d Cir. 1995)*. When certifying a settlement class, courts must follow the general requirements of *Rule 23* and, therefore, "a settlement class must satisfy the *Rule 23(a)* requirements of numerosity, commonality, typicality, and adequacy of representation and the *Rule 23(b)* requirements." *Prudential I, 962 F. Supp. at 508*. Additionally, where, as here, a settlement class is sought to be certified under *Rule 23(b)(3)*, the class must satisfy the Rule's superiority and predominance requirements.

I. *Numerosity*

Rule 23(a)(1) provides that a class action may be maintained only if "the class is so numerous that joinder of all members is impracticable." The numerosity requirement of Rule 23(b)(1) does not require joinder to be impossible. "To meet the numerosity requirement, class representatives must demonstrate only that 'common sense' suggests that it would be difficult or inconvenient to join all class members." Prudential I, *962 F. Supp. at 510* (citing Lerch v. Citizens First Bancorp. Inc., 144 F.R.D. 247, 250 (D.N.J. 1992)).

When dealing with a class that numbers in the hundreds, joinder will most often be impracticable. See Newberg **[*18]** on Class Actions (4th Ed. 2007) § 305 (class of 40 or more raises presumption that numerosity requirement met). The State Class contains over 900 members. In light of the significant class size, the Court finds that Rule 23(a)(1) is satisfied.

ii. *Commonality and Predominance*

Rule 23(a)(2) requires there be "questions of law or fact common to the class." Rule 23(b)(3) requires that these common issues of law or fact "predominate over any questions affecting only individual members." The predominance requirement of Rule 23(b)(3) is a more exacting standard and, therefore, incorporates the Rule 23(a) commonality analysis. See Warfarin, 391 F.3d 516, 528 (3d. Cir. 2004). Accordingly, the two factors are commonly considered together. See Id.; see also In re LifeUSA Holding, Inc., 242 F.3d 136, 144 (3d. Cir. 2001); Prudential I, *962 F. Supp. at 510*.

The commonality requirement of Rule 23(a)(2) is satisfied if there is at least one question of fact or law common to the class. See In re Baby Neal, 43 F.3d 48, 56 (3d Cir. 1994). Here, the commonality requirement is met because the state claims asserted with respect to Champion Mortgage's overtime compensation policy present common operative facts **[*19]** and common questions of law.

For the class to be certified under Rule 23(b)(3), which the parties are seeking here, this Court must also find that these common questions predominate over individual issues. "To evaluate predominance, the Court must determine whether the efficiencies gained by class resolution of the common issues are outweighed by individual issues presented for adjudication." Prudential I, *962 F. Supp. at 510-11*. At the core of this settlement is Champion Mortgage's belief that its mortgage agents did not qualify for overtime compensation. Each State Class member shares a similar legal question: whether the alleged failure to pay mortgage agents for overtime is a violation of applicable state wage laws. This common question shared by class members predominate over any factual variations regarding individual mortgage agent's claims, such as the number of hours worked or the hourly wage. These individual issues affect only the mortgage agent's potential damages, but not the nature or legal basis of the State Class claims. See Prudential I, *962 F. Supp. at 517* ("Individual damages issues do not defeat an otherwise valid class certification attempt"); see also Baby Neal, 43 F.3d at 57.

Similarly, **[*20]** variations between the wage and hour laws of different states are not sufficient to defeat predominance for the State Class. See Warfarin, 391 F.3d at 529-30; Prudential II, 148 F.3d at 313-315. Certification of litigation classes with claims arising under the laws of several states requires a court to determine whether such state law variations render class action litigation unmanageable. See In re Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986). These concerns of case manageability, however, are not present in the context of a class being certified for settlement purposes only. See Warfarin, 391 F.3d at 529 ("when dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes"); Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). Here, since the class is not being certified for litigation purposes, predominance is not defeated by variations in state laws.

iii. *Typicality*

Rule 23 also requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FRCP 23(a)(3). "Typicality lies where there is a strong similarity **[*21]** of legal theories or where the claims fo the class representatives and class members arise from the same alleged course of conduct by the defendant." *Prudential I, 962 F. Supp. at 518* (citations omitted). Even where there may be factual differences between the claims of the class representatives and other class members, it does not rule out a finding of typicality. *In re Lucent Technologies. Inc., Sec. Litig., 307 F. Supp. 2d 633, 640 (D.N.J. 2004)* (citing *Prudential II, 148 F.3d at 310*). Here, the same allegedly unlawful conduct affected both the named Plaintiffs and the putative class members, all of whom are former mortgage agents at Champion Mortgage. Both the named Plaintiffs and the State Class members have alleged that Champion Mortgage's failure to compensate mortgage agents for overtime work violated the applicable state wage and hour laws. This Court finds that the typicality requirement of *Rule 23(a)(3)* is also satisfied.

iv. *Adequacy of Representation*

Rule 23(a)(4) requires that the "representative parties fairly and adequately represent the interests of the class." *F.R.C.P. 23(a)(4)*. To determine whether a class is adequately represented, courts look to two factors: "(1) **[*22]** the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiff must not have interests antagonistic to those of the class." *Prudential I, 962 F. Supp. at 519*. Those standards are met here.

Named Plaintiffs and their counsel have prosecuted this action vigorously on behalf of the class. According to their resumes, Plaintiffs' counsel are experienced in this subject matter and have prosecuted a number of class action lawsuits in the employment and overtime wage context. (Pls' Brief Ex. A). Furthermore, under the proposed settlement, all class members who submitted timely claims, including the named Plaintiffs, will receive a pro-rata portion of the settlement fund based upon estimations of their wage and hours worked. As such, there appears to be no conflict of interest in the settlement allocations. The Court is satisfied that the *Rule 23(a)(4)* adequate representation requirement is met.

v. *Superiority*

Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." The Rule provides the Court with four nonexclusive factors to aid in this **[*23]** determination: (1) the interest of members of the class in individually controlling the litigation of separate claims; (2) the extent to which litigation concerning the current controversy had already been commenced by members of the class; (3) the desirability of concentrating claims in a given forum; and (4) difficulties in management of the litigation if pursued as a class action. *FRCP 23(b)(3)(A)-(D)*.

In this case, a settlement of the class action is the superior method for litigation of the State Class claims. The size and scope of the State Class weighs in favor of class certification. "As the case becomes larger and more geographically dispersed, the traditional alternatives of joinder, consolidation, and intervention will be impracticable." *Prudential I, 962 F. Supp. at 523* (citing Newberg § 4.33, at 4-136 to 4-137). The State Class includes mortgage agents in five different states making traditional methods of joinder and consolidation impracticable. Additionally, the amount of recovery that each State Class member will receive is relatively modest, leaving individual class members with minimal incentive and little ability to litigate their claims against Champion Mortgage **[*24]** independently. The alternative to class action litigation is for individual mortgage agents to bring multiple, individual lawsuits for their small amount of damages. This alternative would be uneconomical for potential individual plaintiffs as

litigation costs could dwarf any potential recovery. Here, a class action would facilitate the spreading of litigation costs among Plaintiffs. See *Prudential II, 148 F.3d at 315-16*. Moreover, the few State Class members who have commenced their own actions have agreed to consolidate their claims into the Settlement and join this action as named Plaintiffs.

In the context of a settlement class action, concerns regarding litigation management and the desirability of concentrating the litigation in a particular forum are insignificant. See *Amchem, 521 U.S. at 620* (stating that when confronted with a settlement-only class certification, a district court need not be concerned with issues of manageability if the case went to trial, because the point of the settlement is that there will be no trial.) Considering the difficulty individual mortgage agents would suffer if forced to bring individual state claims, the Court finds that "the class action is **[*25]** not only the superior method for adjudicating this controversy, it affords the vast majority of class members the only practical avenue of redress." *Prudential I, 962 F. Supp. at 522*.

In summary, certification of the State Class for the Settlement is the superior choice for all class members since common issues and facts predominate and it would be impracticable for individual members to pursue their own claims. We now turn to the certification of the Federal Class as a collective action under the FLSA.

II. The Federal Class

The Federal Class raises only FLSA claims and has already been conditionally certified as a collective action pursuant to *29 U.S.C. § 216(b)*. *Section 216(b) of the FLSA*, states that "an action. . . may be maintained [under the FLSA]. . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *29 U.S.C. § 216(b) (1982)*. Unlike the class action requirements under *Rule 23*, *§ 216(b)* requires class members to "opt-in" by affirmatively indicating their consent to be part of the class. See *Sperling v. Hoffman-La Roche. Inc., 862 F.2d 439, 444 (3d Cir. 1988)*. *Section 216(b)* mandates that "[n]o employee shall be a party **[*26]** plaintiff to any such action [under the FLSA] unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought." *29 U.S.C. § 216(b)*.

Under *§ 216(b)*, there are two threshold requirements for an action to proceed as a collective action: (1) class members must be "similarly situated" and (2) all members must affirmatively consent to join the action. Id. The FLSA does not define "similarly situated" and neither the Third Circuit nor the Supreme Court have expounded a test for making such a determination. In the absence of such guidance, district courts have established a two-tier test to determine who are "similarly situated' employees under *§ 216(b)*. See *Morisky v. PSE&G Co., 111 F. Supp. 2d 493, 497 (D.N.J. 2000)*; *Moeck v. Gray Supply Corp., 2006 U.S. Dist. LEXIS 511, 2006 WL 42368, * 4 (D.N.J. 2006)*; *Bayles v. American Med. Response of Colorado. Inc., 950 F. Supp. 1053, 1066-67 (D.Colo. 1997)*. A court first makes a determination during the "notice stage" -- which this Court already made -- in response to Plaintiffs' motion for preliminary approval of the Settlement. See *Morisky, 111 F. Supp. 2d at 497*. The determination at preliminary stage involves **[*27]** a lenient standard and generally results in "conditional certification" of a class. Id.

Later, after discovery is largely complete and the case is ready for trial the court will make a second determination. *Morisky, 111 F. Supp. 2d at 497*. At this stage the court will have more information on which to base its decision and, therefore, will employ a stricter standard. Id. If, under the more stringent standard, the court determines that plaintiffs are similarly situated, the case will proceed as a collective action. Id.

There has been no objection filed to this Court's "conditional certification" of the Federal Class or any other change to suggest that Federal Class

members are no longer "similarly situated." The Federal Class members are all former mortgage agent's asserting claims regarding Champion Mortgage's failure to provide overtime wages as required by the FLSA. The Court finds that the 917 Federal Class members remain similarly situated and certifies this action as a collective action under *§ 216(b)*.

C. Attorney's Fees

Plaintiffs' also request final approval of the $ 250,000.00 attorney's fees/costs negotiated under the Settlement. Plaintiffs' counsel argues that these fees are "extremely **[*28]** modest" and amount to less than 21% of the "gross Class settlement fund." (Pls' Brief at 18). The request for attorney's fees is unopposed.

I. Attorneys' Fees

The Third Circuit has established two methods for evaluating the award of attorneys' fees: (1) the lodestar approach, and (2) the percentage of the recovery approach. *General Motors, 55 F.3d at 820-21*; *Prudential II, 148 F.3d at 333*. The Third Circuit has emphasized that "[t]he percentage of recovery method is generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)* (quoting *Prudential II, 148 F.3d at 333*). The Court finds that the percentage of fund method is the proper method for compensating Plaintiffs' counsel in this common fund case.

In *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000)*, the Third Circuit set forth with specificity the factors that a court should consider in evaluating attorneys' fees under the percentage of fund method. The Gunter factors include:

> (1) the size of the fund created and the number of persons benefitted; **[*29]** (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, 223 F.3d at 195 n.1. In Gunter, the Circuit also directed District Courts to "cross-check the percentage award at which [it] arrive[s] against the 'lodestar' award method, which is normally employed in statutory fee-award cases." Id. The Third Circuit has noted three additional factors that may be considered when analyzing the propriety of an attorneys' fees award, namely (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 164*. (citing *Prudential II, 148 F.3d at 338-40*). **[*30]** Although the analysis of the aforementioned seven factors may somewhat overlap with the factors considered under the General Motors test to examine the appropriateness of the Settlement, this Court will nonetheless consider each factor in turn.

I. *The size of the fund created and the number of persons benefitted*

"As a general rule, as the size of a fund increases, the appropriate percentage to be awarded to counsel decreases." *In re Cendant, 232 F. Supp. 2d at 337*. This rule is based on the premise that, "in many instances[,] the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." Id. (quoting *Prudential II, 148 F.3d at 339*).

Plaintiffs argue that their fees, which constitute 21% of the Settlement, are reasonable in light of awards of 25% to 30% in what they term "mega

fund" cases. (Pls' Atty. Brief at 4) (citing *In re Rite Aid, 396 F.3d at 298*). While the current matter does not qualify as a "very large settlement" it is still significant that Plaintiffs have secured $ 1.2 million for the 917 class members. See *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 737 n.19 (3d Cir. 2001)* (recognizing $ 100,000,000 as **[*31]** the marker of a very large settlement). It is also significant that counsel has secured this settlement in the face of considerable litigation challenges surrounding certification of the class and estimation of unpaid overtime hours. This factors weighs in favor of Plaintiffs' request for attorney's fees.

ii. *The presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel*

As noted, there are no objections to the Settlement by any of the State or Federal Class members. This absence of objections weighs in favor of Plaintiffs' request.

iii. *The skill and efficiency of the attorneys involved*

The skill and efficiency of the attorneys involved is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D.Pa. 2000)*. Here, Plaintiffs' counsel includes attorneys with significant employment law and class action experience. (Resumes, **[*32]** Pls' Brief Ex.A). The settlement entered with Defendants is a reflection of Plaintiffs' counsel's skill and experience. See *Warfarin, 212 F.R.D. at 261* (class counsel "showed their effectiveness through the favorable cash settlement they were able to obtain"). The only indication of inefficiency was the fact that Plaintiffs required three motions for preliminary certification and four amended complaints before finally presenting the Court with an acceptable settlement agreement. However, this lengthy process was likely the result of the difficulty of consolidating the various state claims and not a reflection of Plaintiffs' counsel's lack of skill. This factor weighs in favor, although only slightly, of the Plaintiffs' request.

iv. *The complexity and duration of the litigation*

As discussed above, if this case were to proceed to trial Plaintiffs would have to contend with many complex legal issues such as certification of the class, classification of Plaintiffs under the applicable state labor laws and the estimation of the amount of unpaid overtime hours. The complexity of the issues involved in this case supports approval of the attorneys' fees award.

v. *The* ***[*33]*** *risk of nonpayment by Defendants*

Plaintiffs again raise the specter of financial difficulties in the mortgage industry to support their argument that a large award may have been difficult to satisfy if Plaintiffs had prevailed at trial. (Pls' Atty. Brief at 5-6). Since this danger is entirely speculative, this factor does not weigh for or against Plaintiffs' request for attorney's fees.

vi. *The amount of time devoted to the case by plaintiffs' counsel*

In their brief, Plaintiffs' write that "class counsel devoted over 1400 hours in this case… [t]his results in fees of less than $ 150 per hour." (Pls' Atty. Brief at 6). The Court is unable to verify this claim since Plaintiffs have not submitted a summary of counsel's billed hours for this matter, only a summary of the expenses incurred. (Pls' Atty. Brief Ex. A, Ex. B). The cost estimates submitted by Touhy, Touhy Buehler & Williams are also uninformative since the descriptions of a majority of the line items are either blank or simply refer to an invoice number. Nonetheless, the Court has no reason to doubt the veracity of counsel's estimation of an average hourly rate of $ 150 for the work required to secure the Settlement. Counsel's **[*34]** devotion of considerable time to this matter weighs in favor of the approval of attorney's fees.

vii. *The awards in similar cases*

This seventh and final *Gunter* factor involves a comparison of the fee request with attorneys' fees awarded in similar cases. Attorneys' fees of 30% are common in this Circuit. See *In re Rite Aid, 396 F.3d at 300* (review of 289 settlements demonstrates "average attorney's fee percentage [of] 31.71%" with a median value that "turns out to be one-third"); *General Motors, 55 F.3d at 822*. Attorneys' fees of approximately 30 percent of the common fund are also regularly awarded in labor and employment class actions. See *In re Safety Components. Inc. Sec. Litig., 166 F Supp. 2d 72, 102 (D.N.J. 2001)* (granting award of 33 1/3 % in common fund case and citing to ten cases from this Circuit holding the same); see also *Erie County Retirees Assoc. v. County of Erie, Pennsylvania, 192 F. Supp. 2d 369, 382-83 (W.D. Pa. 2002)* (38% of common fund was awarded in ADEA case). The percentage requested by Plaintiffs (21%) is reasonable when compared to fee awards in other cases.

viii. *Lodestar cross-check*

The Third Circuit has suggested it is sensible for a court to use a second **[*35]** method to cross-check its initial fee calculation. See *In re Rite Aid, 396 F.3d at 300*. However, the "lodestar cross-check does not trump the primary reliance on the percentage of common fund method." Id.; see *In re Cendant, 264 F.3d at 285* ("The lodestar cross-check, however, is very time consuming. Thus, while the Court should in the first instance test the presumption, if challenged, by the *Gunter* factors, it may, if necessary, utilize the lodestar cross-check."). To apply the lodestar method, the Court must examine the number of hours Plaintiffs' counsel worked and the rate for these lawyers' services, and multiply the number of hours worked by the hourly rate. The Court can also multiply the hourly rate by a lodestar multiplier to reflect the risks of nonpayment facing counsel. *Prudential II, 148 F.3d at 340-41*. According to their submissions, counsel spent 1,950 hours on the litigation, and had an average mixed hourly rate of $ 350. (Pls' Atty. Brief Ex. A). This results in a lodestar of approximately $ 683,500. Given the fee counsel has requested, the multiplier under the Cendant Prides formula is 1. See In *Re Cendant PRIDES, 243 F.3d 722*.

In In Re Cendant PRIDES, the Third Circuit **[*36]** ruled that a multiplier of 3 was an appropriate ceiling. *243 F.3d at 742*. In Prudential II, the Third Circuit noted, based on a review of common fund cases, "[m]ultipliers ranging from one to four are frequently awarded in common fund cases, when the lodestar method is applied." *148 F.3d at 341*. Accordingly, the Court finds that the requested fee of $ 250,000 is reasonable when measured by the lodestar cross-check.

ix. *Expenses*

In addition to their request for attorneys' fees, Plaintiffs' counsel seeks reimbursement of costs and expenses. This request is a portion of the total $ 250,000 requested by Plaintiffs' counsel, resulting in a breakdown of $ 205,100.29 for attorney's fees and $ 44,899.71 for expenses. In common fund cases, counsel is "entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case." *In re Cendant, 232 F. Supp. 2d at 343*. The scope of reimbursable expenses is broad. See *Oh v. AT & T Corp., 225 F.R.D. 142, 154 (D.N.J. 2004)* (finding expenses such as "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express service, (6) **[*37]** telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund pro hac vice." to be reasonable). As noted, while the summary of expenses attached to the affidavit's filed by Plaintiffs in support of their request for expenses does not provide considerable detail it is sufficient to satisfy the Court that the expenses requested by Plaintiffs' counsel are

reasonable.

D. Incentive Award

Numerous courts have recognized the authority to award compensation to named plaintiffs in class action litigation. See. e.g., *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 145 (E.D. Pa. 2000)* ("[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." (quoting *In re S. Ohio Corr. Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997)))*. The incentive awards requested here are to reward the individually-named plaintiffs for their initiative in filing the state and federal claims that were eventually consolidated into the Settlement. According to Plaintiffs' **[*38]** brief, Plaintiff Chemi is singled out for the highest reward ($ 5,000.00) for "taking the lead in this litigation" and being "extremely active in this case." (Pls' Brief at 20). Mr. Gagliardi and Ms. Intile are to be awarded $ 3,000.00 each for "providing counsel with documents and information during discovery" and making themselves available for depositions. (Id.) Messrs. Lauretti, Moody and Crockett are to be awarded $ 1,000.00 each for filing initial state claims in New York, Massachusetts and Maryland, respectively, and agreed to consolidate their claims into the Settlement. The Court finds these incentive award's to be reasonable in light of the considerable time that the lead Plaintiffs invested in the outcome of the Settlement.

CONCLUSION

When considered under the various factors discussed above, the evidence presented by Plaintiffs weighs in favor of final approval of the Settlement. The Court **GRANTS** Plaintiffs' request for final approval of the Settlement and the request for attorney's fees and costs.

/s/ William H. Walls 26 May 2009

United States Senior District Judge

End of Document

Exhibit 5

Caution
As of: March 26, 2026 6:51 PM Z

In re Remeron Direct Purchaser Antitrust Litig.

United States District Court for the District of New Jersey

November 9, 2005, Decided ; November 9, 2005, Filed

Civil No. 03-0085 (FSH)

Reporter
2005 U.S. Dist. LEXIS 27013 *; 2005-2 Trade Cas. (CCH) P75,061

IN RE REMERON DIRECT PURCHASER ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

Notice: [*1] NOT FOR PUBLICATION

Subsequent History: Judgment entered by, Dismissed by *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27012 (D.N.J., Nov. 9, 2005)*

Prior History: *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 47058 (D.N.J., Aug. 30, 2005)*

Core Terms

settlement, class action, class member, incentive award, settlement fund, attorney's fees, antitrust, discovery, negotiate, patent, notice, named plaintiff, reimbursement, estimate, generic, mediate, class certification, contingent, million settlement, lodestar, proposed settlement, antitrust action, summary judgment, pharmaceutical, orange, skill, overarching, multiplier, weigh, percentage-of-the-fund

Case Summary

Procedural Posture
Plaintiffs, a class of direct purchasers of an anti-depressant drug, sued defendants, the manufacturers of the drug, alleging various patent and antitrust violations. The parties sought final approval of their settlement agreement, which included a plan of allocation, award of attorneys' fees, reimbursement of litigation expenses, and incentive awards to certain individual plaintiffs in the class.

Overview

The complaint alleged that the manufacturers violated *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, by using various illegal and deceptive means as part of an overall scheme to improperly create and extend patent protection for a drug. The manufacturers' conduct allegedly delayed the market entry of less expensive generic versions of the drug, thereby forcing direct purchasers to pay artificially inflated prices for both the manufacturers' drug and its generic equivalents. After more than three years of hotly contested litigation, the parties reached a settlement that included the establishment of a $75 million common fund. One third of that fund was to be allocated to the purchasers' attorneys. The court analyzed the settlement, employing a nine-factor test, and concluded that the settlement was fair, adequate, and reasonable under *Fed. R. Civ. P. 23(e)*. The court also found that the attorneys' fees were reasonable and in line with similar cases. Finally, the court found it proper to award two individual plaintiffs $30,000 each for their involvement in the case, noting that no class member had objected to such incentive awards.

Outcome
The court approved the final settlement proposed by the parties.

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements

HN1 **Class Actions, Judicial Discretion**

The United States Court of Appeals for the Third Circuit affords an initial presumption of fairness for a settlement if the court finds that: (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.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements

HN2 **Class Actions, Judicial Discretion**

A class action may be settled under *Fed. R. Civ. P. 23(e)* upon a judicial finding that the settlement is fair, reasonable, and adequate. *Fed. R. Civ. P. 23(e)(1)(C)*. Under *Rule 23(e)*, the court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. The range recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements

HN3 **Class Actions, Judicial Discretion**

To determine whether a settlement is fair, reasonable and adequate under *Fed. R. Civ. P. 23(e)*, the United States Court of Appeals for the Third Circuit applies a nine-factor test. These factors are: (a) The complexity, expense, and likely duration of the litigation; (b) the reaction of the class to the settlement; (c) the stage of the proceedings and the amount of discovery completed; (d) the risks of establishing liability; (e) the risks of establishing damages; (f) the risks of maintaining the class action through the trial; (g) the ability of the defendants to withstand a greater judgment; (h) the range of reasonableness of the settlement fund in light of the best possible recovery; and (i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements

HN4 **Class Actions, Judicial Discretion**

Where a class is comprised of sophisticated business entities that can be expected to oppose any settlement they find unreasonable, the lack of objections indicates the appropriateness of the settlement.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Settlements

HN5 **Class Actions, Judicial Discretion**

An assessment of the reasonableness of a proposed settlement seeking monetary relief requires analysis of the present value of the damages a plaintiff would likely recover if successful, appropriately discounted for the risk of not prevailing. In order to

evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain.

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > Settlements

HN6 **Special Proceedings, Class Actions**

A court evaluating a proposed class action settlement should consider whether the settlement represents a good value for a weak case or a poor value for a strong case.

Civil Procedure > Special Proceedings > Class Actions

HN7 **Special Proceedings, Class Actions**

As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate. In evaluating the formula for apportioning the settlement fund, the court keeps in mind that district courts enjoy broad supervisory powers over the administration of class action settlements to allocate the proceeds among the claiming class members equitably.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN8 **Class Actions, Judicial Discretion**

For purposes of attorneys' fees, the percentage of recovery method is generally favored in cases involving a common fund, and is designed to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN9 **Class Actions, Judicial Discretion**

The United States Court of Appeals for the Third Circuit set forth with specificity the factors that a court should consider in evaluating requested attorneys' fees in Gunter v. Ridgewood Energy Corp. The Gunter factors need not be applied in a formulaic way, and their weight may vary on a case-by-case basis. The Gunter factors include (a) the size of the fund created and number of persons benefitting from the settlement, (b) the presence/absence of substantial objections to the fee, (c) the skill of the plaintiffs' counsel, (d) complexity and duration of the litigation, (e) the risk of nonpayment, (f) amount of time devoted to the litigation, (g) awards in similar cases.

Civil Procedure > Special Proceedings > Class Actions

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN10 **Special Proceedings, Class Actions**

A determination of a fair attorney fee must include consideration of the sometimes undesirable characteristics of contingent antitrust actions, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN11 **Class Actions, Judicial Discretion**

The percentage-of-the-fund method of awarding attorneys' fees in class actions should approximate the fee which would be negotiated if the lawyer were offering his or her services in the private marketplace. The object is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation. In determining the market price for such services, evidence of negotiated fee arrangements in comparable litigation should be examined.

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN12 **Class Actions, Judicial Discretion**

For purposes of attorney fee award, in addition to the percentage-of-the-fund approach, the United States Court of Appeals for the Third Circuit has suggested that it is sensible for district courts to cross-check the percentage fee award against the lodestar method. A lodestar cross-check is not a Gunter factor but is a suggested practice. The Third Circuit has recognized that multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN13 **Costs & Attorney Fees, Costs**

Counsel in common fund cases are entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the case.

Counsel: For EON LABS, INC., Movant: FRANKLYN C. STEINBERG, III, STEINBERG LAW OFFICES, SOMERVILLE, NJ.

For MEIJER, INC., Plaintiff: LISA J. RODRIGUEZ, TRUJILLO RODRIGUEZ & RICHARDS, LLP, HADDONFIELD, NJ; REBEKAH R. CONROY, WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For LOUISIANA WHOLESALE DRUG CO. INC, Plaintiff: PETER S. PEARLMAN, COHN, LIFLAND, PEARLMAN, HERRMANN & KNOPF, LLP, SADDLE BROOK, NJ; REBEKAH R. CONROY, WALDER HAYDEN & BROGAN, ROSELAND, NJ.

For ORGANON, INC., AKZO NOVEL, NV, Defendants: KEVIN J. MCKENNA, GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, PC, NEWARK, NJ; MARA E. ZAZZALI, JENNIFER A. HRADIL, GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, NEWARK, NJ.

Judges: Hon. Faith S. Hochberg, United States District Judge.

Opinion by: Faith S. Hochberg

Opinion

OPINION

Hon. Faith S. Hochberg

HOCHBERG, District Judge:

This matter is before the Court upon a settlement agreement between the manufacturers of the anti-depressant drug Remeron, Organon U.S.A. and Akzo Nobel N.V. (collectively "Defendants" or "Organon"), and the direct purchasers of Remeron ("Plaintiffs"). The settling parties seek (1) final approval of their class action **[*2]** settlement agreement and plan of allocation and (2) award of attorneys' fees to Plaintiffs' Counsel, reimbursement of litigation expenses, and incentive awards to named Plaintiffs. The Court preliminarily approved the settlement at a hearing on August 30, 2005. The final Fairness Hearing was conducted on November 2, 2005.

I. BACKGROUND

A. The Litigation

1. The Complaint

In 2003, direct purchasers of Remeron ("Direct Purchasers") filed class action complaints against Defendants. The complaint alleges that Defendants violated Section 2 of the Sherman Act, *15 U.S.C. § 2*, by: (a) using various illegal and deceptive means as part of an overall scheme to improperly create and extend patent protection for the drug mirtazapine, which Defendants sold under the brand-name Remeron, by manipulating the Hatch-Waxman statutory scheme; (b) committing affirmative misrepresentations and failing to disclose material prior art in the prosecution of U.S. Patent No. 5,977,099 (the "099 patent") before the United States Patent and Trademark Office ("PTO"); (c) making false and misleading representations to the Food and Drug Administration ("FDA") to obtain the **[*3]** listing of the 099 patent in the FDA's Orange Book in a wrongful manner; (d) submitting the 099 patent for listing in the Orange Book approximately 14 months beyond the FDA-mandated deadline for patent listing; and (e) filing and prosecuting sham patent litigation against potential generic competitors.

The complaint alleges that Defendants' conduct delayed the market entry of less expensive generic versions of Remeron, thereby forcing Direct Purchasers to pay artificially inflated prices for both Remeron and its AB-rated generic equivalents (i.e. generic mirtazapine).

2. Extensive Discovery and Litigation Prior to Settlement

Plaintiffs' claims were the subject of extensive and contentious discovery. During three years of hotly contested litigation, Plaintiffs' Counsel composed and propounded four sets of document requests which, as ordered by the Court, were served on behalf of various coordinated direct and indirect purchaser plaintiffs, as well as subpoenas duces tecum directed to multiple third parties. Overall, more than 1 million pages of documents and data were produced by Defendants and third parties. Plaintiffs' Counsel conducted over 45 depositions of witnesses with **[*4]** knowledge of facts relevant to Plaintiffs' allegations. Subsequently, Plaintiffs' Counsel retained and worked closely with nearly a dozen experts in the areas of (i) patent prosecution process before the PTO and patent interpretation, (ii) the FDA regulatory regime regarding prescription drugs, (iii) the pharmaceutical industry, and (iv) antitrust economics and the calculation of damages. The opinion of these experts were necessary both to support the complex theories of liability and damages advanced by Plaintiffs, and to rebut the numerous defenses raised by Defendants.

On September 8, 2004, the Court ruled on Defendants' motion to dismiss the complaints filed by Plaintiffs. Based on a prior opinion issued in the separate antitrust litigation between Defendants and generic drug manufacturers Mylan, Teva and Alphapharm (the "Generics"), the Court held that Plaintiffs were collaterally estopped from asserting

claims arising from the alleged wrongful Orange Book listing and sham litigation. The Court also dismissed Plaintiffs' Walker Process claim for lack of standing. Following this opinion, every plaintiff group other than the Direct Purchasers, including the Generics and all **[*5]** other direct and indirect purchasers, chose to settle their claims.

This litigation further engendered significant dispositive motion practice in the form of motions for summary judgment filed by both sides. Plaintiffs filed three separate motions for partial summary judgment, including motions seeking findings that: (a) Defendants were estopped from relitigating certain findings from the prior patent litigation and, therefore, that the patent litigation was objectively baseless; (b) that the 099 patent was not eligible for listing in the Orange Book; and (c) that Defendants possessed monopoly power over mirtazapine.

In opinions dated September 7, 2004 and February 18, 2005, the Court denied the first and third of these motions, determining, respectively, that (i) Defendants would not be estopped from litigating the objective bases for the prior patent litigation, and (ii) that Plaintiffs could not prove Defendants' monopoly power based solely on "direct" evidence of Defendants' control over the price of mirtazapine.

On October 1, 2004, Defendants filed a single, omnibus motion for summary judgement, which attacked both the legal and factual bases for the "overarching scheme" and **[*6]** "late listing" claims. Defendants' motion also questioned Plaintiffs' ability to demonstrate the existence of monopoly power in a properly defined relevant market. Defendants' motion was pending at the time the Settlement was preliminarily approved, and even a partial finding in Defendants' favor could have severely limited, or barred entirely, the ability of the Direct Purchasers to recover.

On October 27, 2003, Plaintiffs filed their motion for class certification, together with a memorandum of law explaining, *inter alia*, Plaintiffs' theory of class-wide antitrust injury and proposed method of calculating Class damages, supported by the testimony of an expert economist. In preparation for and in furtherance of the class certification motion, Plaintiffs' Counsel engaged in a comprehensive review of numerous issues specific to the pharmaceutical industry, including the economic structure, pricing, and distribution practices of branded and generic manufacturers. Such preparations were necessary in order to support Plaintiffs' motion and rebut numerous defenses to class certification raised by Defendants, including their reliance on the Eleventh Circuit's decision in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181 (11th Cir. 2003)*, **[*7]** which came down during the pendency of this case, and engendered significant supplemental briefing and arguments on the issue of class certification. See id. Class certification was granted here only after the Settlement had been proposed, and the Defendants stipulated not to oppose Plaintiffs' certification request.

B. Mediation and Settlement

In March 2003, the parties began to explore the possibility of settlement. This process eventually resulted in the Settlement now before the Court, but progress toward this agreement was slow, as each party had strong conviction in their respective claims or defenses. Additionally, throughout the course of this case, the parties participated in a lengthy and complex mediation procedure utilizing both skilled mediators and the good offices of the Court. This process encompassed multiple hearings and mediation sessions, the first of which was held in January 2004 before Judge Politan.

On August 24, 2005, after full discovery, significant motion practice and a lengthy negotiation process, Plaintiffs' Counsel entered into the Settlement with Defendants. The Settlement will settle all claims arising out of or relating in any way to any **[*8]** conduct alleged or which could have been alleged in the Class Action relating to

any alleged delay in the marketing or selling of Remeron or its generic equivalents, in exchange for payment of $ 75 million in cash.

The Court preliminarily approved the Settlement and certified the class at a hearing on August 30, 2005. On September 19, 2005, copies of the Notice Of Proposed Class Action Settlement and Hearing Regarding Settlement (the "Notice") were timely disseminated by first-class mail to all Class members. The Notice informed Class members, among other things, that they could object to any or all terms of the Settlement, or opt-out of the Class entirely. The deadline for opting out was October 19, 2005. No Class member has objected to, or opted-out of the Settlement.

II. ANALYSIS

A. Final Approval of Class Action Settlement

1. Settlements That Meet Certain Conditions Are Presumed Fair

HN1 The Third Circuit affords an initial presumption of fairness for a settlement "if the courts finds that: (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 **[*9]** a small fraction of the class objected." *In re Remeron End-Payor Antitrust Litigation, 2005 U.S. Dist. LEXIS 27011, 2005 WL 2230314, *15 (D. N.J. Sep 13, 2005)* (hereinafter "End-Payor Opinion"), quoting *In re Cendant Corp. Litig., 264 F.3d 201, 233 n. 18 (3d Cir. 2001)*.

Each of these factors weighs in favor of this presumption in the instant case. First, settlement negotiations were lengthy and formal, and included both formal presentations to the Court and to skilled mediators, as well as private mediation sessions attended by members of the Class. Second, as discussed in Part I above, both fact and expert discovery in this case was completed before the Settlement was reached, and included over one million pages of document discovery, and numerous expert reports. Third, both Plaintiffs' Counsel and Defendants' Counsel are skilled and experienced litigators. Fourth, not a single member of the Class has objected to, or opted-out of, the proposed Settlement. Thus, this Court determines that an initial presumption of fairness attaches, although such finding is not dispositive.

2. Standard for Court Approval of Settlement

HN2 A class action may be settled under *Rule 23(e)* upon **[*10]** a judicial finding that the settlement is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)(C)*. Under *Rule 23(e)*, this Court must determine whether the settlement is within a range that responsible and experienced attorneys could accept considering all relevant risks and factors of litigation. See *Walsh v. Great Atlantic and Pacific Tea Co., 96 F.R.D. 632, 642 (D.N.J. 1983)*. The range "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)*.

Because a settlement represents an exercise of judgment by the negotiating parties, cases have consistently held that the function of a court reviewing a settlement is neither to rewrite the settlement agreement reached by the parties nor to try the case by resolving issues left unresolved by the settlement. *Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir. 1974)*; *Bullock v. Administrator of Kircher's Estate, 84 F.R.D. 1, 4 (D.N.J. 1979)*. "The temptation to **[*11]** convert a settlement hearing into a full trial on the merits must be resisted." *Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1315 (3d Cir. 1993)*.

HN3 To determine whether the settlement is fair, reasonable and adequate under *Rule 23(e)*, courts in the Third Circuit apply the nine-factor test enunciated in *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*, and recently reaffirmed in *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516,*

534-35. These factors are:

> (a) The complexity, expense, and likely duration of the litigation;
>
> (b) the reaction of the class to the settlement;
>
> (c) the stage of the proceedings and the amount of discovery completed;
>
> (d) the risks of establishing liability;
>
> (e) the risks of establishing damages;
>
> (f) the risks of maintaining the class action through the trial;
>
> (g) the ability of the defendants to withstand a greater judgment;
>
> (h) the range of reasonableness of the settlement fund in light of the best possible recovery; and
>
> (i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. (quoting *Girsh, 521 F.2d at 156-57*). **[*12]**

3. Evaluation of the Settlement Under Applicable Standards

a. The Complexity, Expense and Likely Duration of the Litigation

This factor requires examination of the additional cost, in time, money and judicial resources, of continued litigation. Courts must balance a proposed settlement against the enormous time and expense of achieving a potentially more favorable result through further litigation. See, e.g., *In re Sunbeam Securities Litigation, 176 F. Supp. 2d 1323, 1332 (S.D. Fla. 2001)* (more than three years of complex litigation before settlement reached).

The settlement of this complex antitrust action is clearly favored in view of the long litigation road yet to be traveled. See, e.g., *Behrens v. Wometco Enters., Inc., 118 F.R.D. 534, 543 (S.D. Fla. 1988)*, aff'd *899 F.2d 21 (11th Cir. 1990)* ("The law favors compromises in large part because they are often a speedy and efficient resolution of long, complex and expensive litigations.").

This case has already been long and hard-fought. Prior to the Settlement, the parties completed significant and voluminous fact and expert discovery, and fully litigated **[*13]** Defendants' motion to dismiss. Still pending are Plaintiffs' motion for class certification, and multiple motions for summary judgment. As this Court observed with respect to the end-payor settlement, "thousands of pages of materials were filed with this Court on summary judgment issues such as market definition, market power, and improper / late listing in the FDA Orange Book." End-Payor Opinion at *17. Absent the Settlement, these motion would have required considerable additional work on the part of the parties and the Court to fully litigate.

Further, if the case were not concluded on summary judgment, a lengthy and expensive trial on liability and damages allegedly caused by Defendants' alleged violations of Sherman Act *§ 2* would likely have followed. Trial preparation on both sides would be necessary. Given Defendants' vigorous advocacy of their contention that they did not violate the Sherman Act, and the complex theories advanced for liability, it would be likely to expect appeals from any result reached on the question of liability or of damages. Avoidance of this expenditure of time and resources clearly benefits all parties. See *In re General Motors Pick-Up Trust Fuel Tank Products Liab. Litig., 55 F.3d 768, 812 (3d Cir. 1995)* **[*14]** (concluding that lengthy discovery and ardent opposition from the defendant with "a plethora of pretrial motions" were facts favoring settlement, which offers immediate benefits and avoids delay and expense); *Rolland v. Cellucci, 191 F.R.D. 3, 10 (D. Mass. 2000)* (prospect of two week trial "would have imposed significant preparatory time on everyone and would likely have required the court several months to issue an opinion.").

Finally, even if a trial resulted in a judgment for

Plaintiffs, such judgment might not equal the amount of the Settlement, while Plaintiffs would have incurred additional expense and delay, as well as the risk of non-recovery based on a verdict for Defendants or reversal of a verdict for Plaintiffs on appeal. Therefore, this factor weighs in favor of approving the Settlement.

b. The Reaction of the Class to the Settlement

The response of the Class to the proposed Settlement also supports approval. As described above in Part I, the Settlement Notice included a description of: (a) the allegations of the Class Action; (b) the Class certified by the Court; (c) Class members' rights to opt-out or object under *Rule 23*; (d) the proposed plan of **[*15]** allocation; (e) the attorneys' fees, reimbursement of expenses and incentive award that would be sought, and (f) the process for Court approval. All Class members were sent copies of the Notice. The deadline for serving objections to the Settlement was October 26, 2005. No Class members have objected to, or have chosen to opt out of, the Settlement. Moreover, as noted above, the three largest Class members have closely monitored the Class Action, with the assistance of their own outside counsel, by attending meditation sessions and court hearings. These Class members were informed of, and agreed to, the material terms of the Settlement Agreement prior to its execution.

Such acceptance of the Settlement on the part of the Class is convincing evidence of the Settlement's fairness and adequacy. See *Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d Cir. 1990)* ("only" 29 objections in 281 member class "strongly favors settlement"); see generally *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 318 (3d Cir. 1998)* (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted **[*16]** out and 300 objected). These factors weigh in favor of the Settlement.

HN4 Furthermore, where, as here, a class is comprised of sophisticated business entities that can be expected to oppose any settlement they find unreasonable, the lack of objections indicates the appropriateness of the Settlement. See *In re M.D.C. Holdings Securities Litigation, 1990 U.S. Dist. LEXIS 15488, 1990 WL 454747, *10 (S.D.Cal. Aug 30, 1990)* (lack of objections "is significant since the class includes sophisticated financial institutions . . . who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses"). The absence of objections from the sophisticated Class is particularly significant here because many Class members here have also been members of classes certified in other pharmaceutical antitrust actions (see, e.g., *In re Relafen Antitrust Litigation, 231 F.R.D. 52, 2005 WL 2386119 (D.Mass. 2005)*; In re Cardizem CD Antitrust Litig., No. 99-73259 (E.D. Mich. Nov. 25, 2002); *In re Buspirone Patent and Antitrust Litigation, 210 F.R.D. 43 (S.D.N.Y. 2002))*, and are therefore well suited to evaluate a proposed settlement **[*17]** in an action of this type.

c. The Stage of the Proceedings and the Amount of Discovery Completed

The purpose of this *Girsh* factor is to ensure that Class Counsel has an "adequate appreciation of the merits of the case before negotiating" a settlement. *In re Prudential, 148 F.3d at 319*, quoting *In re General Motors, 55 F.3d at 813*. In the present case, the Settlement comes only after the parties had sufficient time to understand and evaluate their respective positions.

As discussed in Part I, discovery in this case spanned more than a year, is complete, and has been extensive. This discovery included the entire record in the underlying patent litigation, numerous interrogatories and document requests, as well as third-party subpoenas to pharmaceutical manufacturers and consultants to the pharmaceutical industry. Direct Purchasers Plaintiffs reviewed over one million pages of documents and data produced by Defendants and third parties. Plaintiffs also answered extensive

interrogatories and produced voluminous records, and both Plaintiffs' and Defendants' experts have been extensively deposed.

Given this vast amount of discovery obtained, and **[*18]** the volume of motion practice that enabled Plaintiffs' Counsel to preview some of the defenses that Defendants would advance, Plaintiffs' Counsel had a valid basis to negotiate a settlement. See *In re Lucent Technologies, Inc., Securities Litigation, 307 F. Supp. 2d 633, 638 (D. N.J. 2004)*. Moreover, the mediation and negotiation process was itself rigorous and involved, giving the parties ample opportunity to assess the strengths of their respective claims and defenses before both learned mediators and the Court. See *In re Linerboard Antitrust Litig., 296 F. Supp.2d 568, 578 (E.D. Pa. 2003)* (noting positively that settlement talks involved "a number of face to face meetings and telephone conferences.").

As a result of the parties' efforts, the litigation had reached the stage where "the parties certainly [had] a clear view of the strengths and weaknesses of their cases." *Bonett v. Educational Debt Service, Inc., 2003 U.S. Dist. LEXIS 9757, 2003 WL 21658267, *6 (E.D. Pa. May 9, 2003)*, quoting *In re Warner Communications Sec. Litig., 618 F. Supp. 735, 745 (S.D.N.Y. 1985)*. Thus, the final Settlement occurred only after the parties and the **[*19]** Court were able to assess its fairness adequately.

d. The Risks of Establishing Liability

This factor surveys the possible risks of litigation in order to balance the likelihood of success and potential damages against benefit of settlement. *In re Prudential, 148 F.3d at 319*. The history and current status of the litigation indicate that Plaintiffs face significant risk even before reaching trial. In an opinion dated September 8, 2004, this Court dismissed Plaintiffs' claims arising from allegations of fraud in connection with the prosecution of the 099 patent, wrongful listing of that patent in the Orange Book, and subsequent sham litigation. Therefore, without this Settlement, Plaintiffs would have to proceed on two claims: (1) the claim relating to the Defendants' decision to list the 099 patent 14 months after the deadline to do so established by FDA regulations (the "late listing claim"); and (2) Plaintiffs' claim that Defendants had engaged in an overarching scheme to delay competition, the net effect of which was anticompetitive, even if the individual acts of the scheme were not actionable under *Section 2* of the Sherman Act (the "overarching scheme claim"). **[*20]** The risk to those surviving claims was immediate: pending before the Court at the time the Settlement was proposed was Defendants' omnibus motion for summary judgment, wherein Defendants argued that the late listing and overarching scheme claims were barred entirely by the Court's prior findings and Supreme Court precedent.

Finally, if Plaintiffs had succeeded in reaching trial, Plaintiffs would have had to prove that Defendants (1) possessed monopoly power, and (2) willfully acquired or maintained that power as distinguished from the growth or development of such due to a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. Defendants raised numerous legal and factual defenses, including, *inter alia*, assertions that Direct Purchasers' claims: (1) involved no cognizable antitrust injury or damage; (2) were barred by the Noerr-Pennington doctrine; (3) were barred for failure to define properly an antitrust market; (4) described harm that was effectively "passed-on" to third parties; and (5) were time-barred by the applicable statute of limitations. Moreover, the Court's February 18, 2005 opinion denying Plaintiffs' **[*21]** motion for partial summary judgment on the issue of monopoly power would require Plaintiffs to prepare a complex and detailed analysis of the "relevant market" in which Remeron competed, in order to demonstrate the existence of antitrust liability. These risks of proving liability weigh in favor of approving this settlement.

e. The Risks of Establishing Damages

The fifth Girsh factor to be analyzed when considering the fairness of a settlement is "the risk of establishing damages." *Girsh, 521 F.2d at 157*. This factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *In re Cendant, 264 F.3d at 239*. To the extent that establishing damages is contingent upon liability, many of the same risks discussed in the previous section are also present here. Furthermore, there are substantial risks in proving damages, which the parties have avoided by virtue of the proposed settlement.

The determination of damages is a complicated and uncertain process. In the present case, the parties offered competing expert reports which included significantly different estimates of overcharge damages to which **[*22]** Plaintiffs would be entitled assuming liability could be proven at trial. Plaintiffs' expert economist estimates that the maximum antitrust damages (prior to trebling) ranged from $ 108 million to $ 133 million, while Defendants' expert, relying on a similar damage model but disagreeing on certain material assumptions, estimated the same range as $ 23.9 million to $ 29.7 million. It is by no means certain that Plaintiffs would have succeeded in recovering the maximum measure of damages estimated by Plaintiffs' expert. See, e.g., *In re Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, *10 (E.D. Pa. Jan 4, 2001)* ("Plaintiffs' damages theories rested primarily on the testimony and reports of expert witnesses. Such experts would likely have been challenged on Daubert or other grounds. Plaintiffs, therefore, risked the rejection of its experts first by the Court pursuant to *Federal Rule of Evidence 104(a)*, or by the jury in assessing credibility."); *In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F.Supp. 450, 539 (D.N.J. 1997)* ("a jury's acceptance of expert testimony is far from certain, regardless of the **[*23]** expert's credentials"); *In re Safety Components, Inc. Securities Litigation, 166 F. Supp. 2d 72, 90 (D. N.J. 2001)*. Therefore, the risks of proving damages weigh in favor of approving the settlement.

f. The Risks of Maintaining the Class Action Through Trial

"Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *End-Payor Opinion at *23*, quoting *In re Warfarin Sodium Antitrust Litigation, 391 F.3d 516, 537 (3d Cir. 2004)* (internal quotes and citation omitted). The Settlement here comes after Plaintiffs' motion for class certification has been fully briefed. The briefing submitted indicates that this is a hotly contested issue, with Defendants raising multiple factual and legal arguments in opposition to certification. Class certification was granted here only after the Settlement had been proposed, and the Defendants had stipulated not to oppose Plaintiffs' certification request. Thus, the risks faced by Plaintiffs with regard to class **[*24]** certification weigh in favor of approving the Settlement.

g. The Ability of the Defendants to Withstand a Greater Judgment The parties do not contend that Defendants could not withstand a larger judgment. However, as this Court has noted, "many settlements have been approved where a settling defendant has had the ability to pay greater amounts." *End-Payor Opinion at *23*, citing *Warfarin Sodium, 391 F.3d at 538* ("The fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached."); *Young Soon Oh v. AT & T Corp., 225 F.R.D. 142, 150-51 (D.N.J. 2004)*; *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 632 (E.D.Pa. 2004)*; *Erie County Retirees Assoc. v. County of Erie, Pennsylvania, 192 F. Supp. 2d 369, 376 (W.D. Pa. 2002)*; *Lazy Oil Co. v. Witco Corp., 95 F. Supp.2d 290, 318 (W.D. Pa. 1997)*. This factor does not favor nor disfavor the Settlement.

h. The Range of Reasonableness of the Settlement

In Light of the Best Possible Recovery

[*25] ***HN5*** An assessment of the reasonableness of a proposed settlement seeking monetary relief requires analysis of the present value of the damages a plaintiff would likely recover if successful, appropriately discounted for the risk of not prevailing. See *In re Prudential, 148 F.3d at 322*. As this Court previously noted, "in order to evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain." *End-Payor Opinion at *24*, citing *In re Ampicillin Anttitrust Litigation, 82 F.R.D. 652, 654 (D.D.C.1979)*; *Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)*.

In the present case, Plaintiffs' expert economist estimates that the maximum antitrust single damages ranged from $ 108 million for the "late listing" claim, to $ 133 million for the "overarching scheme" claim. Accordingly, the Settlement represents 56% to 69% of the maximum single damages Plaintiffs could hope to recover, provided that liability was proven **[*26]** at trial. This is above the range of settlements routinely granted final approval. See *End-Payor Opinion at *24* ("An antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors"); see also *In re Cendant Corp. Litig., 264 F.3d 201, 231 (3d Cir. 2001)* (approving settlement of 36% of total damages and noting that typical recoveries in complex securities class actions range from 1.6% -- 14% of estimated damages); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350,*5 (E.D. Pa. June 2, 2004)* (collecting cases in which courts have approved settlements of 5.35% to 28% of estimated (single) damages in complex antitrust actions); *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, *4* (approving settlement of approximately 10% of total damages of $ 830 million); *Stop & Shop Supermarket Co. v. Smithkline Beecham Corp., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926 (E.D. Pa. May 19, 2005)* (Recovery of 11.4% of estimated single damages "compares favorably with the settlements reached in other complex class action lawsuits.")

Moreover, in light of the **[*27]** highly contested nature of liability, it is likely that any judgment entered would have been the subject of post-trial motions and appeals, further prolonging the litigation and reducing the value of any recovery. See, e.g., *Parks v. Portnoff Law Associates, Ltd., 243 F.Supp.2d 244, 253 (E.D. Pa. 2003)*. An appeal of a damage award could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself. See *Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990)* (class won a jury verdict and a motion for judgment N.O.V. was denied, but on appeal the judgment was reversed and the case dismissed); *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)* (reversal of multimillion dollar judgment obtained after protracted trial); *Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 485 (S.D.N.Y. 1970)*, modified, *449 F.2d 51 (2d Cir. 1971)*, rev'd *409 U.S. 363, 366, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973)* ($ 145 million judgment overturned after years of litigation and appeals). Thus, the range of reasonableness of the settlement in light of the best possible recovery favors the Settlement.

[*28] i. The Range of Reasonableness of the Settlement to a Possible Recovery In Light of all the Attendant Risks of Litigation

This factor requires the Court to examine the terms of settlement from a "slightly different vantage point[]" than reasonableness in light of the best recovery. *In re General Motors, 55 F.3d at 806*. As this Court noted, ***HN6*** "a court evaluating a proposed class action settlement should also consider whether the settlement represents a good value for a weak case or a poor value for a strong case.'" *End-Payor Opinion at *23*, quoting *Warfarin Sodium, 391 F.3d at 538*; see also *Girsh,*

521 F.2d at 157 (court must examine the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation).

As discussed above, this litigation involves difficult legal and factual issues regarding a claim for damages resulting from Defendants' alleged violation of *Section 2* of the Sherman Act. Thus, in light of the significant size of the settlement fund relative to the potential recoverable damages, the Settlement represents a good value for a strong case, albeit one where numerous **[*29]** critical legal issues have not been determined and are therefore uncertain. In addition, even if Plaintiffs successfully prevailed on those issues at trial, Defendants would likely appeal, resulting in further delaying any recovery for the Class. The Court is satisfied that the Settlement accounts for the risks inherent in this complex litigation and provides appropriate relief in light of these risks.

j. Conclusion

Given this Court's analysis, the Court concludes that the nine-factor test utilized by the Third Circuit is satisfied. The settlement is fair, adequate, and reasonable under *Federal Rule of Civil Procedure 23(e)*.

B. Approval of the Plan of Allocation

HN7 "As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate." *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 381 (D.D.C. 2002)*; see also *In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 8931, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000)*. "In evaluating the formula for apportioning the settlement fund, the Court keeps in mind that district courts enjoy broad supervisory powers over the administration **[*30]** of class action settlements to allocate the proceeds among the claiming class members equitably." *Hammon v. Barry, 752 F. Supp. 1087, 1095 (D.D.C. 1990)* (internal quotation marks and citations omitted); accord *In re "Agent Orange"Prod. Liability Litig., 818 F.2d 179, 181 (2d Cir. 1987)*.

Plaintiffs propose to allocate the Settlement funds, net of Court approved attorneys' fees, incentive award, and expenses ("Net Settlement Fund"), in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged conduct in restraint of trade. Such a method of allocating the Net Settlement Fund is inherently reasonable. See *In re Lucent Technologies, Inc., Securities Litigation, 307 F. Supp. 2d 633, 649 (D. N.J. 2004)* ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable."); *In re Corel Corp. Inc. Securities Litigation, 293 F. Supp. 2d 484, 493 (E.D. Pa. 2003)* (Courts "generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.") quoting *Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, **[*31]** *12 (E.D. Pa. Jan.4, 2001)*.

The Plan of Allocation provides a method for determining each Class member's pro-rata share of the Net Settlement Fund. Specifically, the Plan of Allocation describes: 1) the method of calculating each Class member's overcharge damages and pro-rata share of the Net Settlement Fund; 2) the contents and method of disseminating a Claims Notice form; 3) the manner in which claims will be initially reviewed and processed; 4) the method of notifying Class members of the amount that each Class member will receive from the Net Settlement Fund ("Notice of Class Member Distribution Amount"); and 5) the process for handling and resolving challenged claims.

The Plan of Allocation also includes the deadlines for completing the following tasks related to distributing each Class member's pro-rata share of the Net Settlement Fund: 1) preparation and dissemination of the Claims Notice form; 2) receipt by Claims Administrator of completed Claims Notice form and supporting documentation; 3)

curing deficiencies in any Claims Notice form or supporting documentation submitted by Class member; 4) disseminating the Notice of Class Member Distribution Amount; and, 5) challenging **[*32]** and resolving disputes over the Claims Administrator's determination of each Class member's distribution amount.

As the Plan of Allocation appears fair based on Plaintiffs' expert economist's calculations, and the three largest Class members support it, and the lack of any objections to it, this Court gives the plan final approval.

C. Plaintiffs' Motion for Award of Attorneys' Fees, Interest, Reimbursement of Expenses and Incentive Awards

Class Counsel requests that the Court award attorneys' fees in the amount of $ 25 million plus interest accrued on that amount since it has been held in escrow. The $ 25 million requested fee represents 33 1/3 % of the $ 75 million Settlement Fund. Class Counsel also requests recovery of litigation expenses and incentive awards to named Plaintiffs.

1. Attorneys' Fees and Interest

This Court first finds that the percentage of fund method is the proper method for compensating Plaintiffs' Counsel in this common fund case. See, e.g., *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 333 (3d Cir. 1998)* (stating***HN8*** "the percentage of recovery method is generally favored in cases involving a common fund, **[*33]** and is designed to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure"); *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722, 734 (3d Cir. 2001)* (stating "the percentage-of-recovery method has long been used in this Circuit in common-fund cases").

HN9 The Third Circuit set forth with specificity the factors that a court should consider in evaluating such requested attorneys' fees in *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000)* (overturning a decision that reduced a requested fee of 25% of the recovered fund to 18%). The Gunter factors "need not be applied in a formulaic way, and their weight may vary on a case-by-case basis." *Oh v. AT & T Corp., 225 F.R.D. 142, 146 (D.N.J. 2004)* (citing *Gunter, 223 F.3d at 195*). The Gunter factors include (a) the size of the fund created and number of persons benefitting from the settlement, (b) the presence/absence of substantial objections to the fee, (c) the skill of Plaintiffs' counsel, (d) complexity and duration of the litigation, (e) the risk of nonpayment, (f) amount of time devoted to the litigation, (g) **[*34]** awards in similar cases. See *Gunter, 223 F.3d at 195*; *In re Aremissoft Corp. Sec. Litig., 210 F.R.D. 109, 129 (D.N.J. 2002)*.

a. The Size and Nature of the Common Fund Created, and the Number of Class Members Benefitted by the Settlement

The Class here is comprised of approximately 70 business entities, as identified from Defendants' sales records. These entities will share in a settlement worth $ 75 million in cash, less attorneys' fees, expenses and incentive award as granted by the Court. The magnitude of this recovery is significant when measured against the estimates as to the potential values of Plaintiffs' claims made by the parties' experts during the course of this litigation. See, e.g., *In re General Instrument Securities Litig., 209 F. Supp.2d 423 (E.D. Pa. 2001)* (awarding a one-third fee, and finding that a $ 48 million fund to be shared by a class of thousands is "quite large" and exceeds "twice the amount that defendants' expert claimed plaintiffs could recover under the best circumstances."); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 (E.D. Pa. June 2, 2004)* ($ 202 million settlement valued **[*35]** at 42 percent of damages (prior to trebling) is "highly favorable" factor in granting

counsel's 30% fee request).

b. The Absence of Objections

Following preliminary approval of the Settlement and the form and manner of notice to the Class, individual notice was mailed to Class members and posted on Co-Lead Counsel's websites. The notice informed potential Class members that Class Counsel would be seeking fees of up to 33 1/3% of the Settlement Fund, reimbursement of expenses, plus interest thereon, and incentive awards for each of the named plaintiffs in the Class Action.

Class Counsel have received no objections from the Class. [1] The lack of objections from the Class supports the reasonableness of the fee request. See *Stoetzner v. United States Steel Corp., 897 F.2d 115, 11-19 (3d Cir. 1990)* (even when 29 members of a 281 person class (i.e. 10% of the class) objected, the response of the class as a whole "strongly favors [the] settlement"); *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 305* (stating that the fact that only two class members objected to the fee request supports approval of the fee); *In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 514 (W.D. Pa. 2003)* **[*36]** ("the absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsel's request"). thus indicating the strong support of the Class for the award of fees and expenses requested.

[*37] c. The Skill and Efficiency of Plaintiffs' Counsel

Class Counsel include some of the preeminent antitrust firms in the country with decades of experience in prosecuting and trying complex actions. Class Counsel also include firms with extensive patent experience, who are intimately involved in numerous lawsuits involving antitrust violations based on the improper use of patents. Class Counsel have significant experience in FDA regulatory matters. The settlement entered with Defendants is a reflection of Class Counsel's skill and experience. See *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 261 (D. Del. 2002)* (class counsel "showed their effectiveness through the favorable cash settlement they were able to obtain"); see also *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000)* (awarding 30% fee and stating "the most significant factor in this case is the quality of representation, as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted **[*38]** the case and the performance and quality of opposing counsel") (internal quotes omitted).

d. The Complexity and Duration of the Litigation

"As to the complexity of the case, an antitrust class action is arguably the most complex action to prosecute.'" *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *10*, quoting *In re Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)*. This antitrust action is no different. As discussed above, this matter is extremely complicated, involving the patent, regulatory and antitrust laws,

---

[1] The support of the fee request by Class members here is even more significant. When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections "indicates the appropriateness of the [fee] request." *Cimarron Pipeline Constr., Inc. v. National Council on Compensation Ins., 1993 U.S. Dist. LEXIS 19969, 1993 WL 355466, *1-2 (W.D. Ok. June 8, 1993)*; In re Sequoia Systems, Inc. Sec. Litig., 1993 WL 616694, *1 (D. Mass. Sept. 10, 1993) (finding "influential" the fact that no class member had objected to the fee request of one-third); *In re M.D.C. Holdings, 1990 U.S. Dist. LEXIS 15488, 1990 WL 454747 at *10 n. 5* (lack of objections "is significant since the class includes sophisticated financial institutions . . . who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses"). Courts have reasoned that favorable responses by sophisticated Class members is persuasive, since those class members are capable, independent of the assistance of Class Counsel, of evaluating the reasonableness of all aspects of a class action settlement. See, e.g., *Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1374 (D. Minn. 1985)* ("The turkey growers in this class are sophisticated businesspeople, who possessed the degree of knowledge and ability sufficient to raise an objection if they believed the fee application was excessive").

including interpretation of complex provisions of the Hatch-Waxman Act.

The discovery process was lengthy and difficult. Class Counsel (a) reviewed over one million pages of documents, (b) conducted over 45 depositions of fact witnesses, and (c) spent thousands of hours researching, analyzing and consulting with experts on the complex issues of fact and law put at issue in this case.

Finally, as noted by this Court in the End-Payor Opinion, "the circumstances surrounding a difficult settlement increase the complexity of a case." See *End-Payor Opinion at *29*, citing *Larrison v. Lucent Techs., Inc., 327 F. Supp. 426, 434,2004 U.S. Dist. LEXIS 27246 (D. N. J. 2004).* **[*39]** Here, the Court is well aware of the long and difficult road that led to the proposed Settlement, as the Court itself frequently lent its good offices to settlement hearings and mediation sessions. Thus, the complexity of the issues involved in Class Counsel's prosecution of this litigation supports the requested fee.

e. The Risk of Nonpayment

HN10 A determination of a fair fee must include consideration of the sometimes undesirable characteristics of a contingent antitrust actions, including the uncertain nature of the fee, the wholly contingent outlay of large out-of-pocket sums by plaintiffs, and the fact that the risk of failure and nonpayment in an antitrust case are extremely high. See, e.g., *The Stop & Shop Supermarket Company v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, *11 (E.D. Pa. 2005)* (risk of overcoming Noerr-Pennington defense, among others, "favors approval of the percentage of recovery requested as a fee in this case"); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *12* (risk posed by Defendants' vigorous legal and factual defenses counsel in favor of 30% fee award).

This case is no exception to the rule. When Class Counsel **[*40]** undertook the representation of the named plaintiffs and the Class, there were no assurances that any fees would be received. The outcome of various motion practice in this case further increased Plaintiffs' risks. In its September 8, 2004 decision on Defendants' motion to dismiss, the Court dismissed (a) Plaintiffs' claims arising from the alleged Walker-Process fraud, (b) wrongful Orange Book listing and (c) sham litigation associated with the prosecution and enforcement of the 099 Patent. Following this opinion, every plaintiff group other than the Direct Purchaser Class, including the Generics and all other direct and indirect purchasers, chose to settle their claims.

Thereafter, Plaintiffs proceeded against Defendants on two theories of liability: (1) claims arising from the late-listing of the 099 patent in the Orange Book; and (2) Defendants' alleged overarching scheme to delay generic competition. The risk to those surviving claims was immediate: pending before the Court at the time the Settlement was proposed was Defendants' omnibus motion for summary judgment, wherein Defendants argued that the late listing and overarching scheme claims were barred entirely by the **[*41]** Court's prior findings and Supreme Court precedent, and refuted by documentary evidence and testimony from Defendants' own employees. The prospect of prosecuting such untested theories through to trial presented undeniable risk. Accordingly, the risk of non-payment in this case weigh heavily in favor of approving the fee requested.

f. The Time Devoted to this Case by Plaintiffs' Counsel was Significant

Class Counsel has expended over 35,000 hours and advanced over $ 1.9 million in expenses on this case. Class Counsel has analyzed over a million pages of document discovery and has taken dozens of depositions. Class Counsel also retained and worked closely with multiple experts in the complex areas of patent law, FDA regulation and the pharmaceutical industry implicated in this case. Class Counsel fought Defendants' motion to

dismiss, prepared Plaintiffs' motion for class certification, and represented the Class in the multiple mediation sessions and settlement conferences necessary to reach the Settlement. See *End Payor Opinion at *29* ("Class Counsel's efforts in posturing this case for trial . . . played a role in spurring the settlement [and] produced a substantial payout **[*42]** to the class.'") quoting *In re Newbridge Networks Sec. Litig., 1998 U.S. Dist. LEXIS 23238, 1998 WL 765724, *3 (D. D.C. Oct 23, 1998)*.

Moreover, Class Counsel will likely incur hundreds of additional hours in connection with administering the settlement, without prospect for further fees. See *Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 252* (fee award will be sole compensation for counsel "despite the continuing responsibilities [counsel] will have in responding to Class Member inquiries, assisting the Claim Evaluator, consulting on individual cases, and any post-judgment proceedings and appeals.").

g. Awards in Similar Cases

The seventh and final *Gunter* factor -- a comparison with attorneys' fees awarded in similar cases -- also supports the fee requested by Class Counsel in the present case.

i. The requested 33 1/3% fee is within the applicable range of percentage-of-the-fund awards

"Courts within the Third Circuit often award fees of 25% to 33% of the recovery." *End-Payor Opinion at *30*, citing *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 (E.D. Pa. June 2, 2004)* (approving 30% fee of a $ 202 million settlement in an antitrust class action); *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616 (E.D. Pa. 2005)* **[*43]** (approving 30% fee of the $ 65 million settlement in similar pharmaceutical antitrust action). A one third fee from a common fund has been found to be typical by several courts within this Circuit which have undertaken surveys of awards within the Third Circuit and others. *End-Payor Opinion at *30*, citing *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306-07 (3d Cir. 2005)* (review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71%" with a median value that "turns out to be one-third"). See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995)* (In common fund cases "fee awards have ranged from nineteen percent to forty-five percent of the settlement fund"); *Cullen v. Whitman Medical Corp., 197 F.R.D. 136, 150 (E.D. Pa. 2000)* ("the award of one-third of the fund for attorneys' fees is consistent with fee awards in a number of recent decisions within this district"); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *14* (citing with approval "a recent Federal Judicial Center study that found that in federal class actions generally **[*44]** median attorney fee awards were in the range of 27 to 30 percent.").

Moreover, the requested fee is consistent with awards in other complex antitrust actions involving the pharmaceutical industry. In re Relafen Antitrust Litig., No. 01-12239-WGY (D. Mass. April 9, 2004)) (awarding 33 a % fee of a $ 175 million settlement); In re Buspirone Antitrust Litig., No. 01-CV-7951 (JGK) (S.D.N.Y. April 1, 2003) (awarding a 33 a % fee of a $ 220 million settlement); North Shore Hematology-Oncology Associates, P.C. v. Bristol Myers Squibb Co., No. 1:04cv248 (EGS) (D. D.C. Nov. 30, 2004) (awarding a 33 a % fee of a $ 50 million settlement); In re Terazosin Hydrocholride Antitrust Litig., No. 99-MDL-1317 (S.D. Fla. Apr. 19, 2005); (awarding a 33 a % fee of a $ 72.5 million settlement). Cf. In re Cardizem CD Antitrust Litig., No. 99-73259 (E.D. Mich. Nov. 26, 2002) (awarding 30% of a $ 110 million settlement).

ii. The requested 33 1/3% fee reflects the market rate in other litigation of this type

HN11 The percentage-of-the-fund method of awarding attorneys' fees in class actions should

approximate the fee which would be negotiated if the lawyer were offering his or her services **[*45]** in the private marketplace. "The object . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation." *In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)*; see also *Missouri v. Jenkins, 491 U.S. 274, 285-86, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989)*; *In re Synthroid Marketing Litig., 264 F.3d 712, 718 (7th Cir. 2001)* ("when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time"); see also *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 307*; *In re RJR Nabisco, Inc. Sec. Litig., 1992 U.S. Dist. LEXIS 12702, 1992 WL 210138, *7 (S.D.N.Y. Aug. 24, 1992)*.

In determining the market price for such services, evidence of negotiated fee arrangements in comparable litigation should be examined. See *Continental Illinois Sec. Litig., 962 F.2d at 573* (the judge must try to simulate the market "by obtaining evidence about the terms of retention in similar suits, suits that differ only because, since they are not class actions, the market **[*46]** fixes the terms"); *Synthroid Marketing Litig., 264 F.3d at 719* (court should evaluate fee contracts and other data from similar cases where fees were privately negotiated). Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation. See, e.g., *In re Ikon Office Solutions, Inc., 194 F.R.D. at 194* ("In private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re Orthopedic Bone Screws Products Liability Litig., 2000 U.S. Dist. LEXIS 15980, 2000 WL 1622741, *7 (E.D. Pa. Oct. 23, 2000)* (". . . the court notes that plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery"); *Durant v. Traditional Invest., Ltd., 1992 U.S. Dist. LEXIS 12273, 1992 WL 203870, *4 n. 7 (S.D.N.Y. Aug. 12, 1992)* ("contingent fee agreements up to 40 percent have been held reasonable"); *Phemister v. Harcourt Brace Jovanovich, Inc.., 1984 U.S. Dist. LEXIS 23595, 1984 WL 21981, *15 (N.D. Ill. Sept. 14, 1984)* ("the percentages agreed on [in contingent **[*47]** fee arrangements in non-class action damage lawsuits] vary, with one-third being particularly common").

h. Lodestar Cross-Check

HN12 In addition to the percentage-of-the-fund approach, the Third Circuit has suggested that it is "sensible" for district courts to "cross-check" the percentage fee award against the "lodestar" method. *Prudential, 148 F.3d at 333*. A lodestar cross-check is not a Gunter factor but is a "suggested practice." *In re Cendant Corp., PRIDES Litig., 243 F.3d at 735 (3d Cir. 2001)*. The Third Circuit has recognized that "'multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *Id., at 341*, quoting 3 Herbert Newberg & Albert Conte, Newberg on Class Actions, § 14.03 at 14-5 (3d ed. 1992). "The district courts may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Rite Aid, 396 F.3d at 306-07* (footnote omitted).

The records demonstrates that Class Counsel's lodestar in this case is $ 13,419,645.71, resulting in a multiplier of 1.8. An examination of recently approved multipliers reveals that the multiplier **[*48]** requested here "is on the low end of the spectrum." *End-Payor Opinion at *33*, (approving multiplier of 1.73) citing *Nichols v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, *24 (E.D. Pa. Apr. 22, 2005)* (approving multiplier of 3.15); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, *4 (E.D. Pa. June 2, 2004)* (approving a 2.66 multiplier); *Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1304 (D. N.J. 1995)*, aff'd, *66 F.3d 314 (3d Cir.*

1995) (approving a 9.3 multiplier); *In re Rite Aid Corp. Secs. Litig., 146 F. Supp. 2d 706, 736 (E.D. Pa. 2001)* (multiple of over 6). This lodestar cross-check corroborates the result of the percentage-of-the-fund method.

i. Conclusion

Taking into consideration the above factors, this Court awards Plaintiffs' Counsel $ 25 million of the Settlement Fund, plus 33 1/3 % of the accrued interest on the Settlement Fund.

2. Reimbursement of Reasonable Expenses

In addition to their request for attorneys' fees, Plaintiffs' Counsel seeks reimbursement of $ 1,925,667.53 in expenses. ***HN13*** "Counsel in common fund cases is entitled to reimbursement of expenses that were **[*49]** adequately documented and reasonably and appropriately incurred in the prosecution of the case." *In re Cendant Corp., 232 F. Supp. 2d 327, 343 (D. N.J. 2002)*, quoting *In re Safety Components Int'l, Inc., 166 F. Supp. 2d 72, 104 (D. N.J. 2001)*.

Upon review of the affidavits submitted in support of this request, the Court finds the requested amount to be fair and reasonable. Plaintiffs' Counsel's expenses reflect costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of court reporters and deposition transcripts. Reimbursement of similar expenses is routinely permitted. See *End-Payor Opinion at *32*, citing *Oh v. AT & T Corp., 225 F.R.D. 142, 154 (D. N.J. 2004)* (finding the following expenses to be reasonable: "(1) travel and lodging, (2) local meetings and transportation, (3) depositions, (4) photocopies, (5) messengers and express services, (6) telephone and fax, (7) Lexis/Westlaw legal research, (8) filing, court and witness fees, (9) **[*50]** overtime and temp work, (10) postage, (11) the cost of hiring a mediator, and (12) NJ Client Protection Fund-pro hac vice.").

3. Incentive Awards to Named Plaintiffs

Finally, Plaintiffs' Counsel request the approval of an incentive award in the amount of $ 60,000, in total, for the two named plaintiffs, LWD and Meijer. The named plaintiffs spent a significant amount of their own time and expense litigating this action for the benefit of the Class. As recognized by numerous courts, such efforts should not go unrecognized. See *End-Payor Opinion at *32*, citing *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 400 (D. D.C. 2002)* ("Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class. . . . In fact, courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation") (internal quotations and citation omitted).

The Settlement Notice advised Class members that Class Counsel would apply for such an incentive award. No Class member objected. **[*51]** Moreover, the amount requested here is similar to amounts awarded in comparable settlements. See *End-Payor Opinion at *33* (granting incentive awards of $ 30,000 each to two third party payor plaintiffs); *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350 at *18* (approving $ 25,000 to each representative of the classes); see also, *Yap v. Sumitomo Corp. of America, 1991 U.S. Dist. LEXIS 2124, 1991 WL 29112, *9 (S.D.N.Y. Feb. 22, 1991)* ($ 30,000 incentive awards to the named plaintiffs); *Van Vraken v. Atlantic Richfield Co., 901 F. Supp. 294, 300 (N.D. Cal. 1995)* ($ 50,000 incentive award to named plaintiff); *In re Dun & Bradstreet Credit Services Customer Litig., 130 F.R.D. 366, 373-74 (S.D. Ohio 1990)* (two incentive awards of $ 55,000 and three incentive awards of $ 35,000); *Revco Sec. Litigation, Arsam Co. v. Salomon Bros., Inc., 1992 U.S. Dist. LEXIS 7852, 1992 WL 118800, *7 (N.D. Ohio May 6, 1992)* ($ 200,000 incentive award to

named plaintiff); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250-51 (S.D. Ohio 1991)* ($ 50,000 incentive awards to each of the six named plaintiffs); *Bogosian v. Gulf Oil Corp., 621 F. Supp. 27, 32 (E.D. Pa. 1985)* **[*52]** (incentive awards of $ 20,000 to each of two named plaintiffs). The requested incentive awards are both appropriate and reasonable.

III. CONCLUSION

For the foregoing reasons, (a) Direct Purchasers Plaintiffs' motion for final approval of the Settlement, and (b) Class Counsel for Direct Purchasers Plaintiffs' motion for attorneys' fees of $ 25 million (plus accrued interest), litigation expenses, and incentive awards to Named Plaintiffs are granted.

November 9, 2005

Hon. Faith S. Hochberg, U.S.D.J.

End of Document

Exhibit 6

Caution
As of: March 26, 2026 6:51 PM Z

Meijer, Inc. v. 3M

United States District Court for the Eastern District of Pennsylvania

August 14, 2006, Decided ; August 15, 2006, Filed; August 15, 2006, Entered

CIVIL ACTION NO. 04-5871

Reporter
2006 U.S. Dist. LEXIS 56744 *; 2006-2 Trade Cas. (CCH) P75,397

MEIJER, INC. & MEIJER DISTRIBUTION, INC., on behalf of themselves and all others similarly situated v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY)

Prior History: *Meijer, Inc. v. 3M, 2005 U.S. Dist. LEXIS 13995 (E.D. Pa., July 13, 2005)*

Core Terms

settlement, class member, notice, class action, attorney's fees, tape, settlement agreement, proposed settlement, settlement fund, incentive award, final approval, lodestar, district court, transparent, entity, antitrust, fee award, certificate, discovery, invisible, multiplier, subsidiary, affiliate, calculate, negotiate, class representative, member of the class, mail, opt, reimbursement

Case Summary

Procedural Posture

Plaintiffs, a class of purchasers of certain transparent and invisible tape, brought a class action antitrust lawsuit against defendant tape manufacturer. The parties reached a settlement, which the court preliminarily approved. Before the court was a motion brought pursuant to *Fed. R. Civ. P. 23* for final approval of settlement and class counsel's motion for attorneys' fees, expenses, and an incentive award.

Overview

This class action suit alleged that the tape manufacturer unlawfully maintained monopoly power through its bundled rebate programs and its exclusive dealing arrangements with various retailers. After considerable discovery and mediation, the parties reached a settlement totalling approximately $27 million. The court first determined that the settlement class satisfied the requirements of *Fed. R. Civ. P. 23(a)* and *(b)(3)*. Among other factors, the court noted that the class satisfied the numerosity requirement because it consisted of at least 143 members, from at least 35 different states. Moreover, the class members met the commonality requirement because they shared numerous common questions of law and fact. As to the settlement, the court found that, because it resulted from arm's-length negotiations after a year of litigation and discovery, it had the presumption of fairness. Applying the nine Girsh factors established by the United States Court of Appeals for the Third Circuit, the court found that only the manufacturer's ability to withstand greater judgment did not favor the proposed settlement and concluded that it was outweighed by the other factors favoring settlement.

Outcome

The court approved the final certification of the class for settlement purposes and approved the settlement agreement and distribution plan. The court further approved class counsel's requested reimbursement of expenses in the amount of $ 390,452, award of attorneys' fees in the amount of $ 7.5 million, and an incentive award for the class

representative in the amount of $ 25,000.

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN1 **Class Actions, Certification of Classes**

Class actions created for the purpose of settlement are recognized under the general scheme of *Fed. R. Civ. P. 23*, provided that the class meets the certification requirements under the rule. The class may not be finally certified for settlement purposes unless it fully satisfies the requirements laid out in *Fed. R. Civ. P. 23(a)* and *(b)*. In the settlement context, the requirements of *Fed. R. Civ. P. 23(a)* and *(b)* call for heightened judicial scrutiny.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2 **Class Actions, Prerequisites for Class Action**

The United States Court of Appeals for the Third Circuit has summarized the legal standard for class certification as follows: To be certified, a class must satisfy the four threshold requirements of *Fed. R. Civ. P. 23(a)*: (1) numerosity (a class so large that joinder of all members is impracticable); (2) commonality (questions of law or fact common to the class); (3) typicality (named parties' claims or defenses are typical of the class); and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class). In addition to the threshold requirements of *Rule 23(a)*, parties seeking class certification must show that the action is maintainable under *Rule 23(b)(1)*, *(2)*, or *(3)*. *Rule 23(b)(3)* provides for so-called "opt-out" class action suits. Under *Rule 23(b)(3)*, two additional requirements must be met in order for a class to be certified: (1) common questions must predominate over any questions affecting only individual members (the predominance requirement), and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy (the superiority requirement).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN3 **Prerequisites for Class Action, Numerosity**

When determining whether a proposed class is sufficiently large such that joinder of all members of the class is impractical, the United States Court of Appeals for the Third Circuit has noted that no minimum number of plaintiffs is required, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of *Fed. R. Civ. P. 23(a)* has been met. In addition to evaluating the absolute size of the proposed class, courts may consider other characteristics of the class when assessing numerosity, such as the geographic dispersion of class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN4 **Prerequisites for Class Action, Commonality**

The commonality requirement for class action suits will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. Because the requirement may be satisfied by a single common issue, it is

easily met.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN5 **Prerequisites for Class Action, Commonality**

The concepts of commonality and typicality in class action suits are broadly defined and tend to merge. A plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory. The named plaintiffs' claims need only be sufficiently similar to those of the class such that the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN6 **Prerequisites for Class Action, Adequacy of Representation**

The adequacy of a class representative is dependent on satisfying two factors: 1) that the plaintiffs' attorney is competent to conduct a class action; and 2) that the class representatives do not have interests antagonistic to the interests of the class. The second factor that must be considered when evaluating adequacy serves to uncover conflicts of interest between named parties and the class they seek to represent. For this factor to be satisfied, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. Consequently, the adequacy of representation requirement is not satisfied where the named representative's interest in maximizing its own recovery provides a strong incentive to minimize the recovery of other class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7 **Class Actions, Prerequisites for Class Action**

Fed. R. Civ. P. 23(b)(3) requires that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. *Fed. R. Civ. P. 23(b)(3)*. The *Rule 23(b)(3)* predominance inquiry tests whether the class is sufficiently cohesive to warrant adjudication by representation and mandates that it is far more demanding than the *Rule 23(a)(2)* commonality requirement. The difficulty of demonstrating sufficient class cohesion naturally varies depending on the nature of the claim, but predominance is a test readily met in certain cases alleging violations of the antitrust laws.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN8 **Class Actions, Prerequisites for Class Action**

The superiority requirement of *Fed. R. Civ. P. 23(b)(3)* 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. The considerations relevant to this determination are (A) the interest of members of the class in individually controlling the prosecution and defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of

concentrating the litigation of the claims in the particular forum. *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN9 **Class Actions, Certification of Classes**

The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court. While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members. Consequently, prior to approving a settlement, the court must determine whether the notice provided to class members was adequate. The court must also scrutinize the terms of the settlement to ensure that it is fair, adequate, and reasonable. Cases where the parties simultaneously seek certification and settlement approval require courts to be even more scrupulous than usual when they examine the fairness of the proposed settlement.

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN10 **Class Actions, Notice of Class Action**

The due process demands of the *Fifth Amendment* and the Federal Rules of Civil Procedure require adequate notice to class members of a proposed class action settlement. In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. The due process requirements of the *Fifth Amendment* are satisfied by the combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class. The notice must 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.

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN11 **Class Actions, Notice of Class Action**

In a settlement class maintained under *Fed. R. Civ. P. 23(b)(3)*, class notice must meet the requirements of both *Fed. R. Civ. P. 23(c)(2)* and *23(e)*. *Rule 23(c)(2)* provides that class members must receive the best notice 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)*. *Rule 23(c)(2)* also requires that the notice indicate an opportunity to opt out, that the judgment will bind all class members who do not opt out, and that any member who does not opt out may appear through counsel.

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN12 **Class Actions, Notice of Class Action**

In addition to the requirements of *Fed. R. Civ. P. 23(c)(2)*, *Fed. R. Civ. P. 23(e)* requires that notice of a proposed settlement of a class action lawsuit must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing. The court should consider both the mode of dissemination and its content to assess whether notice was sufficient. Although the notice need not be unduly specific, the notice document must describe, in detail, the nature of the proposed

settlement, the circumstances justifying it, and the consequences of accepting and opting out of it.

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

HN13 **Class Actions, Notice of Class Action**

In the usual situation, first-class mail and publication in the press fully satisfy the notice requirements of both *Fed. R. Civ. P. 23* and the due process clause.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN14 **Class Actions, Compromise & Settlement**

Fed. R. Civ. P. 23(e) requires that the court must approve any settlement of a class action and states that the court may only approve a settlement after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. *Fed. R. Civ. P. 23(e)(1)*. The United States Court of Appeals for the Third Circuit has determined that a court should accord a presumption of fairness to settlements if the court finds that (1) the negotiations occurred at arms 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.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN15 **Class Actions, Compromise & Settlement**

The United States Court of Appeals for the Third Circuit developed a nine-factor test in Girsh v. Jepson (the "Girsh factors") which provides the analytic structure for determining whether a class action settlement is fair, reasonable, and adequate under *Fed. R. Civ. P. 23(e)*. The nine factors are (1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation. The Girsh factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN16 **Class Actions, Compromise & Settlement**

The first Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the complexity, expense, and likely duration of the litigation, captures the probable costs, in both time and money, of continued litigation.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN17 **Class Actions, Compromise & Settlement**

The second Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the reaction of the class to the settlement, attempts to gauge whether members of the class support the settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN18 **Class Actions, Compromise & Settlement**

This third Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the stage of the proceedings and the amount of discovery completed, enables the court to determine whether counsel had an adequate appreciation of the merits of the case before negotiating.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN19 **Class Actions, Compromise & Settlement**

The fourth Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the risks of establishing liability, enables the court to examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them. When considering this factor, the court should avoid conducting a mini-trial. Rather the court may give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.

Antitrust & Trade Law > Sherman Act > Claims

HN20 **Sherman Act, Claims**

In order to succeed on a claim that a defendant violated *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, the plaintiff must establish that the defendant possessed monopoly power in the relevant market and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence of a superior product, business acumen, or historic accident.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN21 **Class Actions, Compromise & Settlement**

Like the fourth Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, the fifth Girsh factor, i.e., the risks of establishing damages, attempts to measure the expected value of litigating the action rather than settling it at the current time. In making this inquiry, the court considers the potential damage award if the case were taken to trial against the benefits of immediate settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN22 **Class Actions, Compromise & Settlement**

The sixth Girsh factor established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the risks of maintaining the class action through the trial, allows the court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial. *Fed. R. Civ. P. 23(a)* provides that a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable, and proceeding to trial would always entail the risk, even if slight, of decertification. There will always be a risk or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN23 **Class Actions, Compromise & Settlement**

The seventh Girsh factor established by the United

States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement, i.e., the ability of the defendants to withstand a greater judgment is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the settlement.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN24 **Class Actions, Compromise & Settlement**

The eighth and ninth Girsh factors established by the United States Court of Appeals for the Third Circuit for analyzing a proposed class action settlement ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In making this assessment, the court compares the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing with the amount of the proposed settlement. The damages estimates should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside. The primary touchstone of this inquiry is the economic valuation of the proposed settlement. In making this assessment, the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's own view of the merits of the litigation.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

HN25 **Class Actions, Compromise & Settlement**

In addition to analyzing the terms of a class action settlement agreement, the court must also examine the fairness of the proposed distribution plan. Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable, and adequate. Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN26 **Class Attorneys, Fees**

In class action cases, attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN27 **Class Attorneys, Fees**

District courts approving class action settlements must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly. Thorough review of fee arrangements is critical in the context of a class action settlement because of the danger that the lawyers might urge a class settlement at a low figure or on a less-than optimal basis in exchange for red-carpet treatment for fees, and because the parties to the action might lack sufficient incentive to object to the arrangement. Courts must be especially vigilant in searching for the possibility of collusion in pre-certification settlements.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN28 **Class Attorneys, Fees**

Courts typically use one of two methods for assessing attorneys' fees, either the percentage of recovery method or the lodestar method. The percentage of recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure. The United States Court of Appeals for the Third Circuit also recommends use of the lodestar method to cross-check the percentage fee award, in order to verify that the fee award is not excessive.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN29 **Class Attorneys, Fees**

When a district court uses the percentage of recovery method for assessing attorneys' fees, it first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case. The percentage will be based on the net settlement fund after deducting the costs of litigation.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN30 **Class Attorneys, Fees**

In Gunter v. Ridgewood Energy Corp., the United States Court of Appeals for the Third Circuit directed the district courts to consider the following seven factors ("Gunter factors") when determining whether a percentage of recovery fee award is reasonable: (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 the 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.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN31 **Class Attorneys, Fees**

The list of seven factors created by the United States Court of Appeals for the Third Circuit in Gunter v. Ridgewood Energy Corp. (the "Gunter factors"), for assessing the reasonableness of a percentage of recovery fee award was not intended to be exhaustive. In the case, In re Prudential, the court noted three other factors (the "Prudential factors") that may be relevant and important to consider: (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 the settlement. Therefore, in reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case. While the district courts should engage in robust assessments of the fee award reasonableness factors when evaluating a fee request, these factors need not be applied in a formulaic way because each case is different, and in certain cases, one factor may outweigh the rest.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN32 **Class Attorneys, Fees**

When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections indicates the appropriateness of the fee request.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN33 **Class Attorneys, Fees**

The skill and efficiency of plaintiffs' counsel in a class action case is measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience, and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case, and the performance and quality of opposing counsel.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN34 **Class Attorneys, Fees**

While counsel should not be penalized for prosecuting a case in an efficient manner, a court reviewing a percentage of recovery fee award may nonetheless consider the amount of time devoted to a case by counsel as disfavoring the requested fee.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

HN35 **Class Attorneys, Fees**

The United States Court of Appeals for the Third Circuit has suggested that, in addition to reviewing fee award reasonableness factors, it is sensible for district courts to cross-check the percentage fee award against the lodestar method. The lodestar is calculated by multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation. The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award. Moreover, the lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. The resulting multiplier need not fall within any pre-defined range, provided that the district court's analysis justifies the award. It is appropriate for the court to consider the multipliers utilized in comparable cases. The Third Circuit has recognized that multipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN36 **Class Members, Named Members**

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class.

Counsel: **[*1]** For MEIJER, INC., MEIJER DISTRIBUTION, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: BRENT W. LANDAU, DANIEL A. SMALL, COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC, WASHINGTON, DC;DAVID P. GERMAINE, JOSEPH M. VANEK, VANEK VICKERS &

MASINI PC, CHICAGO, IL, US; IRA NEIL RICHARDS, KATHRYN C. HARR, TRUJILLO RODRIGUEZ & RICHARDS LLC, PHILADELPHIA, PA; THOMAS A. VICKERS, DAAR & VANEK PC, CHICAGO, IL.

For 3M COMPANY, formerly known as MINNESOTA MINING AND MANUFACTURING COMPANY, Defendant: BRENT N. RUSHFORTH, DAVID T. SMUTNY,KATHERINE E. WOOD, KIT A. PIERSON, PAUL ALEXANDER, HELLER, EHRMAN, LLP, WASHINGTON, DC; DAVID W. ENGSTROM, ELEANOR MORRIS ILLOWAY, JOHN G. HARKINS, JR., HARKINS CUNNINGHAM, PHILADELPHIA, PA.

Judges: Padova, J.

Opinion by: Padova

Opinion

MEMORANDUM

Padova, J.

August 14, 2006

Plaintiffs, Meijer, Inc. and Meijer Distribution, Inc. (collectively "Meijer"), have brought this class action antitrust lawsuit against Defendant 3M for damages arising out of 3M's allegedly anti-competitive conduct. Plaintiffs have reached a settlement with 3M, which the Court has preliminarily approved. Presently before the Court are Plaintiffs' Motion for Final Approval of **[*2]** Settlement (Docket No. 96) and Plaintiffs' Counsel's Motion for Attorneys' Fees, Expenses, and Incentive Award (Docket No. 97). After a Final Approval Hearing held on August 8, 2006, and for the reasons that follow, the Court grants both Motions.

I. BACKGROUND

Meijer brings this action against 3M on behalf of itself and other members of a proposed class, which includes persons and entities who purchased invisible or transparent tape directly from 3M at any time from October 2, 1998 to February 10, 2006 and also purchased, for resale under their own label, "private label" invisible or transparent tape from 3M at any time from October 2, 1988 to February 10, 2006. Meijer alleges one count of monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, claiming that 3M unlawfully maintained monopoly power in the transparent tape market through its bundled rebate programs [1] and through exclusive dealing arrangements with various retailers. (Compl. P 27.) Meijer further claims that "3M has used its unlawful monopoly power . . . to harm Plaintiffs and the other Class members in their business or property by increasing, maintaining, or stabilizing **[*3]** the prices they paid for invisible and transparent tape above competitive levels." (Id. P 34.) Meijer seeks relief for these overcharges. (Id. P 4.)

A. Litigation History

The conduct of 3M that forms the basis of this class action lawsuit was the subject of a prior lawsuit before the Court, LePage's Inc. v. 3M, Civ. A. No. 97-3983 (E.D. Pa.). In that suit, LePage's, Inc., a competing supplier of transparent tape, sued 3M alleging, *inter alia*, unlawful maintenance of monopoly power in violation of *Section 2* of the Sherman Act. The jury found in favor of LePage's. See *Le Page's Inc. v. 3M, 2000 U.S. Dist. LEXIS 3087, Civ. A. No. 97-3983, 2000 WL 280350 (E.D. Pa. Mar. 14, 2000)*, aff'd **[*4]** , *324 F.3d 141 (3d Cir. 2003)* (en banc), cert. denied, *542 U.S. 953, 124 S. Ct. 2932, 159 L. Ed. 2d 835 (2004)*. Thereafter, Bradburn Parent/Teacher Store, Inc. brought a class action lawsuit against 3M on the

[1] In short, 3M's bundled rebate programs provided purchasers with significant discounts on 3M's products. The availability and size of the rebates, however, were dependent upon purchasers buying 3M products from multiple product lines. See *LePage's, Inc. v. 3M,324 F.3d 141, 154-55 (3d Cir. 2003)*.

basis of the conduct litigated in LePage's. *Bradburn Parent/Teacher Stores, Inc. v. 3M, 2004 U.S. Dist. LEXIS 16193, Civ. A. No. 02-7676 (E.D. Pa.).* Bradburn, who originally had sought to represent a class which included Meijer, was ultimately granted certification of a modified class that excluded purchasers of private label tape, such as Meijer. *Bradburn Parent/Teacher Stores, Inc. v. 3M, 2004 U.S. Dist. LEXIS 16193, Civ. A. No. 02-7676, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004)*. Having been excluded from the class in Bradburn, Meijer attempted to intervene in that lawsuit as an additional class representative. In denying Meijer's Motion to Intervene, this Court noted that "there is nothing which would prevent Meijer from filing its own individual or class-action lawsuit against [3M] and presenting its claims in that forum." *Bradburn Parent/Teacher Store, Inc. v. 3M, 2004 U.S. Dist. LEXIS 25246, Civ. A. No. 02-7676, 2004 WL 2900810, at *6 (E.D. Pa. Dec. 10, 2004)*.

Accordingly, on December 16, 2004, Meijer filed a Complaint **[*5]** against 3M. On February 10, 2005, 3M moved to dismiss the Complaint on the grounds that it was barred by the statute of limitations and failed to allege an antitrust injury. Meijer filed its opposition to that Motion on March 11, 2005. On July 13,2005, this Court denied 3M's Motion to Dismiss, but left open the question of whether and to what extent the statute of limitations should be tolled. See *Meijer, Inc. v. 3M, 2005 U.S. Dist. LEXIS 13995, Civ. A. No. 04-5871, 2005 WL 1660188, at *4 n.2 (E.D. Pa. July 13, 2005)*.

While 3M's Motion to Dismiss was pending, this Court entered a Protective Order negotiated by counsel for 3M and for Meijer, which allowed Meijer to begin receiving documents from the Lepage's and Bradburn cases as well as documents responsive to its own discovery requests. (Daniel A. Small Decl. P 18.) Separately, individual lawsuits were filed against 3M by Publix Supermarkets, Inc. ("Publix"), a former member of the Bradburn class, and by Kmart Corporation ("Kmart"), a member of the proposed Meijer Class. (Id. P 19.) On May 26, 2005, 3M moved for coordination of pretrial discovery among the four pending actions. Meijer responded on June 13, 2005, agreeing **[*6]** that such coordination was appropriate and suggesting modifications to 3M's proposed order. On July 20, 2005, the Court issued an Order coordinating pretrial discovery. Thereafter, Meijer participated in the merits discovery that was ongoing in Bradburn and, in collaboration with Publix and Kmart, established an online database to facilitate the compilation and review of documents and depositions. (Id. PP 22, 24.) On August 2, 2005, 3M filed its Answer to Meijer's Complaint with affirmative defenses.

On September 6, 2005, Meijer moved for class certification under *Federal Rule of Civil Procedure 23(a)* and *(b)(3)*; this Motion was supported by an expert affidavit from an economist, Professor Keith Leffler ("Leffler Declaration"). 3M filed its opposition to this Motion on October 26, 2005. Meanwhile, this Court, following a status hearing on September 26, 2005, suggested that the parties in the coordinated actions attempt to reach a settlement through mediation. (Id. P 31.) The parties selected as a mediator Jonathan B. Marks, and the mediation occurred on November 8 and 9, 2005. (Id. PP 32-33.) Negotiations continued in the days **[*7]** immediately following the mediation, and ultimately resulted in a Memorandum of Understanding ("MOU"), dated November 21, 2005, that resolved the Meijer, Publix, and Kmart actions. (Id. PP 36-37.) Pursuant to the MOU, 3M agreed to pay a total of $ 30 million to settle the three separate lawsuits. (Id. P 38.) Meijer, Publix, and Kmart then allocated that lump sum among the three actions in proportion to the relevant purchases of 3M tape represented in each action; under this allocation plan, all three parties settled their claims for the same percentage of their respective purchases. (Id.)

Subsequent to the execution of the MOU, counsel for Meijer and 3M spent approximately three months negotiating the details of their formal Settlement Agreement, which the parties signed on February 10, 2006. (Id. PP 39, 41.) On February 13,

2006, Meijer moved for preliminary approval of the proposed Settlement; on February 15, 2006, Bradburn moved to intervene for the purpose of opposing preliminary approval of Meijer's proposed Settlement and Settlement Class. Both Meijer and 3M opposed Bradburn's Motion and, on March 9, 2006, the Court denied Bradburn permission to intervene. **[*8]** On March 28, 2006, the Court issued an Order preliminarily approving the Settlement. That Order also preliminarily certified the Settlement Class for settlement purposes, appointed Class Counsel, [2] and approved Meijer as Class Representative. Additionally, the Order authorized the dissemination of Notice to the Settlement Class, scheduled a hearing for final approval of the proposed Settlement ("the Final Approval Hearing"), and set June 6, 2006 as the deadline for objections to the Settlement, requests for exclusion from the Settlement Class, or for filing a Notice of Appearance at the Final Approval Hearing. Pursuant to the March 28th Order, Notice of the Settlement was disseminated through publication and first-class mail, and also was posted on a dedicated website. (Id. P 52.) On May 23, 2006, Meijer filed the instant Motions for Final Approval of Settlement and for Attorneys' Fees, Expenses and Incentive Award. The Motions were supported by a Declaration from Class Counsel attorney Daniel A. Small ("Small Declaration") and a second Declaration from Professor Keith Leffler ("Leffler Declaration II").

[*9] B. The Settlement Agreement

1. The Settlement Class

The Settlement Class, which was preliminarily certified by the Court, is defined as:

> all persons and entities that purchased invisible or transparent tape directly from 3M Company, or any subsidiary or affiliate thereof, in the United States at any time during the period from October 2, 1998 to February 10, 2006 and also purchased for resale under the class member's own label, any "private label" invisible or transparent tape from 3M or any of 3M's competitors from October 2, 1988 to February 10, 2006; but excluding 3M Company, its subsidiaries, affiliates, officers, directors, and employees and excluding those persons or entities that timely and validly request exclusion from the Settlement Class.

2. Terms of the Settlement Agreement

The Settlement Agreement provides for a cash payment of $ 28,889,128 to the Settlement Class; this amount was deposited in an interest-bearing escrow account on April 5, 2006. (Id. P 42.) The Settlement Amount is approximately 2% of the total amount paid to 3M by members of the Settlement Class for invisible and transparent tape for home or office use during **[*10]** the Class Period. (Id. P 43.) The Settlement Amount was subject to reduction and reversion to 3M as members of the Settlement Class requested exclusion. 3M had the right to terminate the Settlement if requests for exclusion exceeded 27.5%. The Distribution Plan calls for the Settlement Amount to be allocated among Class Members in proportion to their relevant purchases of 3M tape. All costs of administering the Settlement and of providing Notice to Members of the Settlement Class are to be paid out of the Settlement Fund. The Agreement authorizes Class Counsel to withdraw up to a total of $ 25,000 from the Settlement Fund for the costs of administering the Settlement and providing Notice to Members of the Settlement Class.

The Settlement Agreement requires that Members of the Settlement Class release and discharge 3M from any and all claims asserted, or which could have been asserted, in the litigation. The release includes all claims and potential claims concerning any 3M discount, rebate, offer, promotion, or other sales program or practice (including programs

[2] The Court appointed the following as Class Counsel: Daniel A. Small and Brent W. Landau of Cohen, Milstein, Hausfield & Toll, P.L.L.C. ("CMHT"); and Joseph M. Vanek of Vanek, Vickers & Masini, P.C. ("VVM," previously "Daar & Vanek, P.C.").

alleged to involve the bundling of products or volume or growth rebates), relating in any way to the sale, promotion, **[*11]** or distribution of invisible or transparent tape for home or office use, in effect from January 1, 1993 to the Settlement Agreement Date of February 10, 2006. The release specifically excludes claims relating to product defect, personal injury, or breach of contract.

The Settlement Agreement permitted Plaintiffs' Counsel [3] to apply to the Court during the Final Approval Hearing for an award of attorneys' fees and a reimbursement of litigation and settlement expenses incurred on behalf of the Settlement Class. The Settlement Agreement also allows Meijer, as Class Representative, to seek an incentive award for its services to the Settlement Class. The attorneys' fees, expenses, and incentive award are to be paid from the Settlement Fund prior to the Fund's distribution to the Class.

C. Final Approval Hearing

[*12] On August 8, 2006, the Court held a Final Approval Hearing to address the Motions for Final Approval of Settlement and for Attorneys' Fees, Expenses and Incentive Award. In preparation for the Hearing, Meijer filed, on August 1, 2006, additional Memoranda in support of these Motions as well as a second Declaration by Attorney Small ("Small Declaration II") and an Affidavit from Thomas R. Glenn, Senior Vice President and Chief Operating Officer of Complete Claims Solutions, Inc. ("CCS"), the firm hired to act as Settlement Administrator. These submissions provided the Court with the following updated information regarding the Settlement Class and Fund: approximately sixty-eight [4] identified Class Members had responded to the Notice which had been mailed to them and were therefore eligible to receive allocation from the Settlement Fund (Thomas R. Glenn Aff. P 13), no objections or Notices of Appearance had been filed, and only one Settlement Class Member - Costco Wholesale Corporation ("Costco") - had requested exclusion from the Class. (Id. P 15.) After factoring in accrued interest and the appropriate reversion to 3M to account for Costco's exclusion, the Settlement Fund totaled **[*13]** $ 27,783,836.97 as of August 1, 2006. (Mem. in Further Support of Pls.' Mot. for Final Approval of Settlement at 5 n.6.). Meijer's submissions also indicated that Plaintiffs' Counsel would request an award of $ 7.5 million in attorneys' fees and a reimbursement of $ 390,452.46 in expenses, and that Meijer would request an incentive award of $ 25,000. The Court confirmed these facts at the Hearing and then considered the final certification of the Settlement Class, the final approval of the proposed Settlement, and the final approval of the requested attorneys' fees, expenses, and incentive award.

[*14] II. FINAL CLASS CERTIFICATION

"The Third Circuit has declared that ***HN1*** class actions created for the purpose of settlement are recognized under the general scheme of *Federal Rule of Civil Procedure 23*, provided that the class meets the certification requirements under the Rule." *Pozzi v. Smith, 952 F. Supp. 218, 221 (E.D. Pa. 1997)* (citing*In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 792-97 (3d Cir. 1995)*). The Settlement Class was preliminarily certified on March 28, 2006; the

---

[3] The term "Plaintiffs' Counsel" refers collectively to Class Counsel, as identified above, and the firm Trujillo, Rodriguez, and Richards, L.L.C. ("TRR"), which has served as local counsel for Plaintiffs.

[4] Sixty-eight refers to the number of clearly non-duplicative responses that CCS had received from identified Class Members as of August 1, 2006. CCS received a total of seventy-two responses from identified Class Members, but four were identified as potentially duplicative. (Glenn Aff. P 13.) CCS also received thirty requests for inclusion in the Settlement Class from entities believing that they may be Class Members; of those requests, two entities were identified as additional Class Members, sent Notice, and given the opportunity to respond and become eligible to receive allocation from the Settlement Fund. (Id. P 14.) As of the Final Approval Hearing on August 8, 2006, no response from those entities had been received; their responses, however, did not need to be postmarked until August 7, 2006 (Id.), and thus may have been validly outstanding at the time of the Hearing. For greater detail regarding the Notice Plan, see infra Section III. A.

Class, however, may not be finally certified for settlement purposes unless it fully satisfies the requirements laid out in *Federal Rule of Civil Procedure 23(a)* and *(b)*. See *In re Cmty. Bank of N. Va., 418 F.3d 277, 299 (3d Cir. 2005)* (noting that "the ultimate inquiry into the fairness of the settlement under *Fed. R. Civ. P. 23(e)* does not relieve the court of its responsibility to evaluate *Rule 23(a)* and *(b)* considerations"). In the settlement context, the requirements of *Rule 23(a)* and *(b)* call for **[*15]** heightened judicial scrutiny. See, e.g., *In re General Motors, 55 F.3d at 784*; *Amchem Prods.,Inc. v. Windsor, 521 U.S. 591, 621, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (stating that the full satisfaction of *Fed. R. Civ. P. 23(a)* and *(b)* criteria as a prerequisite to certification is even more important when the case is to be settled without trial). ***HN2*** The United States Court of Appeals for the Third Circuit ("Third Circuit") has summarized the legal standard for class certification as follows:

> To be certified, a class must satisfy the four threshold requirements of *Federal Rule of Civil Procedure 23(a)*: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class"). In addition to the threshold requirements of *Rule 23(a)*, parties seeking class certification must show that the action **[*16]** is maintainable under *Rule 23(b)(1)*, *(2)*, or *(3)*. *Rule 23(b)(3)* . . . provides for so-called "opt-out" class actions [sic] suits. Under *Rule 23(b)(3)*, two additional requirements must be met in order for a class to be certified: (1) common questions must "predominate over any questions affecting only individual members" (the "predominance requirement"), and (2) class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy" (the "superiority requirement").

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 527 (3d Cir. 2004)(internal citations omitted).

For the reasons given below, the Court finds that the proposed Settlement Class satisfies the requirements of *Rule 23(a)* and *(b)(3)*, and thus the Court certifies the Class for settlement purposes.

A. *Rule 23(a)* Factors

1. Numerosity

HN3 When determining whether a proposed class is sufficiently large such that joinder of all members of the class is impractical, the Third Circuit has noted that "[n]o minimum number of plaintiffs is required . . ., but generally if the named plaintiff demonstrates that the potential number of plaintiffs **[*17]** exceeds forty, the first prong of *Rule 23(a)* has been met." *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)* (citing 5 James Wm. Moore et al., *Moore's Federal Practice § 23.22[3][a]* (Matthew Bender 3d ed. 1999)). In addition to evaluating the absolute size of the proposed class, courts may consider other characteristics of the class when assessing numerosity, such as the geographic dispersion of class members. 5 *Moore's Federal Practice § 23.22[1][d]* (Matthew Bender 3d ed. 2006); see also *In re Corel Corp. Inc. Sec. Litig., 206 F.R.D. 533, 540 (E.D. Pa. 2002)* (noting that plaintiffs' argument that "joinder is impracticable due to the geographic dispersion of class members" supports a finding of numerosity). Here, information supplied from 3M's sales records indicates that the Settlement Class consists of at least 143 Members, who are headquartered in at least 35 different states. (Thomas R. Glenn Aff. P 5; Leffler Decl. Table 1.) Accordingly, the Court finds that the Settlement Class satisfies the numerosity requirement of *Rule 23(a)*.

2. Commonality

HN4 "The **[*18]** commonality requirement will be

satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class. Because the requirement may be satisfied by a single common issue, it is easily met. . . ." *Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)* (citations omitted). The Court notes that the "numerous common questions of law and fact" that this Court found to be present in Bradburn are also present in this case. See *Bradburn, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987, at *3*. Namely, all members of the Settlement Class must establish: the proper definition of the relevant product and geographic market; whether 3M has monopoly power in the relevant market; whether 3M acquired monopoly power through anti-competitive activity; and whether 3M's anti-competitive conduct caused tape prices to be artificially inflated. As Meijer shares multiple questions of law and fact with the proposed Class, the Court finds that *Rule 23(a)*'s commonality requirement is satisfied.

3. Typicality

HN5 The concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal, 43 F.3d at 56*. "'[A] plaintiff's **[*19]** claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other Class members and is based on the same legal theory.'" *T.B. v. School Dist. of Phila., 1997 U.S. Dist. LEXIS 19300, Civ. A. No. 97-5453, 1997 WL 786448, at *4 (E.D. Pa. Dec. 1, 1997)* (quoting *Paskel v. Heckler, 99 F.R.D. 80, 83 (E.D. Pa. 1983))* (alteration in original). The named plaintiffs' claims need only be sufficiently similar to those of the class such that "the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." *Georgine v. Amchem Prods., Inc., 83 F.3d 610, 631 (3d Cir. 1996)*, aff'd subnom. *Amchem Prods., 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689*. Here, Meijer's claims are typical of the claims of the members of the proposed Class. Both Meijer and all Settlement Class Members allegedly have been injured by the same anti-competitive conduct of 3M, and purportedly suffered overcharges as a result. Accordingly, the Court finds that the typicality requirement is satisfied.

4. Adequacy of representation

HN6 The adequacy of the class representative **[*20]** is dependant on satisfying two factors: 1) that the plaintiffs' attorney is competent to conduct a class action; and 2) that the class representatives do not have interests antagonistic to the interests of the class." *In Re Linerboard Antitrust Litig., 203 F.R.D. 197, 207 (E.D. Pa. 2001)*(citations omitted). With respect to the first factor, Class Counsel have submitted firm resumes (Small Decl. PP 62-64, Exs. 8, 9A, 10A) which attest to their extensive experience in antitrust and other class action litigation and their successful prosecution of such cases in courts throughout the country. The Court, therefore, finds that Class Counsel is competent to conduct this class action.

he second factor that must be considered when evaluating adequacy "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., 521 U.S. at 625*. For this factor to be satisfied, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the Class members." *E. Tex. Motor FreightSys. Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)* (quoting **[*21]** *Schlesinger v. Reservists Comm. to Stopthe War,418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974))*; see also *Georgine, 83 F.3d at 630* (finding class representative inadequate because the proposed settlement made "important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others"). Consequently, the adequacy of representation requirement is not satisfied where "the named representative's interest in maximizing its own recovery provides a strong incentive to minimize the recovery of other class members." *Yeager's Fuel, Inc. v. Pa. Power & Light Co.,162 F.R.D. 471, 478 (E.D. Pa. 1995)*.

Meijer is capable of providing adequate representation for the absent Class Members. Meijer, as a purchaser of both brand and private label tape from 3M, has the same interest in this antitrust claim as the absent Class Members do: namely, to challenge and obtain damages for 3M's anti-competitive conduct. The potential concern regarding the adequacy of Meijer's representation is Meijer's decision to seek these damages under an "overcharge" theory as opposed to an alternate **[*22]** "lost profits" theory. See *Bradburn Parent/Teacher Store, Inc. V. 3M, 2004 U.S. Dist. LEXIS 3347, Civ. A. No. 02-7676, 2004 WL 414047, at *4 (E.D. Pa. Mar. 1, 2004)*. *Rule 23(a)(4)*, however, asks the Court to examine the interests of the class representative, not its litigation decisions. Meijer's decision to pursue the common interest of the proposed Class through one theory of recovery as opposed to another does not compromise the adequacy of Meijer's representation unless the record demonstrates that such a decision will work to the detriment of absent Class Members. See *Bradburn, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987, at *6* (rejecting the argument that "the mere risk that the theory [of damages] proposed by Plaintiff will be less well received than a competing theory which could be put forward by other potential class members is sufficient for the Court to find the existence of an imminent and apparent potential conflict").

While the lost profits theory is a means of pursuing damages available to the Settlement Class, Meijer's decision to pursue an overcharge theory is not antagonistic to the interests of the Class. Meijer has submitted a declaration from Keith Leffler, Ph.D., an Associate Professor **[*23]** at the University of Washington, which indicates that it is highly likely that every Class Member's overcharge remedy is larger than its lost profits remedy and, even if a Class Member has a larger lost profits claim, the burden and difficulty of proving such a claim would overwhelm its additional value. (Leffler Decl. P 6.) The Court also finds it significant that, in the years since the LePage's verdict, no potential member of the proposed Meijer Class pursued a lost profits claim and Kmart, the one such entity to file an individual action, chose to pursue an overcharge remedy rather than a lost profits remedy. Complaint at P 4, Kmart Corp. v. 3M Co., Civ. A. No. 05-3842 (E.D. Pa. July 25, 2005). Thus, since Class Counsel is competent to conduct a class action, and since Meijer does not have interests in this action that are antagonistic to the interests of the Members of the proposed Settlement Class, the Court finds that Meijer satisfies the adequacy of representation requirement.

B. *Rule 23(b)(3)* Factors

1. Predominance

HN7 *Rule 23(b)(3)* requires that "the questions of law or fact common to the members of the class predominate over any questions affecting **[*24]** only individual members." *Fed. R. Civ.P. 23(b)(3)*. "The *Rule 23(b)(3)* predominance inquiry tests whether the class is sufficiently cohesive to warrant adjudication by representation, and mandates that it is far more demanding than the *Rule 23(a)(2)* commonality requirement." *In re Life USA Holding Inc., 242 F.3d 136, 144 (3d Cir. 2001)* (citing *Amchem, 521 U.S. at 623-24*). The difficulty of demonstrating sufficient class cohesion naturally varies depending on the nature of the claim, but "'[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws.'" *In re Warfarin, 391 F.3d at 528* (quoting *Amchem, 521 U.S. at 625*).

The Court finds that common questions of law and fact predominate in this case. The substance of this antitrust claim derives from the anti-competitive conduct of 3M and "does not depend on the conduct of individual class members." Id.The success of the claim hinges on matters of common, class-wide proof; the evidence that proves the violation as to one Class Member proves it as to all Class Members. See *In re Linerboard, 203 F.R.D. at 220* **[*25]** (finding predominance requirement satisfied where "[p]laintiffs have shown that they plan to prove common impact by introducing

generalized evidence which will not vary among individual class members."). "Finally, the fact that plaintiffs allege purely an economic injury . . . and not any physical injury, further supports a finding of commonality and predominance because there are little or no individual proof problems in this case otherwise commonly associated with physical injury claims." *In re Warfarin, 391 F.3d at 529*. Accordingly, the Court finds that *Rule 23(b)(3)*'s predominance requirement is met.

2. Superiority

HN8 "The superiority requirement [of *Rule 23(b)(3)*] '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 Warfarin, 391 F.3d at 533-34* (quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 316 (3d Cir. 1998)*). The considerations relevant to this determination are:

> (A) the interest of members of the class in individually controlling the prosecution and defense **[*26]** of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum . . . . [5]

Fed. R. Civ. P. 23(b)(3).

Here, a class action is superior **[*27]** to other methods of adjudication. There appears to be little interest on behalf of the Members of the proposed Class in litigating their claims individually. Roughly half of the Members of the proposed the Class have under $ 1 million in total tape purchases from 3M (Leffler Decl. Table 1), and the potential recovery of these Class Members would be just a fraction of that amount - a sum easily subsumed by the various fees and expenses of a complex antitrust suit against a large corporate defendant such as 3M. See *In re Warfarin, 391 F.3d at 534*; see also *Orloff v. Syndicated Office Sys., Inc., 2004 U.S. Dist. LEXIS 7151, Civ. A. No. 00-5355, 2004 WL 870691, at *5 (E.D. Pa. Apr. 22, 2004)* (finding a class action to be the superior method of adjudication, "because it "provides an efficient alternative to individual claims, and because individual Class members are unlikely to bring individual actions given the likelihood that their litigation expenses would exceed any potential recovery"). The presence of some larger purchasers in the proposed Class who potentially could support an individual suit does not militate against the superiority of the class action, given the presence **[*28]** and number of smaller claimants. See *Bradburn, 2004 U.S. Dist. LEXIS 16193, 2004 WL 1842987, at *18* (finding the superiority requirement to be satisfied even though the "class may include members who have purchased a sufficiently large quantity of tape from 3M to justify the commencement of an individual suit" because "the class also contains many members whose potential damage awards would be dwarfed by their potential litigation expenses."). If these larger purchasers preferred to litigate separately, they could have opted out of the proposed Settlement. The fact that, of the potential members of the proposed MeijerClass, only Kmart chose to bring an individual action speaks both to the lack of interest of the Members of the proposed Class in litigating separately and to the lack of "litigation concerning the controversy already commenced by or against members of the class." *Fed. R. Civ. P. 23(b)(3)*; see also *In re Warfarin, 391 F.3d at 534* ("[T]here were a relatively small number of individual lawsuits pending against [the defendant] in this matter, which indicated . . . that there was a lack of interest in individual prosecution **[*29]** of

---

[5] There is also a fourth consideration: "(D) the difficulties likely to be encountered in the management of a class action." *Fed. R. Civ. P. 23(b)(3)(D)*. The Court, however, need not consider this final factor in the context of a settlement-only class certification. See *Amchem, 521 U.S. at 620* ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see *Fed. Rule Civ. Proc. 23(b)(3)(D)*, for the proposal is that there be no trial.").

claims."). Lastly, the consolidation of these claims before the Court is appropriate given the Court's experience and familiarity with the previous litigation, LePage's, that arose from the conduct of 3M at issue here. Accordingly, the Court finds that a class action is the superior method of adjudication in this case, as required by *Rule 23(b)(3)*.

Thus, the Court concludes that the proposed Settlement Class satisfies all of the relevant requirements of *Rule 23(a)* and *(b)* and, therefore, approves final certification of the Class for the purposes of settlement.

III. MOTION FOR FINAL APPROVAL OF SETTLEMENT

HN9 "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson, 521 F.2d 153, 156 (3d Cir. 1975)*. "While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members." *In re Aetna Inc. Sec. Litig., 2001 U.S. Dist. LEXIS 68, MDL No. 1219, 2001 WL 20928, at *4 (E.D. Pa. Jan. 4, 2001)* (citing *In re General Motors, 55 F.3d at 784*). **[*30]** Consequently, prior to approving a settlement, the Court must determine whether the notice provided to class members was adequate. *Id.* (citations omitted). The Court must also "scrutinize the terms of the settlement to ensure that it is 'fair, adequate and reasonable.'" *Id.* (quoting *In re General Motors, 55 F.3d at 785*). "[C]ases such as this, where the parties simultaneously seek certification and settlement approval, require 'courts to be even more scrupulous than usual' when they examine the fairness of the proposed settlement." *In re Prudential, 148 F.3d at 317* (quoting *In re General Motors, 55 F.3d at 805*).

A. Adequacy of Notice

HN10 The due process demands of the *Fifth Amendment* and the Federal Rules of Civil Procedure require adequate notice to class members of a proposed settlement. *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *5*. "In the class action context, the district court obtains personal jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class. **[*31]** " *In re Prudential, 148 F.3d at 306* (citing *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)*). The due process requirements of the *Fifth Amendment* are satisfied by the "combination of reasonable notice, the opportunity to be heard and the opportunity to withdraw from the class." Id. The notice must 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.'" *Lachance v. Harrington, 965 F. Supp. 630, 636 (E.D. Pa.1997)* (quoting *Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)*).

HN11 Moreover, "in a settlement class maintained under *Rule 23(b)(3)*, class notice must meet the requirements of both *Federal Rules of Civil Procedure 23(c)(2)* and *23(e)*." *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 226 F.R.D. 498, 517 (E.D. Pa. 2005)* (citing *Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 324-25 (E.D. Pa. 1993)*). **[*32]** *Rule 23(c)(2)* provides that class members must receive the "best notice 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)*. *Rule 23(c)(2)* also requires that "the notice indicate an opportunity to opt out, that the judgment will bind all class members who do not opt out and that any member who does not opt out may appear through counsel." *In re Diet Drugs, 226 F.R.D. at 517* (citing *Fed. R. Civ. P. 23(c)(2)*).

HN12 In addition to the requirements of *Rule 23(c)(2)*, *Rule 23(e)* "requires that notice of a

proposed settlement must inform class members: (1) of the nature of the pending litigation; (2) of the settlement's general terms; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the Fairness Hearing." *Id. at 517-18* (citation omitted). The court should consider both "the mode of dissemination and its content to assess whether notice was sufficient." *Id.* Although the "notice need not be unduly specific **[*33]** . . . the notice document must describe, in detail, the nature of the proposed settlement, the circumstances justifying it, and the consequences of accepting and opting out of it." *Id. at 518* (citing *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig., 369 F.3d 293, 308-10 (3d Cir. 2004)*).

The Court finds that the Notice provided in this case satisfies the requirements of due process and the Federal Rules of Civil Procedure. Pursuant to the Settlement Agreement and the Court's Preliminary Approval Order, Meijer hired CCS as Settlement Administrator to oversee the dissemination of Notice to the Class. (Small Decl. II P 3.) Potential Members of the Settlement Class were identified by Meijer and 3M through the examination of 3M's sales data as well as the list of entities compiled in the Bradburn litigation. (Small Decl. P 52.) Between May 1 and May 5, 2006, CCS sent Notice by first-class mail to the 143 entities identified as those believed to be Members of the Settlement Class. (Small Decl. P 52; Glenn Aff. P 5.) This Notice was accompanied by a preprinted Proof of Claim form, which provided the total invoice amount **[*34]** paid to 3M by the Settlement Class Member for invisible transparent tape for home or office use, less any applicable volume rebates, from 1999 through 2004. (Small Decl. P 53.) An attachment to the preprinted form listed this information on a year-by-year and SKU-by-SKU basis. (Id.) Settlement Class Members were given the opportunity either to agree with the total purchase amount stated on the Proof of Claim form, or to disagree and provide supporting documentation for a different amount. (Id.) On or about April 27, 2006, CCS sent Summary Notice by first-class mail to over 3000 other entities identified by 3M as having purchased invisible or transparent tape directly from 3M, based on the list used in the Bradburn litigation. (Small Decl. P 52; Glenn Aff. P 4.) Each entity receiving Summary Notice also received a Claim Form Request, with which it could request a Proof of Claim Form if it believed it was a Member of the Settlement Class. (Small Decl. P 54.) Additionally, an abbreviated Summary Notice was published on May 11, 2006, in DSN Retailing Today, Supermarket News, and Office Products International. (Glenn Aff. P 6.) Lastly, Notice was posted on a dedicated **[*35]** website, *www.TransparentTapeDirectPurchaserSettlement.com*; this website has been active since May 1, 2006. (Small Decl. P 52; Glenn Aff. P 12.) The Court finds that these efforts to disseminate notice were the best practicable. See *Zimmer Paper Prods., Inc. v. Berger & Montague, 758 F.2d 86, 90 (3d Cir. 1985)*(noting that ***HN13*** "in the usual situation first-class mail and publication in press fully satisfy the notice requirements of both *Fed. R. Civ. P. 23* and the due process clause").

The Court also finds the content of the Notice and the Summary Notices to be adequate under the due process clause and *Rules 23*. The Notice describes the nature and background of this action and defines the Class, Class claims, and consequences of Class Membership. (Glenn Aff. Ex. 2.) It summarizes the terms of the Settlement, including information relating to the size of the Settlement Fund; the release provisions of the Settlement; and the attorneys' fees, expenses, and incentive award for which Meijer may apply. (Id.) The Notice also describes the proposed Distribution Plan and details how to submit a proper and timely Proof of Claim form, advising **[*36]** Class Members that, if they fail to submit a proper Proof of Claim form by the specified deadline, they may be barred from any recovery though still bound by the final disposition of the litigation. (Id. at 3-4.) The Notice alerts Class Members to their right to request exclusion from the Class, and details the procedure for and

consequences of doing so. (Id. at 3.) The Notice informs Class Members of the time and date of the Final Approval Hearing, advising them of the nature and purpose of the Hearing, of their rights to object to the Settlement and appear at the Hearing, and of the procedure for asserting those rights. (Id. at 4.) The Notice includes the contact information of the relevant attorneys and of the Settlement Administrator, and also directs Class Members to the dedicated website, where copies of the Notice, the Settlement Agreement, and other documents pertaining to the case may be found. (Id.) The Summary Notices provide the essential information regarding the Class, the litigation, the terms of the Settlement, and the Final Approval Hearing. (Glenn Aff. Exs. 1,4.) The Summary Notices inform potential Class Members of their rights with regard to the **[*37]** Settlement and provide information on how copies of the full Notice and Settlement Agreement may be obtained. (Id.) The Summary Notice distributed by mail also explicitly distinguishes the proposed Meijer Class from the Bradburn Class and details both the procedure for submitting the Claim Form Request and the consequences of failing to submit a Proof of Claim form. (Glenn Aff. Ex.1.) After reviewing the Notice and Summary Notices, the Court concludes that their substance, like the method of their dissemination, is sufficient to satisfy the concerns of due process and *Rule 23*. See *In re Prudential, 148 F.3d at 328*; *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *5* (citing *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 175 (E.D. Pa. 2000)*).

B. Presumption of Fairness

HN14 *Rule 23(e) of the Federal Rules of Civil Procedure* requires that the Court must approve any settlement of a class action and states that the Court may only approve a settlement "after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(1)* **[*38]** . The Third Circuit has determined that a court should accord a presumption of fairness to settlements if the court finds that: "(1) the negotiations occurred at arms 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 Cendant Corp. Litig., 264 F.3d 201, 232 n.18 (3d Cir. 2001)* (citing *In re General Motors, 55 F.3d at 785*).

The Settlement in this case is entitled to a presumption of fairness. The Settlement Agreement resulted from arm's-length negotiations that occurred both during the Court-suggested mediation and in the months following. (Small Decl. PP 36, 40.) Prior to the mediation, the parties exchanged detailed mediation statements so that discussions could be founded on the attorneys' full understanding of the strengths and weaknesses of their cases. (Id. PP 34-35.) The Settlement was reached after a year of litigation and discovery, during which the parties also had access to the LePage's trial record and the Court's ruling on collateral estoppel in Bradburn. See *Bradburn Parent/Teacher Store, Inc. v. 3M, 2005 U.S. Dist. LEXIS 11375, Civ A. No. 02-7676,2005 WL 1388929 **[*39]** (E.D. Pa. June 9, 2005)*. [6] (Id. PP 18, 26.) Meijer engaged in coordinated discovery with the parties in the Bradburn, Publix, and Kmart

---

[6] Based on the outcome of the LePage's litigation, the Court held that collateral estoppel applied to establish the following facts upon the trial of the Bradburn action:

1. For the time period from June 11, 1993 [to] October 13, 1999, the relevant market in this matter is the market for invisible and transparent tape for home and office use in the United States;

2. For some period of time between June 11, 1993 and October 13, 1999, 3M possessed monopoly power in the relevant market, including the power to control prices and exclude competition in the relevant market;

3. For some period of time between June 11, 1993 and October 13, 1999, 3M willfully maintained such monopoly power by predatory or exclusionary conduct; and

4. For some period of time between June 11, 1993 and October 13, 1999, 3M's predatory or exclusionary conduct harmed competition.

*Bradburn, 2005 U.S. Dist. LEXIS 11375, 2005 WL 1388929, at *7*.

actions, which entailed the compilation and review of hundreds of thousands of pages of documents and participation in multiple depositions. (Id. PP 18-25, 28.) As already discussed, Class Counsel has extensive experience litigating antitrust class actions such as the one at hand. Lastly, no Class Members filed objections to the Settlement. Accordingly, the Court will apply a presumption of fairness in analyzing the Settlement.

[*40] C. The *Girsh* Factors

HN15 The Third Circuit developed a nine-factor test in Girsh, "which provides the analytic structure for determining whether a class action settlement is fair, reasonable, and adequate under *Rule 23(e)*." *In re Cendant, 264 F.3d at 231* (citation omitted). The nine factors are:

> (1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

Id. at 232 (citing *Girsh, 521 F.2d at 157*). Upon consideration of these factors, the Court finds that the proposed Settlement is fair, reasonable, and adequate. [7]

[*41]

1. Complexity, expense, and likely duration of the litigation

HN16 "This factor captures 'the probable costs, in both time and money, of continued litigation.'" *Id. at 323* (citing *In re General Motors, 55 F.3d at 812*). An antitrust class action, such as this one, is "arguably the most complex action to prosecute" as "[t]he legal and factual issues involved are always numerous and uncertain in outcome." *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003)* (citations and internal quotation marks omitted).

In the absence of settlement, significant costs in terms of both time and money likely would result from the continued litigation of this case. At the time when the MOU and the subsequent Settlement Agreement were reached, the issue of class certification was still pending, and other legal issues, including the potential tolling of the statute of limitations and the proper preclusive effect of the LePage's verdict, were going to be disputed. The parties had begun coordinated discovery at that point, but substantial merits discovery remained. In addition to discovery costs, continued litigation potentially **[*42]** would have entailed various dispositive motions, the procurement and submission of additional expert reports, and a substantial trial. Whatever the disposition of the case, litigation likely would have continued for some time thereafter through post-trial motions and appeal. See *In re Ikon, 194 F.R.D. at 179* ("[T]he extremely large sums of money at issue almost guarantee that any outcome, whether by summary judgment or trial, would be appealed."). The time and resources saved by the avoidance of these costs would benefit all parties. See *In re Warfarin, 391 F.3d at 536* ("[I]t was inevitable that post-trial motions and appeals would not only further prolong the litigation but also reduce the value of recovery

---

[7] As the Third Circuit has recently noted, "The Girsh factors do not provide an exhaustive list of factors to be considered when reviewing a proposed settlement." *In re AT&T Corp. Sec. Litig.,455 F.3d 160, 2006 WL 2021033, at *3 (3d Cir. 2006)*. In In re Prudential, for instance, the Third Circuit enumerated a list of additional considerations which may be relevant to a court's assessment of the fairness of a class action settlement. *148 F.3d at 323*. After thorough review of the proposed Settlement in this case, the Court has found that all considerations relevant to its assessment of the Settlement's fairness are fully covered by the Court's analysis of the adequacy of the Notice, the nine Girsh factors, and the fairness of the Distribution Plan.

to the class."); *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928,at *6* (noting that "[t]he risk of delay could have deleterious effects on any future recovery due to the time value of money"). Thus the Court finds that the complexity, expense, and likely duration of the litigation favor settlement. See *In re Prudential, 148 F.3d at 318* ("[T]he trial of this class action would be a long, arduous process requiring great expenditures **[*43]** of time and money on behalf of both the parties and the court. The prospect of such a massive undertaking clearly counsels in favor of settlement.").

2. The reaction of the class

HN17 This factor "attempts to gauge whether members of the class support the settlement." Id. As stated above, Notice of this Settlement was disseminated thoroughly by means of publication and first-class mail, and informed potential Class Members of their rights to object to the Settlement and to request exclusion from the Class. The deadline for filing objections and requesting exclusion was June 6, 2006. As of the Final Approval Hearing on August 8, 2006, no objections and only one request for exclusion had been filed. (Glenn Aff. P 15.) This total absence of objections, coupled with such a low opt-out rate, argues in favor of the proposed Settlement. See, e.g., *In re PNC Fin. Servs. Group, Inc., 440 F. Supp. 2d 421, 2006 U.S. Dist. LEXIS 47618, Civ. A. No. 02-271, 2006 WL 1984660, at *9 (W.D. Pa. July 13, 2006)*("Here, no class member objected to the proposed settlement. Similarly, only five opt outs were received after the mailing of over 73,000 copies of the notice and the publication of the summary notice. Under **[*44]** these circumstances an inference of strong class support is properly drawn."); *Marino v. UDR, 2006 U.S. Dist. LEXIS 39680, Civ. A. No. 05-2268, 2006 WL 1687026, at *3 (E.D. Pa. June 14, 2006)* ("The fact that there are no opt-outs and no objections favors the proposed settlement.") (citing *Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d Cir. 1990)*); *Perry v. Fleet Boston Fin. Corp., 229 F.R.D. 105, 115 (E.D. Pa. 2005)* (holding that, when only 70 out of 90,000 potential class members opted out and "not a single class member objected to the proposed settlement . . . [s]uch a response (or lack thereof) weighs greatly in favor of approving the settlement") (citing cases). The lack of objections and low opt-out rate are particularly notable in this case as "these are sophisticated businesses with, in some cases, large potential claims, and they could be expected to object to a settlement they perceived as unfair or inadequate." *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 254-55 (D. Del. 2002)*, aff'd, *391 F.3d 516 (3d Cir. 2004)*.

Additionally, as of August 1, 2006, approximately sixty-eight Settlement Class Members **[*45]** had submitted Proof of Claim forms qualifying them to participate in the proposed Settlement. (Glenn Aff. P 13). These claimants amount to nearly half of the 143 entities to whom Notice originally was mailed and over 60% of the tape purchases by Settlement Class Members from 3M during the relevant period. (Id.) This response further indicates the fairness of the proposed Settlement. See *In re Auto. Refinishing Paint Antitrust Litig., MDL No. 1426, 2004 U.S. Dist. LEXIS 29161, at *15 (E.D. Pa. Sept. 27, 2004)* ("The fact that there have been no objectors to the Settlement, that the claims filed represent a significant majority of the sales at issue, and that claims have been filed by major companies with significant resources . . . supports approval of the settlement."); *Stoner v. CBA Info. Servs., 352 F. Supp. 2d 549, 552 (E.D. Pa. 2005)* ("Over 16% of 11,980 class members notified have submitted claim forms seeking to participate in the settlement. Only 18 members have chosen to opt out and only five have filed . . . objections to the proposed settlement. This relatively high response rate indicates a more than favorable class reaction.") (footnote **[*46]** and citations omitted). Accordingly, the Court finds that the reaction of the Class in this case strongly favors approval of the Settlement.

3. Stage of proceedings and amount of discovery completed

HN18 This factor enables the Court to "'determine whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *In re Cendant, 264 F.3d at 235* (quoting *In re General Motors, 55 F.3d at 813*). In this case, a substantial amount of discovery had been performed before the Settlement was reached: Class Counsel had compiled and undertaken review of hundreds of thousands of pages of discovery documents and depositions, had reviewed the discovery and trial record from the LePage's litigation, had participated in coordinated discovery in the Bradburn litigation, and had consulted extensively with an economic expert. Moreover, prior to reaching the Settlement, the parties had engaged in mediation, including the exchange of mediation statements regarding the merits of their respective positions in order to inform and facilitate their negotiations. The Court concludes, therefore, that the parties had "an adequate appreciation **[*47]** of the merits" of this case at the time they negotiated the Settlement. *In re Cendant, 264 F.3d at 235* (citation omitted).

4. Risks of establishing liability

HN19 This factor enables the Court to examine "'what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.'" *In re Cendant, 264 F.3d at 237* (quoting *In re General Motors,55 F.3d at 814*). "When considering this factor, the court should avoid conducting a mini-trial. Rather the court may 'give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *9* (quoting *In re Ikon, 194 F.R.D. at 181*).

HN20 In order to succeed on its claim that 3M violated *§ 2* of the Sherman Act, Meijer "must establish that [3M] possessed monopoly power in the [relevant] market and that it willfully acquired or maintained that power as distinguished from achieving growth or development as a consequence **[*48]** of a superior product, business acumen, or historic accident." *In re Warfarin, 391 F.3d at 529 n.11* (citing *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*). Meijer's risks of establishing liability in this case are diminished by the LePage's verdict and the collateral estoppel ruling in Bradburn. Meijer, however, faced numerous challenges in establishing 3M's liability in this case. For instance, the rebates offered by 3M after 1999 [8] may not have been anti-competitive and the verdict in favor of LePage's does not mean that purchasers of tape from 3M were necessarily injured as well, since many of them may have benefitted from the challenged rebates. The Court concludes that, given these challenges, this factor favors settlement.

5. Risks of establishing damages

HN21 "Like **[*49]** the fourth factor, 'this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" *In re Cendant, 264 F.3d at 238-39* (quoting *In re General Motors, 55 F.3d at 816*). In making this inquiry, the Court considers the "potential damage award if the case were taken to trial against the benefits of immediate settlement." *In re Warfarin, 212 F.R.D. at 256* (citing*In re Prudential, 148 F.3d at 319*). Meijer had not completed a final damages calculation prior to reaching the Settlement Agreement with 3M against which the Settlement Amount may be compared. The Settlement Class, however, would face significant risks in establishing damages at trial. For instance, to the extent that some Class Members may have benefitted from the challenged rebates, they would have had to prove that a period of recoupment followed the discontinuation of the rebates. See generally *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Some evidence,

---

[8] The collateral estoppel ruling in Bradburn only covers the Class Period up until October 13, 1999. *Bradburn, 2005 U.S. Dist. LEXIS 11375, 2005 WL 1388929, at *7*.

however, suggests that such a recoupment period never occurred and that, even if **[*50]** such recoupment were established, the resulting damages period potentially would have been fairly short. (Leffler Decl. II PP 4, 8-13.) Additionally, the parties' efforts to dispute damages at trial undoubtedly would result in a "'battle of the experts,' with each side presenting its figures to the jury and with no guarantee whom the jury would believe." *In re Cendant, 264 F.3d at 239*. For these reasons, the Court concludes that the risks of establishing damages weigh in favor of settlement in this case.

6. Risks of maintaining class action status through trial

HN22 This factor allows the Court to weigh the possibility that, if a class were certified for trial in this case, it would be decertified prior to trial. *Federal Rule of Civil Procedure 23(a)* provides that "a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable, and proceeding to trial would always entail the risk, even if slight, of decertification." *In re Cendant, 264 F.3d at 239* (citation and internal quotations omitted). The Settlement here was reached before the Court had ruled **[*51]** on class certification, a motion which 3M had contested. Thus, there was the risk that such certification would not be granted in the first place, along with the ever-present risk that the class, if certified, would have been decertified later in the litigation. Accordingly, the Court finds that this factor favors settlement. See *In re Prudential, 148 F.3d at 321* ("There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement.")

7. Ability of defendants to withstand greater judgment

HN23 This factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *In re Cendant, 264 F.3d at 240*. The Court notes that 3M, with 2005 annual net sales of $ 21.2 billion (3M 2005 Annual Report), likely can withstand a judgment significantly greater than the Settlement Amount. Even so, this determination in itself does not carry much weight in evaluating the fairness of the Settlement. See *Perry, 229 F.R.D. at 116* ("Fleet could certainly withstand a much larger judgment as it has **[*52]** considerable assets. While that fact weighs against approving the settlement, this factor's importance is lessened by the obstacles the class would face in establishing liability and damages."). Accordingly, the Court finds that this factor disfavors settlement, albeit very slightly.

8 & 9. Range of reasonableness (in light of best possible recovery and risks of litigation)

HN24 The eight and ninth Girsh factors "ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* (citing *In re Prudential, 148 F.3d at 322*). In making this assessment, the Court compares "'the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing'" with "'the amount of the proposed settlement.'" *In re General Motors, 55 F.3d at 806* (quoting MCL 2d § 30.44). The damages estimates should "generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or **[*53]** rejecting) a settlement will not be set aside." Id. (citation omitted). "The primary touchstone of this inquiry is the economic valuation of the proposed settlement." *Id.* "In making this assessment, the evaluating court must recognize that "settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's own view of the merits of the litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* (citing *In re General Motors, 55 F.3d at 806*).

Pursuant to the Settlement Agreement, Settlement Class Members will receive immediate monetary relief in accordance with their relevant purchases of 3M tape, without undertaking the risks, costs, and delays of further litigation. The Settlement Fund equals approximately 2% of the amount paid to 3M by Members of the Settlement Class for invisible and transparent tape for home or office use during the period from October 2, 1998 to February 10, 2006. Kmart - the one potential member of the proposed Meijer Class that brought an individual suit against 3M - and Publix both settled their **[*54]** claims against 3M for that percentage of their relevant purchases. This percentage also falls "within a range of settlements reached in other antitrust class actions" in this District. *In re Auto. Refinishing Paint Antitrust Litig., 2004 U.S. Dist. LEXIS 29161, MDL No. 1426, 2004 WL 1068807, at *2* (preliminarily approving a settlement which represented approximately 2% of sales during the class period); see also *In re Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004)* (approving a settlement that represents 1.62% of sales from class period); *In re Plastic Tableware Antitrust Litig., 1995 U.S. Dist. LEXIS 17014, Civ. A. No. 94-3564, 1995 WL 678663, at *1 (E.D. Pa. Nov. 13, 1995)* (3.5% of sales); *Fisher Bros. v. Mueller Brass Co., 630 F. Supp. 493, 499 (E.D. Pa. 1985)* (0.2% of sales); *Axelrod v. Saks & Co., 77 F.R.D. 441, 1981 WL 2031, at *1 (E.D. Pa. Feb. 23, 1981)* (3.7% of sales)). Moreover, there is no indication that this Settlement Amount has been reached inappropriately, or should otherwise be considered suspect; both parties have demonstrated willingness and ability to litigate this action, have engaged in mediation **[*55]** at the Court's suggestion, and have reached an agreement that provides Class Members with monetary relief that is immediate, significant, and in line with other comparable settlements. See *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *11* ("Additionally, the hallmarks of a questionable settlement are absent. Plaintiffs will receive a significant monetary settlement, and there is no suggestion of collusion between Defendants and Plaintiffs' counsel.") (internal quotation marks omitted). Accordingly, the Court finds that the Settlement represents a reasonable compromise in light of both the best possible recovery and the risks of litigation.

Thus, of the nine *Girsh* factors, the Court finds that only one - Defendant's ability to withstand greater judgment - does not favor the proposed Settlement. This one factor is outweighed by the other Girsh factors favoring the Settlement. The Court, therefore, concludes that the Settlement Agreement is fair, adequate, and reasonable.

D. Fairness of the Distribution Plan

HN25 In addition to analyzing the terms of the Settlement Agreement, the Court must also examine the fairness of the proposed Distribution Plan. "'Approval of a plan of **[*56]** allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *In re Ikon, 194 F.R.D. at 184* (quoting *In re Computron Software Inc., 6 F. Supp. 2d 313, 321 (D.N.J. 1998)*). "Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *12* (citing *In re Ikon, 194 F.R.D. at 184*).

The proposed Distribution Plan allocates the Settlement Fund among Class Members who submit proof of their claims in proportion to each claimant's relevant, direct purchases from 3M. As detailed above, each Class Member may submit a preprinted Proof of Claim form which specifies that particular Member's purchase amount. When submitting this form, the Class Member can either agree with the total purchase amount stated in the form or disagree and provide supporting documentation for a different amount. These Proof of Claim forms must have been postmarked by July 11, 2006, for those Class Members **[*57]** who received them initially by mail, and by August 7, 2006, for those who received their forms in

response to a Claim Form Request. Once the Settlement Administrator has received and reviewed all of the forms and has calculated each Class Member's recovery, Plaintiffs will return to the Court to seek approval for the distribution of the Settlement Fund. The Court finds that the amount of a Class Member's relevant, direct purchases provides a reasonable measure of the relative injury which each Class Member has suffered, and that the submission procedure for the Proof of Claim forms affords each Class Member an opportunity to attest to the extent of its own injury and, in turn, deserved allocation. Thus, the Distribution Plan correlates to the damages that each participating Class Member actually suffered, and the Court finds this Plan to be fair, reasonable and adequate.

In sum, the Court finds that the content and dissemination of Notice in this case satisfies the requirements of due process and the Federal Rules of Civil Procedure, and also finds that the Settlement Agreement is fair, adequate and reasonable in light of all relevant considerations. The Court therefore grants final **[*58]** approval to the Settlement. The Court further finds that the proposed Distribution Plan is fair, reasonable and adequate, and approves the Plan.

IV. MOTION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD

Plaintiffs' Counsel have asked the Court to award attorneys' fees amounting to the smaller of $ 7.5 million or one-third of the amount remaining in the Settlement Fund after refunding any reversion to 3M. As mentioned above, one Settlement Class Member, Costco, has requested exclusion. After appropriate reversion to 3M, the Settlement Amount totals $ 27,783,836.97. As $ 7.5 million is less than one-third of the Settlement Amount after reversion, Plaintiffs' Counsel seeks $ 7.5 million in attorneys' fees. Plaintiffs' Counsel has also requested reimbursement of litigation expenses in the amount of $ 390,452.46. Meijer has requested an incentive award of $ 25,000 as compensation for the services it provided as Class Representative. All three requests are to be paid from the Settlement Fund prior to the distribution of the Fund to eligible Members of the Settlement Class.

A. Expenses

HN26 "Attorneys who create a common fund for the benefit of a class are entitled to reimbursement **[*59]** of reasonable litigation expenses from the fund." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *13* (citing *In re Ikon, 194 F.R.D. at 192*). Plaintiffs' Counsel have requested reimbursement of litigation expenses incurred from the beginning of this litigation through August 1, 2006, totaling $ 390,452.46. (Small Decl. PP 70-75; Small Decl. II PP 14-20.) These expenses were incurred in connection with the prosecution and settlement of the litigation, and include costs related to the following: travel; computerized legal research; copying; postage; telephone and fax; transcripts; retention of a mediator; the document database; expert services; and claims administration. [9] (Id.) The Court notes that the total amount of these expenses is below the maximum amount of $ 450,000 provided for in the Notice that was mailed to the Settlement Class, and that no objections have been filed in response to this request for reimbursement. Accordingly, the Court finds that the litigation expenses enumerated by Plaintiffs' Counsel are reasonable and grants Plaintiffs' Counsel's request for reimbursement. [10] See, e.g., *In re Remeron End-Payor Antitrust Litig., Civ. A. No. 02-2007, 2005 U.S. Dist. LEXIS 27011, **[*60]** at*

---

[9] Pursuant to the Settlement Agreement and the Court's Preliminary Approval Order, the Settlement Administrator was paid $ 25,000 from the Settlement Fund on April 28, 2006 in partial payment of the costs of giving Notice to the Settlement Class; this amount is not included in Plaintiffs' Counsel's request for reimbursement. (Small Decl. P 74.)

[10] The Court notes that Plaintiffs' Counsel expects to incur approximately $ 20,000 in additional claims administration costs prior to the distribution of the Settlement Fund. (Small Decl. II P 21.) These future expenses are not included in the present request, but Plaintiffs' Counsel will seek reimbursement for them in Plaintiffs' Counsel's anticipated motion with respect to distribution of the Settlement Fund.

92 (D.N.J. Sept. 13, 2005) (approving reimbursement of expenses which "reflect costs expended for purposes of prosecuting this litigation, including substantial fees for experts; substantial costs associated with creating and maintaining an electronic document database; travel and lodging expenses; copying costs; and the costs of deposition transcripts").

[*61] B. Attorneys' Fees

HN27 "District courts approving class action settlements must thoroughly review fee petitions for fairness. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *13* (citations omitted). Thorough review of fee arrangements is critical in the context of a class action settlement because of "'the danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than optimal basis in exchange for red-carpet treatment for fees,'" *In re General Motors, 55 F.3d at 820* (quoting *Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991)*), and because the parties to the action might lack sufficient incentive to object to the arrangement. *In re AT&T Corp. Sec. Litig., 455 F.3d 160, 2006 WL 2021033, at *6 (3d Cir. 2006)*. "[C]ourts must be especially vigilant in searching for the possibility of collusion in pre-certification settlements" such as the one at hand. *In re General Motors, 55 F.3d at 820.* **[*62]**

HN28 Courts typically use one of two methods for assessing attorneys' fees, either the percentage of recovery method or the lodestar method. *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)*. The Court will utilize the percentage of recovery method in this case as it is "generally favored in common fund cases because it allows courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" Id. (quoting *In re Prudential, 148 F.3d at 333*). The Court, however, will use the lodestar method " to 'cross-check' the percentage fee award," as the Third Circuit recommends, in order to verify that the fee award is not excessive. *Id. at 305* (citing *In re Prudential, 148 F.3d at 333*).

HN29 When a district court uses the percentage of recovery method, it "first calculates the percentage of the total recovery that the proposal would allocate to attorneys fees by dividing the amount of the requested fee by the total amount paid out by the defendant; it then inquires whether that percentage is appropriate based on the circumstances of the case." *In re Cendant, 264 F.3d at 256.* **[*63]** "The percentage will be based on the net settlement fund after deducting the costs of litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14* (citing*In re Ikon, 194 F.R.D. at 193*). The net Settlement Fund in this case, as of August 1, 2006, is $ 27,393,384.51. Consequently, the requested fee of $ 7.5 million would result in a percentage of recovery of 27.4%.

HN30 In *Gunter v. Ridgewood Energy Corp.,223 F.3d 190 (3d Cir. 2000)*, the Third Circuit directed the district courts to consider the following seven factors when determining whether a percentage of recovery fee award is reasonable:

> (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 the 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.

Id. at 195 n.1; see also *In re Rite Aid, 396 F.3d at 301.* **[*64]** "Since this is a flexible and fact-driven determination," *In re Aetna, 2001 U.S. Dist. LEXIS*

*68, 2001 WL 20928, at *14*, district courts are not limited to the Gunter factors in their analysis of the fee request's reasonableness. As the Third Circuit recently noted:

> ***HN31*** This list [of Gunter factors] was not intended to be exhaustive. . . . In Prudential, we noted three other factors that may be relevant and important to consider: (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 the settlement. . . . In reviewing an attorneys' fees award in a class action settlement, a district court should consider the Gunter factors, the Prudential factors, and any other factors that are useful and relevant with respect to the particular facts of the case.

*In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 338-340*). **[*65]** While the district courts should "engage in robust assessments of the fee award reasonableness factors when evaluating a fee request," *In re Rite Aid, 396 F.3d at 302*, these factors '"need not be applied in a formulaic way' because each case is different, 'and in certain cases, one factor may outweigh the rest.'" *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (quoting*In re Rite Aid, 396 F.3d at 301*); see also *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 736 (3d Cir. 2001)* ("[A] district court may not rely on a formulaic application of the appropriate range in awarding fees but must consider the relevant circumstances of the particular case.").

Having thoroughly reviewed the facts of this case in light of the *Gunter* and *Prudential* factors [11] and having applied the lodestar cross-check to this analysis, the Court concludes that Plaintiffs' Counsel's request for $ 7.5 million in attorneys' fees is reasonable.

[*66]

1. Size of fund created and number of persons benefitted

Pursuant to the Settlement Agreement, the Settlement Class will obtain an immediate cash benefit of $ 27,783,836.97, less attorneys' fees, expenses, and incentive award payments as awarded by the Court. As of August 1, 2006, approximately sixty-eight Class Members had filed Proof of Claim forms and so were in a position to recover from the Settlement Fund, without having to go through the time, expense, and risk of continued litigation. (Glenn Aff. P 13.) While the number of claimants which stand to be benefitted in this Settlement is fairly small, these claimants comprise nearly half of the 143 Settlement Class Members to whom individual Notice was originally mailed and they account for over 60% of the tape purchases by those Class Members from 3M during the relevant period. (Id.) As discussed above, the Settlement Fund was calculated to provide Class Members with a recovery amounting to approximately 2% of what they paid to 3M for invisible and transparent tape for home or office use during the period from October 2, 1998 to February 10, 2006, a recovery that compares favorably with other class action antitrust **[*67]** settlements. Thus, although the number of entities positioned to recover a share of the Settlement Fund is fairly small, both the percentage of relevant purchases which those entities represent as well as the substantial and comparatively favorable size of the Fund obtained by Plaintiffs' Counsel weigh in favor of the requested fees.

2. Presence or absence of substantial objections by members of the class

[11] The Court has determined that, in this case, all considerations relevant to its analysis of the fee award's reasonableness are covered fully by the Gunter and Prudential factors listed above.

There have been no objections either to the Settlement Agreement or to the requested attorneys' fees. As detailed above, Notice and Summary Notices were disseminated by mail and publication to potential Class Members. The Notice clearly disclosed Plaintiffs' Counsel's intention to request the lesser of $ 7.5 million or one-third of the Settlement Fund in fees to be paid from the Settlement Fund, and also detailed the procedure by which any Class Member could object to that request. The absence of objections to the requested attorneys' fees in this case is particularly notable given the sophisticated nature of the absent Class Members. See *In re Remeron Direct Purchaser Antitrust Litig., Civ. A. No. 03-0085, 2005 U.S. Dist. LEXIS 27013, at *35 n.1* ***[*68]*** *(D.N.J. Nov. 9, 2005)* (***HN32*** "When a class is comprised of sophisticated business entities that can be expected to oppose any request for attorney fees they find unreasonable, the lack of objections 'indicates the appropriateness of the [fee] request.'" (alteration in original) (quoting *Cimarron Pipeline Constr., Inc. v. Nat'l Council on Comp. Ins., 1993 U.S. Dist. LEXIS 19969, Civ. A. Nos. 89-822, 89-1186, 1993 WL 355466, at *1-2 (W.D. Ok. June 8, 1993)*)); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., 2005 U.S. Dist. LEXIS 9705, Civ. A. No. 03-4578, 2005 WL 1213926, at *10 (E.D. Pa. May 19, 2005)*(finding that this factor weighs in favor of approval because, "[a]lthough the Settlement Class in this case is relatively small and consists of sophisticated businesses, not one member of the Settlement Class objected to the requested fee"). The Court finds that this total absence of objections to the requested fees weighs in favor of approval. [12] See *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10532, MDL No. 1261, 2004 WL 1221350, at *5 (E.D. Pa. June 2, 2004)* ("The absence of objections supports approval of the Fee Petition."); *In re Rent-Way Secs. Litig., 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003)* **[*69]** ("[T]he absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsels' request."); *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *15* ("[T]he Class members' view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award.").

3. Skill and efficiency of the attorneys involved

HN33 The skill and efficiency of Plaintiffs' Counsel is "measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted **[*70]** the case and the performance and quality of opposing counsel." *In re Ikon, 194 F.R.D. at 194* (citation omitted). As discussed above, Plaintiffs' Counsel are highly experienced in complex antitrust class action litigation (Small Decl. PP 62-64, Exs. 8-10) and have obtained a significant settlement for the Class despite the complexity and challenges of this case. Defense Counsel are also very experienced in complex class action antitrust litigation and have defended this suit skillfully. Accordingly, the Court finds that this factor favors approval of the requested fees.

4. Complexity and duration of the litigation

As discussed above, Plaintiffs' Counsel had been litigating this action for roughly one year when the Settlement Agreement was reached. While a duration of one year is not especially long, during that time Plaintiffs' Counsel engaged in extensive coordinated discovery, participated in multiple depositions as well as expert consultations, briefed and argued 3M's Motion to Dismiss, briefed Meijer's Motion for class certification, prepared for and participated in the mediation, and negotiated the terms of the Settlement Agreement. Antitrust class **[*71]** actions such as this one are "arguably the most complex action[s] to prosecute." *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004*

---

[12] The import of this absence of objections, while significant, should not be overstated. As the Third Circuit has noted, "[c]lass members may have little incentive to oppose a fee request, since any reduction will only result in a minor increase in their share of the settlement." *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *6*.

*WL 1221350, at *10* (quotation omitted). While the LePage's decision and the collateral estoppel ruling in Bradburn favored the Plaintiffs in this action, Plaintiffs' Counsel nonetheless faced complex challenges in establishing liability and damages in this case, as discussed above. Accordingly, the Court finds that this factor weighs in favor of the reasonableness of the requested fees.

5. Risk of nonpayment

Plaintiffs' Counsel's compensation for their services in this case was wholly contingent on the success of the litigation. (Small Decl. P 61.) Given the risks of establishing liability and damages discussed above, as well as the possibility that this case could not be maintained as a class action through trial, the possibility of non-payment has been present throughout this litigation. Accordingly, the Court finds that this factor weighs in favor of the requested fees.

6. Amount of time devoted to the case by Plaintiffs' counsel

Plaintiffs' Counsel devoted slightly over 4,500 hours of work on this litigation from the **[*72]** inception of the claims through August 1, 2006. (Small Decl. II P 12.) This is a relatively small amount of time for a settlement class action of this size. See, e.g., Stuart J. Logan, Dr. Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 167-234 (2003) (surveying, *inter alia*, class action cases that resulted in a recovery of $ 20-30 million and indicating that, of the 23 such cases which reported total hours awarded toward attorneys' fees, only one reported a total of less than 6,000 hours). ***HN34*** While "[t]he Court recognizes that Plaintiffs' counsel should not be penalized for prosecuting this case in an efficient manner," the Court nonetheless "may consider the amount of time devoted to a case by counsel as disfavoring the requested fee." *Stop & Shop, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *12*. Consequently, the Court finds that the amount of time devoted to this case by Plaintiffs' Counsel weighs against the requested fees.

7. Awards in similar cases

This factor requires the Court to compare the percentage of recovery requested as a fee in this case against the percentage of recovery awarded as a **[*73]** fee in other common fund cases in which the percentage of recovery method, rather than the lodestar method, was used. *In re Cendant Corp. PRIDES Litig., 243 F.3d at 737*. As stated above, Plaintiffs' Counsel's request for attorneys' fees in this case produces a 27.4% percentage of recovery.

The Court finds that this percentage of recovery falls within a reasonable range of awards in similar cases. "In the normal range of common fund recoveries in securities and antitrust suits, common fee awards fall in the 20 to 33 per cent range." 4 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 14:6 (4th ed. 2006). In In re Rite Aid, the Third Circuit noted three studies which found that fee awards ranging between 25-33% of the common fund were not unusual. *In re Rite Aid,396 F.3d at 303* ("[O]ne study of securities class action settlements over $ 10 million . . . found an average percentage fee recovery of 31%; a second study by the Federal Judicial Center of all class actions resolved or settled over a four-year period . . . found a median percentage recovery range of 27-30%; and a third study of class action settlements between $ 100 million **[*74]** and $ 200 million . . . found recoveries in the 25-30% range were 'fairly standard.'") (citation omitted). In 2003, the Class Action Reporter published a survey of fee awards in common fund class actions. See Logan et al., supra. This survey included 65 cases that fell within the $ 20-30 million recovery range; these cases averaged a percentage of recovery of 25.8%. [13] Id. at 174.

---

[13] This survey calculated percentage of recovery by lumping the awards of attorneys' fees and expenses and dividing that sum by the aggregate class recovery, which differs from the methodology employed by the Court. For the sake of comparison, applying this survey's method of calculation to the present case would render a percentage of recovery for Plaintiffs' Counsel of 28.4%.

In addition to considering the survey data, the Court notes that attorneys' fee awards ranging between 20-33% of common funds comparably sized to the present Settlement Fund have been approved by judges within the Third Circuit on numerous **[*75]** occasions. See, e.g., *In re Ravisent Technologies, Inc. Sec. Litig., 2005 U.S. Dist. LEXIS 6680, Civ. A. No. 00-1014, 2005 WL 906361, at *11 (E.D. Pa. Apr. 18, 2005)* (noting that "courts within th[e Third Circuit] have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses."); *In re Rent-Way, 305 F. Supp. 2d at 519* (approving attorneys' fees award of 25% of a $ 25 million settlement fund); *In re Warfarin, 212 F.R.D. at 262-63* (approving 22.5% of $ 44.5 million settlement); *Lazy Oil Co. v. Witco Corp., 95 F. Supp. 2d 290, 322-23 (W.D. Pa. 1997)* (approving 28% of an $ 18.9 million settlement fund). Accordingly, the Court finds that Plaintiffs' Counsel's request does not substantially deviate from the percentage of recovery awarded as fees in similar common fund cases, and that this factor favors the requested fees. The Court concludes that, of the seven *Gunter* factors, only one - the amount of time devoted to the case by Plaintiffs' Counsel - disfavors the requested award of attorneys' fees in this case. This one factor is outweighed by the other Gunter considerations that favor the requested award. Accordingly, **[*76]** the Court finds that, under the Gunter analysis, the percentage of recovery requested as attorneys' fees in this case is reasonable.

8. The Prudential factors

The Court's assessment of Plaintiffs' Counsel's request for attorneys' fees in light of the three Prudential factors is consistent with the Court's finding of reasonableness under the Gunter factors. The first Prudential factor is intended to measure whether "the entire value of the benefits accruing to class members is properly attributable to the efforts of class counsel," *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *11*, or if some of those benefits are more properly attributed "to the efforts of other groups, such as government agencies conducting investigations." *455 F.3d 160, [WL] at *4* (citing *In re Prudential, 148 F.3d at 338*). While Plaintiffs' Counsel were not aided in their prosecution of this case by a government investigation, Plaintiffs' Counsel did have the benefit of prior litigation which assigned liability to 3M for the same sort of anti-competitive conduct that has been alleged here. Compare *Stop & Shop, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *12* ("[T]his action was **[*77]** riskier than many other antitrust class actions because there was no prior government investigation, or prior finding of civil or criminal liability based on antitrust violations, in this case."). The Court finds that this factor is neutral with respect to the reasonableness of the requested attorneys' fees.

As for the second *Prudential* factor, the Court finds that the 27.4% percentage of recovery requested in this case is comparable to the likely "percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained." *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 340*). See *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, at *46* ("Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); see also *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *14* ("[A]n award of thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation."); *In re Ikon, 194 F.R.D. at 194* ("[I]n private **[*78]** contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."). With respect to the third Prudential factor, the Settlement here contains no particularly "innovative" terms to argue in favor of the requested award of attorneys' fees. *In re AT&T, 455 F.3d 160, 2006 WL 2021033, at *4* (citing *In re Prudential, 148 F.3d at 339*). In sum, the Court finds that the Prudential factors are largely neutral with respect to Plaintiffs' Counsel's request, and thus that they do not alter the Court's conclusion of

reasonableness under the Gunter factors. Accordingly, the Court finds that the percentage of recovery requested by Plaintiffs' Counsel for attorneys' fees in this case is reasonable.

9. Lodestar cross-check

HN35 The Third Circuit has suggested that, in addition to reviewing the fee award reasonableness factors, "it is 'sensible' for district courts to 'cross-check' the percentage fee award against the 'lodestar' method." *In re Rite Aid, 396 F.3d at 305* (citing *In re Prudential, 148 F.3d at 333*). The lodestar **[*79]** is calculated by "multiplying the number of hours worked by the normal hourly rates of counsel. The court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation." *In re Aetna, 2001 U.S. Dist. LEXIS 68, 2001 WL 20928, at *15* (citing *In re Ikon, 194 F.R.D. at 195*). "The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award." *In re Rite Aid, 396 F.3d at 306*. The cross-check, however, "does not trump the primary reliance on the percentage of common fund method." *Id. at 307*. Moreover, "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records. . . . [T]he resulting multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award."*Id. at 306-07* **[*80]** (footnotes and citations omitted). It is appropriate for the court to consider the multipliers utilized in comparable cases. *Id. at 307 n.17*.

The total lodestar amount submitted to the Court by the three firms comprising Plaintiffs' Counsel in this case is $ 1,572,775.50 for 4,508.55 hours of attorney and paralegal time. [14] (Small Decl. II P 12.) The lodestar amount covers work done from the inception of the claims in this action through August 1, 2006, and is calculated at each firm's current rates, which are based on the prevailing rates for cases of this type in the community in which the attorneys practice. (Small Decl. P 67; Small Decl. II PP 9-11.) The hours worked were recorded contemporaneously in the books and records that the firms maintained in the ordinary course of business; they do not include any work done in connection with Plaintiffs' Counsel's application for fees. (Id.) The lodestar amount, taken against the requested fee award of $ 7.5 million, results in a lodestar multiplier of 4.77.

[*81] The Third Circuit has recognized that multipliers "'ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.'" *In re Cendant PRIDES,243 F.3d at 742* (quoting*In re Prudential, 148 F.3d at 341*). While a 4.77 multiplier is slightly above average, it is not far outside the range of normal awards. See *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *16* (noting that "during 2001-2003, the average multiplier approved in common fund class actions was 4.35") (citing Logan, et al., supra, at 167). Moreover, the lack of objections by this Class of sophisticated parties to Plaintiffs' Counsel's request for fees supports the resulting multiplier. See *Stop & Shop, 2005 U.S. Dist. LEXIS 9705, 2005 WL 1213926, at *18* (noting that "the high lodestar multiplier (15.6) which results from the Court's award of attorneys' fees in this case is neutralized . . . by the extraordinary support Plaintiffs have shown for counsels' request for fees. Not one member of the Settlement Class, which is made up of approximately 90 sophisticated businesses, objected"). Accordingly, the Court finds that, given

[14] The breakdown amidst the three firms is as follows: CMHT, indicating a lodestar of $ 944,551 for 2,885.05 hours (resulting in an hourly rate of $ 327.40); VVM, indicating a lodestar of $ 436,199 for 1,133.60 hours (hourly rate of $ 384.79); and TRR, indicating a lodestar of $ 192,025.50 for 489.90 hours (hourly rate of $ 391.97). (Small Decl. P 69, Small Decl. II P 12.)

the facts of this case, the **[*82]** requested lodestar multiplier of 4.77 is acceptable and does not call for a reduction in Plaintiffs' Counsel's requested attorneys' fees award.

Having thoroughly reviewed Plaintiffs' Counsel's request for attorneys' fees, the Court concludes that the percentage of recovery requested by Plaintiffs' Counsel is reasonable, and that the lodestar cross-check is consistent with a finding of reasonableness. Accordingly, the Court approves Plaintiffs' Counsel's request for $ 7.5 million in attorneys' fees to be paid from the Settlement Fund.

C. Incentive Award to Representative Plaintiffs

Meijer has asked the Court to approve an incentive award in the amount of $ 25,000 to be paid from the Settlement Fund, because Meijer allegedly has spent a significant amount of its own time and expense litigating this case for the absent members of the Settlement Class. ***HN36*** "'Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'" *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 145 (E.D. Pa. 2000)* (quoting *In re S. Ohio Corr. Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997))*. **[*83]** It is particularly appropriate to compensate named representative plaintiffs with incentive awards when they have actively assisted plaintiffs' counsel in their prosecution of the litigation for the benefit of the class. See *Tenuto v. Transworld Sys., Inc., 2002 U.S. Dist. LEXIS 1764, Civ. A. No. 99-4228, 2002 WL 188569, at *5 (E.D. Pa. Jan. 31, 2002)*; see also *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *18* ("Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly.") (citing In re Plastic Tableware Antitrust Litig., Civ. A. No. 94-3564, 2002 WL 188569 (E.D. Pa. Dec. 4, 1998)).

Meijer has worked closely with Plaintiffs' Counsel throughout the investigation, prosecution and settlement of the claims in this litigation. (Mem. in Supp. of Pls.' Counsel's Mot. for Attys' Fees, Expenses, and Incentive Award at 21.) Furthermore, the Notice advised Class Members that Meijer would apply for an incentive award in this amount and there were no objections to the award. See *In re Remeron Direct Purchaser Antitrust Litig., 2005 U.S. Dist. LEXIS 27013, at *50*. Lastly, **[*84]** the incentive award requested in this case is similar to the awards approved in comparable complex class actions in this District. See *id. at *52* (approving a total incentive award of $ 60,000 to two named plaintiffs); *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *19* (approving incentive awards of $ 25,000 to each of five named plaintiffs); *In re Residential Doors Antitrust Litig., 1998 U.S. Dist. LEXIS 4292, MDL No. 1039, 1998 WL 151804, at *11 (E.D. Pa. Apr. 2, 1998)* (approving $ 10,000 incentive awards to each of four named plaintiffs). Accordingly, the Court approves the requested incentive award.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the Settlement Class meets the certification requirements of *Federal Rule of Civil Procedure 23* and approves the Class's final certification for settlement purposes. The Court also concludes that the Settlement Agreement and Distribution Plan are fair, adequate and reasonable, and approves them. The Court further concludes that Plaintiffs' Counsel's requested reimbursement of expenses in the amount of $ 390,452.46 and requested award of attorneys' fees in the amount of $ **[*85]** 7.5 million are fair and reasonable, and approves them. Lastly, the Court approves Meijer's request to be paid an incentive award in the amount of $ 25,000. An appropriate Order follows.

FINAL APPROVAL ORDER AND JUDGMENT

WHEREAS Plaintiffs Meijer, Inc. and Meijer Distribution, Inc., on behalf of themselves and each Settlement Class Member (as defined herein), by

and through their counsel of record, have asserted claims for damages and injunctive relief against 3M Company, alleging violations of federal antitrust law;

WHEREAS the Plaintiffs and 3M Company, desiring to resolve any and all disputes in this action, executed a Settlement Agreement dated as of February 10, 2006, which was filed with the Court on February 13, 2006;

WHEREAS the Settlement Agreement does not constitute, and shall not be construed as or deemed to be evidence of, an admission of any fault, wrongdoing or liability by 3M Company or by any other person or entity;

WHEREAS 3M Company and each of the Plaintiffs have agreed to entry of this Final Approval Order and Judgment (hereinafter, the "Order");

WHEREAS Plaintiffs, on behalf of themselves and each Settlement Class Member, have agreed to the release **[*86]** of claims specified in the Settlement Agreement;

WHEREAS, on March 28, 2006, this Court granted preliminary approval to the Settlement Agreement and directed that Notice be given to the Settlement Class as defined in the Settlement Agreement;

WHEREAS, pursuant to the Preliminary Approval Order, Notice of the Settlement was given to members of the Settlement Class, in accordance with *Federal Rules of Civil Procedure 23(c)(2)* and *23(e)* and the requirements of due process, and Settlement Class Members were afforded the opportunity to exclude themselves from the Settlement Class or to object or otherwise comment on the Settlement;

WHEREAS an opportunity to be heard was given to all persons requesting to be heard in accordance with this Court's orders; the Court has reviewed and considered the terms of the Settlement Agreement, the submissions of the parties in support thereof, and the comments received in response to the Notice; and after holding a hearing on August 8, 2006, at which all interested parties were given an opportunity to be heard; and

WHEREAS there is no just reason for delay;

NOW, THEREFORE, **[*87]** before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, without any admission of liability or wrongdoing by 3M Company, and upon the consent of the Settling Parties,

IT IS HEREBY ORDERED, AD JUDGED AND DECREED:

I.

JURISDICTION

1.1. The Court has jurisdiction over the subject matter of this action and the parties hereto. The Plaintiffs brought this action asserting a claim under *Section 2* of the Sherman Act, *15 U.S.C. § 2*. Jurisdiction lies in this Court pursuant to *28 U.S.C. §§ 1331* and *1337*. Venue is proper in the Eastern District of Pennsylvania.

II.

DEFINITIONS

As used in this Final Approval Order and Judgment, the following definitions shall apply:

2.1. "3M" or "Defendant" means 3M Company and all of its predecessors, successors and past and present affiliates, subsidiaries, directors, officers, employees and agents.

2.2. "Class Counsel" means the law firms of Cohen, Milstein, Hausfeld & Toll, P.L.L.C. and Daar & Vanek, P.C.

2.3. "Effective Date" means the first date by which all of the events and conditions specified **[*88]** in paragraph 8.1 of the Settlement Agreement have been met and have occurred.

2.4. "Invisible or transparent tape" means invisible or transparent tape sold within the United States for

home and office use, including such products as Scotch (R) tm Magica" [cent] tape, Scotch (R) tm transparent tape, Highlanda" [cent] tapes and other invisible or transparent tapes for home and office use, but not including such products as packaging tapes, sealing tapes or masking tapes.

2.5. "Judgment" refers to this Final Approval Order and Judgment.

2.6. "Litigation" means the action pending in this Court titled Meijer, Inc., and Meijer Distribution, Inc. v. 3M Company, f/k/a Minnesota Mining and Manufacturing Company, Civil Action No. 04-5871 (JP).

2.7. "Notice" means, collectively, the communications by which the Settlement Class was notified of the existence and terms of the Settlement.

2.8. "Notice Plan" means the plan approved in the Preliminary Approval Order for notifying the Settlement Class of the Settlement.

2.9. "Plaintiffs" or "Class Representatives" means Meijer, Inc. and Meijer Distribution, Inc. and each of their parents, subsidiaries, affiliates, assignees, predecessors, **[*89]** successors, officers, directors, employees, agents, and attorneys.

2.10. "Plaintiffs' Counsel" means the law firms of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Daar & Vanek, P.C. and Trujillo Rodriguez & Richards, LLC.

2.11. "Released Claims" means the release and discharge of 3M and each of its parents, subsidiaries, divisions, affiliates, assignors, assignees, predecessors, successors, officers, directors, employees, agents and attorneys, from any and all claims asserted, or which could have been asserted, in the Litigation and any and all claims and potential claims, demands, rights, liabilities and causes of action which have arisen or could arise hereafter, whether known or unknown, whether asserted or that could have been or could hereafter be asserted by any member of the Settlement Class or any parent, affiliate or subsidiary of any of such member against 3M and any of its subsidiaries, affiliates, directors, officers, employees and/or agents, concerning or relating in any way to or arising in any way from any 3M discount, rebate, offer, promotion or other sales program or practice (including without limitation, programs claimed to involve the bundling of products or volume **[*90]** or growth rebates) concerning, including or relating in any way to the sale, promotion or distribution of invisible or transparent tape for home or office use in effect from January 1, 1993 to February 10, 2006, including without limitation claims arising under any federal and/or state antitrust laws, unfair competition laws, consumer protection laws or deceptive trade practices acts or any similar statutory or common law provisions, but excluding from this release claims relating to any alleged product defect, personal injury or breach of contract. With the exception of claims relating to any alleged product defect, personal injury or breach of contract, this release is a "general release" as that term is used in *Section 1542* of the Civil Code of the State of California and all members of the Settlement Class that have not opted out will expressly waive any rights under that statute or any similar law of any state or territory of the United States or any principle of common law that is similar, comparable, or equivalent to *Section 1542 of the California Civil Code*.

2.12. "Settlement" means the settlement contemplated by the terms, conditions and provisions set forth in this Settlement **[*91]** Agreement.

2.13. "Settlement Agreement" means the Settlement Agreement dated as of February 10, 2006 by and among Plaintiffs Meijer, Inc. and Meijer Distribution, Inc., on behalf of themselves and each Settlement Class Member, and Defendant 3M Company, including all exhibits thereto.

2.14. "Settlement Agreement Date" means February 10, 2006, the date as of which the Settling

Parties entered into the Settlement Agreement.

2.15. "Settlement Class" means all persons and entities that purchased invisible or transparent tape directly from 3M, or any subsidiary or affiliate thereof, in the United States at any time during the period from October 2, 1998 to February 10, 2006 and also purchased for resale under the class member's own label, any "private label" invisible or transparent tape from 3M or any of 3M's competitors at any time from October 2, 1988 to February 10, 2006; but excluding 3M Company, its subsidiaries, affiliates, officers, directors, and employees and excluding those persons or entities that timely and validly request exclusion from the Settlement Class.

2.16. "Settlement Class Member" means any person or entity, including but not limited to each individual representative **[*92]** plaintiff, that satisfies all of the requirements for inclusion in the Settlement Class as set forth in paragraph 2.15, and that does not validly request exclusion therefrom.

2.17. "Settlement Consideration" means the amount paid by 3M to or on behalf of the Settlement Class in exchange for the settlement and release of all Released Claims, as defined in paragraph 2.11 herein.

2.18. "Settling Parties" means, collectively, each of the Plaintiffs, on behalf of themselves and each Settlement Class Member, and 3M.

III.

FINAL APPROVAL OF SETTLEMENT

3.1. In its Order Preliminarily Approving Settlement, the Court certified the following Settlement Class, for the purpose of this Settlement only:

> all persons and entities that purchased invisible or transparent tape directly from 3M, or any subsidiary or affiliate thereof, in the United States at any time during the period from October 2, 1998 to February 10, 2006 and also purchased for resale under the class member's own label, any "private label" invisible or transparent tape from 3M or any of 3M's competitors at any time from October 2, 1988 to February 10, 2006; but excluding 3M Company, its subsidiaries, **[*93]** affiliates, officers, directors, and employees and excluding those persons or entities that timely and validly request exclusion from the Settlement Class.

3.2. Attached hereto as Exhibit 1 is the list of persons and entities that timely excluded themselves from the Settlement Class and for which this Final Approval Order and Judgment has no force or effect.

3.3. The terms of the Settlement Agreement are adjudged to be fair, reasonable and adequate and in the best interests of Plaintiffs and the Settlement Class as a whole, and satisfy the requirements of *Federal Rule of Civil Procedure 23(c)(2)* and *23(e)* and due process.

3.4. The Court finds that the Notice and the Notice Plan constituted the best notice practicable under the circumstances and constituted due and sufficient notice and that all Settlement Class Members were afforded the opportunity to exclude themselves from participation in this action.

3.5. The terms of the Settlement Agreement are hereby approved, and the Settling Parties are directed to implement the Settlement in accordance with its terms.

3.6. The Distribution Plan is adjudged **[*94]** to be fair, reasonable and adequate and is hereby approved and Class Counsel are directed to proceed with the Distribution Plan.

3.7. No part of the Settlement Consideration provided by 3M pursuant to the Settlement Agreement shall constitute, nor shall it be construed or treated as constituting, a payment in lieu of treble damages, fines, penalties, forfeitures or punitive recoveries under any state or federal laws,

rules or regulations, or any other applicable statute or provision.

IV.

DISMISSAL OF ACTION AND RELEASES OF CLAIMS

4.1. This Litigation is dismissed with prejudice and, except as provided in paragraph 5.1 of this Order, without costs. The Plaintiffs and all Settlement Class Members are barred from further prosecution of the Released Claims.

4.2. The Court hereby finds that the Released Claims which the Plaintiffs and the Settlement Class Members, on behalf of themselves and, with respect to individuals or individually owned businesses, on behalf of each of their heirs, predecessors, successors, representatives or assigns, and, with respect to corporate entities, on behalf of each of their parents, subsidiaries, affiliates, assignees, predecessors, **[*95]** successors, officers, directors, employees and agents, shall fully and forever release, relinquish and discharge, by operation of this Final Approval Order and Judgment are as defined in paragraph 2.11 of this Order, i.e.,

> the release and discharge of 3M and each of its parents, subsidiaries, divisions, affiliates, assignors, assignees, predecessors, successors, officers, directors, employees, agents and attorneys from any and all claims asserted, or which could have been asserted, in the Litigation and any and all claims and potential claims, demands, rights, liabilities and causes of action which have arisen or could arise hereafter, whether known or unknown, whether asserted or that could have been or could hereafter be asserted by any member of the Settlement Class or any parent, affiliate or subsidiary of any of such member against 3M and any of its subsidiaries, affiliates, directors, officers, employees and/or agents, concerning or relating in any way to or arising in any way from any 3M discount, rebate, offer, promotion or other sales program or practice (including without limitation, programs claimed to involve the bundling of products or volume or growth rebates) **[*96]** concerning, including or relating in any way to the sale, promotion or distribution of invisible or transparent tape for home or office use in effect from January 1, 1993 to February 10, 2006, including without limitation claims arising under any federal and/or state antitrust laws, unfair competition laws, consumer protection laws or deceptive trade practices acts or any similar statutory or common law provisions,but excluding from this release claims relating to any alleged product defect, personal injury or breach of contract. With the exception of claims relating to any alleged product defect, personal injury or breach of contract, this release is a "general release" as that term is used in *Section 1542* of the Civil Code of the State of California and all members of the Settlement Class that have not opted out will expressly waive any rights under that statute or any similar law of any state or territory of the United States or any principle of common law that is similar, comparable, or equivalent to *Section 1542 of the California Civil Code*.

4.3. Upon the Effective Date, each Settlement Class Member, on behalf of themselves and, with respect to individuals or individually **[*97]** owned businesses, on behalf of each of their heirs, predecessors, successors, representatives or assigns, and, with respect to corporate entities, on behalf of each of their parents, subsidiaries, affiliates, assignees, predecessors, successors, officers, directors, employees and agents, shall have, shall be deemed to have and by operation of this Judgment shall have fully, finally and forever released, relinquished and discharged 3M and its attorneys from any and all Released Claims and shall be deemed to have covenanted and agreed not to sue 3M or its attorneys with respect to the Released Claims.

4.4. The following injunction is hereby entered: All

members of the Settlement Class are permanently enjoined from filing, commencing, initiating, asserting, continuing to prosecute, intervening in, participating in or maintaining in any jurisdiction any action or claim based in whole or in part on any Released Claims, except for proceedings in this action, if any, that are necessary to consummate or enforce the Settlement Agreement or the terms of this Order.

4.5. Upon the Effective Date, 3M shall be deemed to have, and by operation of the Final Judgment shall have fully, finally and **[*98]** forever released, relinquished and discharged each and all of the Plaintiffs and Plaintiffs' Counsel from all claims arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Litigation, other than claims for breach of the Settlement Agreement.

V.

FEES AND EXPENSES AND PLAINTIFF INCENTIVE AWARD

5.1. The Court approves the award of $ 7.5 million plus interest that may have accrued on that sum deposited in escrow to pay Plaintiffs' Counsel's attorneys fees plus $ 390,452.46 to reimburse Plaintiffs' Counsel for payment of costs and expenses reasonably incurred in prosecuting and settling this action. The award shall be apportioned among Plaintiffs' Counsel by Cohen, Milstein, Hausfeld & Toll, P.L.L.C., subject to review by this Court upon request of any Plaintiffs' Counsel.

5.2. The Court approves the award of $ 25,000.00 as an incentive award for Plaintiffs Meijer, Inc. and Meijer Distribution, Inc.

VI.

FINALITY OF JUDGMENT

6.1. The Court finds that this Final Approval Order and Judgment adjudicates all the claims, rights and liabilities of the parties to the Settlement Agreement **[*99]** and is final and shall be immediately appealable. Neither this Order nor the Settlement Agreement shall constitute any evidence or admission of liability by 3M, nor shall either document or any other document relating to the Settlement be offered in evidence or used for any other purpose in this or any other matter or proceeding except as may be necessary to consummate or enforce the Settlement Agreement or the terms of this Order or if offered by 3M in responding to any action purporting to assert Released Claims.

VII.

RETENTION OF JURISDICTION

7.1. Without affecting the finality of this Order, the Court retains jurisdiction for the purposes of enforcing the terms of the injunction set forth in paragraph 4.4 of this Order and enabling any of the Settling Parties to apply to this Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of the Settlement Agreement and this Final Approval Order and Judgment, for the modification of any of the provisions of this Final Approval Order and Judgment, and for the enforcement of compliance herewith.

So Ordered.

Dated this 14th day of August, **[*100]** 2006.

/s/ John R. Padova

EXHIBIT 1

Persons and Entities That Timely Excluded Themselves from the Settlement Class

15

---

[15] The United States submitted a letter stating that, under federal law, it "cannot be represented by private counsel in a class action lawsuit" and that "[a]s a result, the United States Attorney General does not agree to the inclusion of the federal government as a class member in this Rule 23 litigation."

Costco Wholesale Corporation

End of Document

Exhibit 7

Caution
As of: March 26, 2026 6:52 PM Z

In re Linerboard Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

June 2, 2004, Decided

MDL No. 1261

Reporter
2004 U.S. Dist. LEXIS 10532 *

IN RE LINERBOARD ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: All Actions (Civil Action Numbers 98-5055 and 99-1341)

Subsequent History: Costs and fees proceeding at, Petition granted by *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 10533 (E.D. Pa., June 2, 2004)*

Prior History: *In re Linerboard Antitrust Litig., 2004 U.S. Dist. LEXIS 8801 (E.D. Pa., May 4, 2004)*

Disposition: Class Counsels' petition for award of attorneys' fees and reimbursement of expenses granted.

Core Terms

settlement, stone, class action, antitrust, fee award, discovery, class certification, liaison, attorney's fees, memorandum, corrugate, skill, deposition, entity, class representative, multiplier, lodestar, temple, settlement fund, reimbursement, sheet, lodestar method, similar case, cross-check, nonpayment, counsel's, expend, reward, calculate, negotiate

Case Summary

Procedural Posture
Petitioners, class counsel, sought attorneys' fees and costs totaling 30 percent of $ 202,572,489, the total of the settlements with all defendants in this antitrust class action lawsuit (the settlement fund), and reimbursement of costs totaling $ 1,391,203.36. Class counsel also petitioned the court for payment of incentive fees to the five class representatives.

Overview
In the fee petition, class counsel requested a fee of 30 percent of the settlement fund, or approximately $ 60 million. Consideration of the seven Gunter factors counseled in favor of awarding the requested fee: (1) the settlements were highly favorable to the class when analyzed as a percentage of total damages, and the number of persons benefitted was large; (2) the absence of objections to the proposed fee amount indicated the class's approval of the fee petition; (3) the result achieved clearly reflected counsel's skill and expertise; (4) the case was complex; (5) counsel faced significant risks of nonpayment; (6) counsel expended significant time, 51,268 hours, on the litigation; and (7) the 30 percent fee was comparable to fees approved in the four most recent horizontal price fixing cases. It was not appropriate to reduce the 30 percent fee request by utilizing a sliding scale formula. The joint fee petition was approved for all counsel with specific allocations to firms to be determined by liaison counsel. Also, the expenses advanced by counsel were reasonable and necessary to the prosecution of the case and therefore were to be paid from the settlement fund.

Outcome
The court awarded class counsel 30 percent of the settlement fund and reimbursement of costs totaling $ 1,391,203.36. Additionally, the court granted $

25,000 in incentive fees to each of the five class representatives.

LexisNexis® Headnotes

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN1 **Basis of Recovery, American Rule**

Ordinarily, a court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees (though there is an advantage to using the alternative method to double check the fee). There are two primary methods for calculating attorneys' fees: the percentage-of-recovery method and the lodestar method. The percentage-of-recovery method is generally favored in cases involving a common fund, 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 by aligning counsel's interests with those of the class. The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN2 **Attorney Fees & Expenses, Reasonable Fees**

The common-fund doctrine allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN3 **Attorney Fees & Expenses, Reasonable Fees**

The percentage of recovery method resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN4 **Attorney Fees & Expenses, Reasonable Fees**

A court determines an attorney's lodestar by multiplying the number of hours he or she reasonably worked on a client's case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer. After the lodestar is calculated, the lodestar then may be increased or decreased based upon the contingent nature or risk involved and the quality of the attorney's work. An increase or decrease of the lodestar amount is referred to as a "multiplier."

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable

Fees

HN5 **Attorney Fees & Expenses, Reasonable Fees**

The United States Supreme Court has held that the standard for evaluating fee awards is reasonableness. In determining whether a particular percentage of recovery is reasonable, the court first calculates the percentage of the total recovery that the requested fee represents. The court then evaluates that figure in light of the circumstances of the case. In making that decision, the United States Court of Appeals for the Third Circuit has directed district courts to consider seven factors as follows: (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 the 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. The Third Circuit also recommended in Cendant that district courts employ a lodestar cross-check in common fund cases using the percentage of recovery method.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN6 **Regulated Practices, Private Actions**

To assess risk in antitrust class actions the only truly objective measurement of the strength of plaintiffs' case is found by asking: Was defendants' liability prima facie established by the government's successful action?

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN7 **Attorney Fees & Expenses, Reasonable Fees**

The United States Court of Appeals for the Third Circuit looks to cases of similar size, not necessarily similar subject matter, when it analyzes the "awards in similar cases" prong of the Gunter analysis.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN8 **Judicial Officers, Judges**

What should govern attorneys' fee awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases.

Antitrust & Trade Law > Regulated Practices > Private Actions > Private Attorneys General

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9 **Private Actions, Private Attorneys General**

The incentive for "the private attorney general" is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Governments > Public Improvements > General Overview

HN10 **Special Proceedings, Class Actions**

Payments to class representatives may be considered a form of restitutionary relief within the discretion of the trial court. They may also be treated as a reward for public service and for the conferring of a benefit on the entire class.

Judges: [*1] DuBOIS, J.

Opinion by: DuBOIS

Opinion

MEMORANDUM

DuBOIS, J.

I. INTRODUCTION

Presently before the Court is Class Counsels' Revised Memorandum of Law in Support of Petition for Award of Attorneys' Fees and Reimbursement of Expenses (Document No. 320, filed March 18, 2003) ("Fee Petition") [1], Declarations in Support of Class Settlements with the Stone and PCA Defendants and in Support of Class Counsels' Petition for Attorneys' Fees and Costs (docket no. 302, filed February 2, 2004), Declaration of Stephen A. Saltzburg in Support of Plaintiffs' Petition for an Award of Attorneys Fees (docket no. 304, filed February 2, 2004), Appendix of Declarations by Counsel for the Class in Support of Petition for Counsel Fees and Reimbursement of Cost Disbursements (docket no. 305, filed February 2, 2004) and Supplemental Affidavit of David. J. White, CPA, Regarding Attorneys' Time and Expense Summaries for and Through December 2003, and Litigation Fund Expenses From February 1, 2004 through March 17, 2004 (docket no. 321, filed March 18, 2004). In the Fee Petition, petitioners requests a fee of 30 percent of $ 202,572,489, the total of the settlements with all defendants **[*2]** in the class action (the "Settlement Fund") and reimbursement of costs totaling $ 1,391,203.36. A hearing on the Fee Petition was held on March 26, 2004. For the reasons that follow, the Court grants the Fee Petition, and awards petitioners 30 percent of the Settlement Fund and reimbursement of costs in the amount requested.

The Court also writes at this time in ruling on class counsel's unopposed Petition for Payment of Incentive Fees to the Five Class Representatives (Docket No. 301, filed February 2, 2004) ("Incentive Fee Petition"). [2] Petitioners have requested $ 25,000 for each of the five representatives of the classes and the Court concludes **[*3]** that amount is appropriate.

II. BACKGROUND

The Court sets forth only an abbreviated factual and procedural history as pertinent to the Fee Petition. The factual background of the case is described at length in this Court's Memorandum dated October 4, 2000 denying defendants' Motion to Dismiss, its Memorandum dated September 4, 2001 certifying classes of direct purchasers of corrugated boxes and

[1] Class counsel did not file a separate fee petition but began the Revised Memorandum of Law with the statement, "class counsel move for an award of attorneys' fees and for reimbursement of costs." Accordingly, the Court will treat the Revised Memorandum of Law in Support of Petition for Award of Attorneys' Fees and Reimbursement of Expenses as a fee petition.

[2] The three Class Representatives on behalf of the Box Class are Garrett Paper, Inc., Local Baking Products, Inc., and Oak Valley Farms, Inc. General Refractories Co. And I. Halper Corrugated Box Company are the representatives for the sheet class. Two other plaintiffs, one a box purchaser, Winoff Industries, and on a sheet purchaser, Crest Meat Co. dismissed their complaints.

corrugated sheets, and the Opinion of the Court of Appeals for the Third Circuit affirming the September 4, 2001 Memorandum and Order. See *In re Linerboard Antitrust Litig., 2000 U.S. Dist. LEXIS 14433, MDL No. 1261, 2000 WL 1475559, [*4] at *1-3 (E.D. Pa. Oct. 4, 2000)* ("Linerboard I"); *In re Linerboard Antitrust Litig., 203 F.R.D. 197, 201-04 (E.D. Pa. 2001)* ("Linerboard II"); *In re Linerboard Antitrust Litig., 305 F.3d 145, 147-49 (3d Cir. 2002)* ("Linerboard III").

This is an antitrust action involving allegations that a number of U.S. manufacturers of linerboard [3] engaged in a continuing combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. The seven lawsuits transferred to this Court for all pretrial proceedings by the Judicial Panel on Multidistrict Litigation on February 12, 1999 were instituted after an administrative complaint filed by the Federal Trade Commission ("FTC") against Stone Container Corporation ("Stone") was resolved by a consent decree. *Linerboard I, 2000 U.S. Dist. LEXIS 14433, 2000 WL 1475559, at *1* (setting forth allegations in FTC complaint and details of consent decree). Class plaintiffs named the following defendants in their Complaints -- Stone Container Corporation, Jefferson Smurfit Corporation, Smurfit-Stone Container Corp., International Paper Company, **[*5]** Georgia-Pacific Corporation, Temple-Inland, Inc., Gaylord Container Corporation, Tenneco, Inc., Tenneco Packaging, Inc., Union Camp Corporation, Packing Corporation of America and Weyerhaeuser Paper Company -- and alleged that they conspired to raise the price of corrugated containers and corrugated sheets throughout the United States by restricting production and/or curtailing inventories in violation of federal antitrust laws.

By Memorandum **[*6]** and Order dated September 4, 2001, this Court certified the following two plaintiff classes:

> **Class 1 - Sheet Class**
>
> All individuals and entities which purchased corrugated sheets in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their coconspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals and entities which purchased corrugated sheets pursuant to contracts in which the purchase price was not tied to the price of linerboard.
>
> **Class 2 - Box Class**
>
> All individuals and entities which purchased corrugated containers in the United States directly from any of the defendants during the class period from October 1, 1993 through November 30, 1995, excluding the defendants, their coconspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities, and excluding those individuals and entities which purchased corrugated containers pursuant to contracts in which the purchase price was not tied to the price of linerboard or containerboard. **[*7]**

Linerboard II, 203 F.R.D. at 224. On September 25, 2001, defendants filed a Petition for Leave to Appeal pursuant to *Federal Rule of Civil Procedure 23(f)* [4] in the Court of Appeals. By Order dated

[3] Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes and for a variety of industrial and commercial applications. Corrugated sheets are made by gluing a fluted sheet which is not made of linerboard, known as the corrugating medium, between facing sheets of linerboard; corrugated sheets are also referred to as containerboard. The defendants named in the lawsuits are major integrated manufacturers and sellers of linerboard, corrugated sheets and corrugated boxes.

[4] Appellate review of an order of a district court granting or denying class action certification requires the permission of the Court of

December 18, 2001, the Court of Appeals granted that petition. Thereafter, on September 5, 2002, the Court of Appeals affirmed the ruling of this Court. By Order dated October 16, 2002, the Court of Appeals denied defendants' petition for en banc review. On January 14, 2003, defendants filed a Petition for Writ of Certiorari to the United States Supreme Court. The petition was denied on April 21, 2003. See *Gaylord Container Corp. v. Garrett Paper, Inc., 123 S. Ct. 1786, 538 U.S. 977, 155 L. Ed. 2d 666 (2003)*.

[*8] By Order dated August 26, 2003, this Court approved a partial settlement in the amount of $ 8 million between plaintiff classes and Temple-Inland, Inc. and Gaylord Container Corp. The $ 8 million settlement was reduced to$ 7.2 million in accordance with the terms of the settlement agreement based on the number of parties that subsequently opted-out of the classes. This first partial settlement was described by petitioners as an "ice-breaker -- a settlement that would lead to further settlements. Within a month of Court approval of the ice-breaker settlement, on September 22, 2003, the plaintiff classes and defendants International Paper Company and Union Camp Corporation, Georgia Pacific Corporation, and Weyerhauser Company announced they had reached a settlement agreement in the total amount of $ 68 million. The Court granted final approval of that settlement on December 8, 2003. Prior to that date, in October and November 2003, the parties announced the two additional partial settlements with defendants Packaging Corporation of America, Tenneco, Inc., and Tenneco Packaging, Inc. (The "PCA settlement") in the amount of $ 43 million and with defendants Stone Container Corporation, **[*9]** Jefferson Smurfit Corporation, and Smurfit Stone Container Corporation (the "Stone settlement") in the amount of $ 92.5 million. As a result of a "most favored nation's clause" in the PCA settlement agreement, the terms of the Stone settlement triggered a reduction in the amount owed by PCA from $ 43 million to $ 34 million. The Court granted final approval of both the PCA settlement and the Stone settlement in a Memorandum and Order dated March 21, 2004. With the Court's approval of these last two partial settlements, all claims in the class action were resolved for a total of $ 202,572,489.

Petitioners submitted the Fee Petition on February 2, 2004, and a revised Fee Petition, that made only minor clerical changes on March 18, 2004. Petitioners also submitted a series of declarations from experts on class actions, a volume of declarations from all plaintiff counsel detailing their work, and two affidavits from an accountant that managed petitioners' time and expense records. A hearing was held on the Fee Petition on March 26, 2004 (the same hearing at which the PCA and Stone settlements were considered). There were no objections to the Fee Petition.

In the Memorandum the Court **[*10]** will refer to the attorneys involved in three ways: "petitioners" (all counsel representing members of the class), "designated counsel" (lead counsel, liaison counsel and the executive committees appointed by Third Case Management Order dated November 9, 2000) and "liaison counsel" (Howard Langer Esq.).

II. LEGAL STANDARD

A. METHODS OF DETERMINING REASONABLENESS OF FEE PETITIONS IN CLASS ACTIONS: LODESTAR AND PERCENTAGE OF RECOVERY

HN1 "Ordinarily, a court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees (though there is, as we have noted, an advantage to using the alternative method to double check the fee)." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig. , 55 F.3d 768, 821 (3d Cir.1995)*. As the

---

Appeals. *Federal Rule of Civil Procedure 23(f)* provides, in relevant part, as follows: "A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order."

Third Circuit explained in *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 243 F.3d 722 (3d Cir. 2001)*, there are two primary methods for calculating attorneys' fees: the percentage-of-recovery method and the lodestar method. [5] **[*12]** "The percentage-of-recovery method is generally favored in cases involving a common fund [6], and is designed to allow courts to award fees **[*11]** from the fund 'in a manner that rewards counsel for success and penalizes it for failure'" by aligning counsel's interests with those of the class. [7] *Id. at 732*; see also, *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir.2000)*; *Brytus v. Spang & Co., 203 F.3d 238, 243 (3d Cir.2000)*; *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 333-34 (3d Cir.1998)*; *In re GM Trucks, 55 F.3d at 821*. "The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." [8] *Cendant Prides, 243 F.3d at 732*.

[5] The advantages and disadvantages of the two methods are described by the Third Circuit in *In re Cendant Corporation Litigation, 264 F.3d 201, 255-56 (3d Cir. 2001)*, and in the reports of two task forces convened by the Third Circuit to study the issue of counsel fees, *Report of the Third Circuit Task Force, Court Awarded Attorneys Fee, 108 F.R.D. 237, 247-248 (1985)* ("1985 Task Force Report") and Report of Third Circuit Task Force on the Selection of Class Counsel (Final Report January 2002) ("Second Task Force Report"); see also, 1 Alba Conte, Attorney Fee Awards, § 2.02, at 31-32 (2d ed. 1993).

[6] ***HN2*** "The common-fund doctrine … allows a person who maintains a lawsuit that results in the creation, preservation, or increase of a fund in which others have a common interest, to be reimbursed from that fund for litigation expenses incurred." *Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 241 (1985)*.

[7] ***HN3*** "The percentage of recovery method resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class." *In re GM Truck, 55 F.3d 768, 819 n. 38 (3d Cir.1995)*.

[8] ***HN4*** "A court determines an attorney's lodestar by multiplying the number of hours he or she reasonably worked on a client's case by a reasonable hourly billing rate for such services given the geographical area, the nature of the services provided, and the experience of the lawyer." *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir.2000)*. After the lodestar is calculated, "the lodestar then could be increased or decreased based upon the contingent nature or risk involved and the quality of the attorney's work. An increase or decrease of the lodestar amount is referred to as a 'multiplier.'" *Cendant Prides, 243 F.3d at 732 n. 14* (quoting *Task Force Report, 108 F.R.D. 237, 243)*.

[*13] B. REASONABLENESS OF FEE AWARD: PERCENTAGE OF RECOVERY METHOD

This is a common fund case. Therefore, the percentage of recovery method is the proper one to calculate attorneys' fees.

HN5 The Supreme Court has held that the standard for evaluating fee awards is reasonableness. *Hensley v. Eckerhart, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)*. In determining whether a particular percentage of recovery is reasonable, the Court first calculates the percentage of the total recovery that the requested fee represents. The Court then evaluates that figure in light of the circumstances of the case. *In re Cendant Corporation Litigation, 264 F.3d at 256*. In making that decision, the Third Circuit has directed district courts to consider seven (7) factors as follows:

> (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 the 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 **[*14]** 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) (the "Gunter" factors). The Third Circuit also recommended in *Cendant* that district courts employ a lodestar cross-check in common fund cases using the percentage of recovery method.

III. DISCUSSION

In the Fee Petition, petitioners have requested a fee of 30 percent of the Settlement Fund, or approximately $ 60 million. In determining the reasonableness of that request, the Court addresses each of the *Gunter* factors. The Court will also utilize the lodestar cross-check.

A. Counsel's Requested 30 Percent Fee is Reasonable Under the Gunter Factors

1. The Size of the Fund Created and the Number of Persons Benefitted.

a. Size of the Fund

The settlements are highly favorable to the class when analyzed as a percentage of total damages. Plaintiff classes' expert, Dr. John C. Beyer, constructed an econometric model and determined that over the class period prices for boxes and sheets were 2.7 percent higher than they would have been absent the alleged **[*15]** conspiracy. See Affidavit of John C. Beyer, Ph.D. in Support of Settlement Agreement [with defendants International Paper and Union Camp Corp., Georgia Pacific and Weyerhauser Co.] (docket no. 273, filed November 18, 2003) ("Beyer Aff.") P 46. When this figure was multiplied by all defendants' sales, the result was total damages in the amount of $ 478 million over the full class period. Id. at P 50. The settlements represent approximately 55 percent of the claimed damages, as calculated by plaintiffs' expert for the statute of limitations period, and approximately 42 percent of the damages for the full period. Fee Petition at 20.

The fact that numerous courts have approved settlements where the percent of damages was substantially lower than in this case provides objective evidence that the settlements are highly favorable. *Lazy Oil Co v. Witco, 95 F. Supp. 2d 290, 339 (W.D. Pa. 1997)* (court approved settlement amounting to 5.35 percent of damages for the entire class period and 25.5 percent of the of the damages falling within the limitations period); *In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707, 714 (M.D. Pa. 1978)* (approving **[*16]** settlement of 28 percent of estimated damages for four years); *In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 325 (N.D. Ga. 1993)* (court approved a combined settlement of approximately 12.7 to 15.3 percent of the estimated $ 2 billion minimum possible trebled recovery); Erie Forge and Steel, Inc. v. Cyprus Minerals Co., Civil No. 94-404 (W.D.Pa. Dec. 23, 1996) (approving settlement of $ 3.6 million where plaintiffs' expert estimated damages of $ 44.4 million); Fox v. Integra Financial Corp., Civil Action No. 90-1504 (W.D. Pa. July 9, 1996) (settlement of $ 6.5 million approved where plaintiffs' best estimate of provable damages was $ 33 million); *In re Four Seasons Sec. Litig., 58 F.R.D. 19, 36-37 (W.D. Okla. 1972)* ($ 8 million settlement approved although claims exceeded $ 100 million); *Cagan v. Anchor Sav. Bank FSB, Fed. Sec. L. Rep. (CCH) P 95,324 at 96,559, 1990 WL 73423 at *12-13 (E.D.N.Y. May 22, 1990)* (approving $ 2.3 million settlement over objections that "best possible recovery would be approximately $ 121 million"); *Behrens v. Wotemco Enterprises, Inc., 118 F.R.D. 534, 542 (S.D. Fla. 1988)* **[*17]** ("The mere fact that the proposed settlement of $ 0.20 a share is a small fraction of the desired recovery of $ 3.50 a share is not indicative of an inadequate compromise"), aff'd *899 F.2d 21 (11th Cir. 1990)*.

In absolute terms, all claims in the class action have been resolved for a total of $ 202.5 million. According to a recent survey of all class actions between 1972 and 2003, the total settlements in the

Linerboard litigation make this the sixth largest reported antitrust settlement. 24 Class Action Rep. 157, 169-170 (2003). The settlements are remarkable given the fact that there was no prior government action to establish liability and the case covered a relatively short conspiracy period of 26 months. Dec. in Support of Class Settlements with Stone and PCA Def. and in Support of Class Counsel's Pet. For Attorney's Fees and Costs, Exhibit 1 (Dec. of Howard Langer) at 4. Further, the settlements are to be paid entirely in cash. Id.

b. Number of Persons Benefitted

The number of persons benefitted is large, and includes all entities that purchased corrugated containers and sheets during the class period. Fee Petition at 20. The size of that population **[*18]** is best estimated by the number of entities that were sent the notice describing the final partial settlements -- approximately 80,000 companies. Id.

Based on the foregoing, the Court concludes that consideration of the first *Gunter* factor -- the size of the fund created and the number of persons benefitted-counsels in favor of granting the Fee Petition.

2. The Presence or Absence of Substantial Objections by Members of the Class to the Settlement Terms and/or the Fees Requested by Counsel.

Class members were advised that petitioners would apply for a fee award of up to 30 percent of the Settlement Fund and that class members had a right to object. Fee Petition at 21-22. No objections were filed. Id. The absence of objections supports approval of the Fee Petition. See, e.g., *In re Cell Pathways, Inc. , 2002 U.S. Dist. LEXIS 18359 at *24 (E.D. Pa. September 23, 2003)* (existence of only one objection shows that class does not object to thirty percent requested by attorneys and supports approval of fee petition); *In re Aetna Inc., Sec. Litig., 2001 U.S. Dist. LEXIS 68, at *48 (E.D. Pa. Jan. 4, 2001)* ("the Class **[*19]** Members's view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award"). While in some cases a lack of objections may reflect the absence of counsel or unfamiliarity with the legal system, in this case class members are represented by counsel. Further, the classes in this cases include many of the largest corporations in America -- entities that are hardly unfamiliar with civil litigation.

Based on the foregoing, the Court concludes that consideration of the second *Gunter* factor -- the presence or absence of substantial objections by members of the class to the settlements and/or the fees requested by counsel -- supports granting the Fee Petition.

3. The Skill and Efficiency of the Attorneys Involved.

The result achieved is the clearest reflection of petitioners' skill and expertise. See *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 261 (D. Del. 2002)* (Class Counsel "showed their effectiveness through the favorable cash settlement they were able to obtain"); see also, *Ikon, 194 F.R.D. at 194*. The size of the settlements in absolute terms and expressed as a percentage **[*20]** of total damages evidences a high level of skill by petitioners.

The Court's Memorandum of September 5, 2003 describes in detail designated counsel's work before the largest settlements -- the PCA and Stone settlements -- were reached. *In re Linerboard Antitrust Litigation, 292 F. Supp. 2d 644 (E.D. Pa. 2003)*. The Court incorporates that section of the September 5, 2003 Memorandum by reference. The Court has repeatedly stated that the lawyering in the case at every stage was superb, and does so again.

Petitioners' skill and efficiency in managing this litigation was revealed in several discrete stages: pre-filing investigation; proceedings before the Judicial Panel on Multidistrict Litigation ("JPML"); investigation leading up to the filing of the

Amended Complaint and the joining of additional defendants; class certification and the discovery leading thereto; *Rule 23(f)* proceedings before the Third Circuit; deposition and other discovery following the Third Circuit's affirmance of this Court's class certification decision; and settlement negotiations between February and October 2003 with all defendants. Dec. in Support of Class Settlements with Stone and PCA Def. **[*21]** and in Support of Class Counsel's Pet. For Attorney's Fees and Costs, Exhibit 1 (Dec. of Howard Langer) at 3.

In the first phase -- pre-filing investigation -- liaison counsel participated in a working group of attorneys investigating the possibility of private civil actions against Stone Container Corporation following the FTC's publication for public comment of a consent decree with Stone. Id. at 4. That group ultimately disbanded without taking action. In June and July 1998, three suits were filed as class actions in the Northern District of Illinois on behalf of a limited group of purchasers of corrugated sheets from Stone. Id. According to liaison counsel, these suits were limited to purchasers of sheets because counsel filing those cases was concerned with the indirect purchaser issues raised by *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*. Id. That same summer, liaison counsel was approached by an attorney representing a purchaser of boxes from Stone who asked if liaison counsel would research the possibility of bringing an action on behalf of purchasers of corrugated boxes from Stone. Id. at 5. That lawyer, John Peoples, **[*22]** had approached other antitrust lawyers with his client's claim but they all had declined to pursue the matter. Id. Liaison counsel concluded that *In re Sugar Industry Antitrust Litigation, 579 F.2d 13, 19 (3d Cir. 1978)* provided a viable, if unused (in the class action context), exception to Illinois Brick under which suit could be instituted against Stone. Id.

In the second phase -- early proceedings against Stone and proceedings before the JPML -- the attorneys that would ultimately become the group of designated counsel filed suit against Stone on September 23, 1998, Winoff Industries v. Stone Container Corp., in the Eastern District of Pennsylvania. Id. at 7. Petitioners in Philadelphia immediately undertook to coordinate their activities with petitioners in Chicago. Id. at 8. On October 13, 1998, Stone moved before the JPML for transfer and consolidation of all suits to the Northern District of Illinois. Petitioners in Philadelphia opposed the motion to transfer to Chicago and cross-moved for transfer to, and consolidation before, this Court. Id. Argument was held before the JPML on January 29, 1999 in Fort Myers, Florida. Id. **[*23]** at 9. On February 12, 1999, the JPML issued its order transferring all actions to this Court for all pretrial proceedings. Id.

In the third phase -- investigation leading up to the filing of the Amended Complaint and the naming of additional defendants-petitioners, prior to the transfer order issued by the JPML, organized themselves into committees and undertook different assignments related to the preparation of the Amended Complaint. Id. at 9. Attorneys were assigned to review Stone's FTC documents, research public sources, pursue third party discovery, review prior proceedings against the corrugated industry and to work with expert economists. Id.

Petitioners' handling of subpoenas at this stage serves as a simple example of the efficiency with which petitioners managed this litigation. Subpoenas were served on Stone and eleven other companies, each of which objected to the subpoena. Id. Petitioners took advantage of the geographic dispersal of counsel in moving to enforce the subpoenas. To the extent counsel in the case was located in the jurisdiction in which a subpoena was issued, that firm was assigned enforcement of the subpoena. Id.

As to other possible **[*24]** defendants, petitioners prepared matrices based on such facts as whether Stone documents and independent research established that a specific company had been

contacted by Stone as described generally by the FTC; whether they had taken downtime; the nature of the downtime and whether the companies announced price increases at the times they were allegedly colluding. Id. As a result of that research and analysis, petitioners determined that a number of other companies should be named as defendants: Jefferson Smurfit, International Paper, Union Camp, Gaylord Container Corp., Temple Inland, Weyerhauser, Packaging Corp. of America, Tenneco, Inc., and Tenneco Packaging (as a single entity) Georgia Pacific and Simpson Tacoma Kraft Co. Id. at 10-11.

In the fourth phase -- class certification and class-related discovery-petitioners established a document depository to organize and facilitate the review of the more than one million documents produced to plaintiffs. Id. at 16. According to liaison counsel, the goal of the document review was to identify from the initial production those documents that would prove most useful in establishing the criteria for class certification. **[*25]** Id. at 17. After several briefing sessions with selected petitioners to apprise them of the facts and theories of the case, lawyers from among petitioners were assigned to review designated categories of documents. Id. Telephone conferences and meetings were held among the petitioners reviewing the documents to assure that there was appropriate cross-communication regarding their respective research. Id. Summary memoranda were prepared and circulated. Id. Separate and apart from the review itself, Donald Perelman was assigned to incorporate all of the relevant information provided in a detailed annotated chronology that was supplemented through the course of the litigation as documents were produced. Id. This detailed chronology allowed petitioners to correlate all the information obtained from defendants in a single document so that patterns could be observed, correspondence among different defendants could be analyzed, and an overview of each defendant's role in the conspiracy could be established. Id. Prior to the class certification hearing, petitioners received and reviewed tens of thousands of documents for the purpose of adducing evidence in support of **[*26]** class certification. Id. at 18. There was also significant deposition discovery related to class certification. Id.

The filings related to class certification were extensive, involving hundreds of pages of briefs and many hundreds of pages of exhibits. Id. at 19. Argument on plaintiff classes' certification motion took place on August 8, 2001. Id. at 20. It extended over six hours and the transcript was 221 pages in length. Id. The Court in its Memorandum of September 4, 2001, approving class certification, cited many of the documents petitioners found in defendant's files, confirming the importance of petitioners' intense early document review. Id.

In the fifth phase -- *Rule 23(f)* proceedings before the Third Circuit -- petitioners extensively briefed the issue of class certification and ultimately secured the Third Circuit's imprimatur on plaintiff classes' theories of liability and of class-wide impact and damages. Id. at 24.

Prior to the Third Circuit's decision in this case no class certification had been affirmed by the Third Circuit on *Rule 23(f)* appeal. Id. The defendants retained Kenneth Starr, a former Solicitor General of the United States **[*27]** and a former Judge of the United States Court of Appeals for the D.C. Circuit to oversee and argue the appeal. This fact is significant because the quality and vigor of opposing counsel is relevant in evaluating the quality of plaintiffs' counsel. See, e.g., *Ikon, 194 F.R.D. at 194*; *In re Warner Communications Sec. Litig., 618 F. Supp. 735, 749 (S.D.N.Y. 1985)*; *Arenson v. Board of Trade, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974)*. On September 5, 2003, the Third Circuit issued its decision affirming this Court's class certification ruling. Id.

In the sixth phase-deposition discovery after the Third Circuit's affirmance-petitioners deposed 70 employees and former employees of defendants and third parties. Id. at 30. A small group of 18 senior lawyers from among petitioners was chosen to take

the depositions. Id. All these attorneys were required to attend a day long seminar presented by Martin Twersky, Esquire. Id. The seminar utilized films produced by defendants and obtained from third parties to provide the attendees with a virtual tour of box plants and mills. Id. Procedures were put into place to assure that **[*28]** information gained at one deposition was shared with all those petitioners taking depositions. Id. This was done by circulating memoranda and having regular conference calls among petitioners. Efforts were also made to take less important depositions first in order to allow counsel to develop expertise in deposing defendants' witnesses. Id. In addition, this procedure provided an added benefit -- by the time key senior officials' depositions were taken a record existed against which their testimony could be tested. Id. Counsel also took the depositions of less important witnesses by video conference and telephone to reduce the cost of litigation. Id. at 31.

In the seventh phase of the litigation -- settlement negotiations between February and October 2003 -- petitioners reached a series of partial settlements with groups of defendants that ultimately resolved all claims in the class case. Efforts at settlement began at the outset of the case but were unsuccessful. Id. at 49. During the period between the Court's decision certifying the classes and the Third Circuit's order granted interlocutory review, petitioners established a target for global settlement. **[*29]** Id.

Following the Third Circuit decision, liaison counsel recommenced discussions with Temple Inland/Gaylord. Petitioners believed that Temple Inland/Gaylord was a natural partner for an initial "ice breaker" settlement that would include a commitment from the settling defendant(s) to cooperate with plaintiff classes as they prosecuted their case against the other defendants. Id. at 51. Temple Inland/Gaylord was independently represented by Philadelphia counsel. Id. It was viewed as a second tier producer. Further, there was considerable ambiguity regarding its potential liability. Id. Temple Inland had acquired Gaylord during the course of the litigation and the evidence against Gaylord was stronger than against Temple Inland but its market share was much smaller. According to petitioners, their strategy was to offer a settlement low enough to entice Temple Inland/Gaylord to break ranks with the other defendants but high enough to represent a genuine threat to the other defendants. Id. at 53. Ultimately the parties agreed on $ 8 million and the Court approved the Temple Inland/Gaylord settlement on August 26, 2003. Id.

After notice of the class certification **[*30]** and the Temple Inland/Gaylord settlement was sent to potential class members, entities representing approximately 25 percent of the sales to the classes opted-out. Id. at 54. As the Court noted in its Memorandum of September 5, 2003, the large number of opt-outs at such a late stage was unusual. Id. None of the major corporations included in the classes opted out at or near the outset of the case. Id. at 54-55. Petitioners argue that this was due to the high risk of nonpayment in the early stages of the litigation that was significantly ameliorated by petitioners' stewardship of the case through the Third Circuit's decision affirming this Court's class certification order. Id. at 55.

After a mediation session before the Honorable Lowell A. Reed on June 17, 2003, counsel for International Paper and Union Camp asked petitioners about further settlement discussions. Id. They proposed that the class negotiate with them and two other defendants, Georgia Pacific and Weyerhauser. Id. Counsel for these companies believed their clients formed a natural group because the liability case against them developed through discovery was materially weaker than that against the **[*31]** remaining defendants. Id. After several fruitless rounds of negotiations in which defendants pursued a settlement that was only slightly larger than the Temple Inland/Gaylord settlement, petitioners and counsel for International Paper, Union Camp, Georgia Pacific and Weyerhauser reached a settlement of $ 68 million that was approved by the Court on December 8,

2003.

Two groups of defendants remained in the case at that stage of the litigation, Packaging Corporation of America, Tenneco, Inc., and Tenneco Packaging, Inc. ("PCA defendants") and Stone Container Corporation, Jefferson Smurfit Corporation, and Smurfit Stone Container Corporation ("Stone defendants"). Id. at 57. The sales of these defendants represented 44 percent of the total sales of all defendants in the case. Id. Stone and Jefferson Smurfit merged in 1998 so any settlement with them would have to include both companies -- a fact that complicated petitioners' task because the liability case against Stone and Jefferson Smurfit was not of equal strength. Id. Settlement negotiations with the PCA defendants began shortly after the settlements with International Paper, Union Camp, Georgia Pacific and Weyerhauser **[*32]** became public. Id. at 58. While these negotiations were proceeding, special settlement counsel for the Stone defendants contacted petitioners. Settlements with both groups of defendants, the PCA defendants and the Stone defendants, were reached on October 28 and 29 respectively. Id. The Court approved those settlements on March 21, 2004.

Throughout every phase of the litigation petitioners managed a major discovery effort, managed on a day-to-day basis by Martin Twersky and Robert LaRocca. Id. at 25. In terms of document discovery alone, defendants produced more than 430 boxes of documents containing more than one (1) million pages of records. Id. This effort required the single largest expenditure of petitioners' time and resources and provides further evidence of their skill in managing this litigation. Id. As an example of what was accomplished, on November 15, 2002, a day long meeting of senior counsel for all parties occurred where the parties agreed on a basic framework for document discovery such as: (1) the discovery period; (2) production by defendants of electronic records of transactions at their mills and box plants, instead of hard copy invoices and **[*33]** purchase/sales records; (3) defendants agreement to search headquarters, regional offices and elsewhere for documents; (4) defendants agreement not to rely on categories of discovery they declined to produce; and (5) issues related to interrogatories and document requests. Id. at 27. According to liaison counsel, following this meeting discovery began in earnest. Id.

Petitioners management of discovery disputes provides further evidence of their skill and efficiency in managing this litigation. Throughout the litigation, the Court urged counsel to seek informal resolution of discovery disputes whenever possible and petitioners expended a great deal of time and effort to this end. Id. at 44. For example, more than 750 letters and e-mails were exchanged between petitioners and defense counsel seeking to resolve discovery issues. Id. Most of these informal efforts at resolution have proved successful and the Court's involvement has only been required on a few occasions. Id.

Based on the foregoing, the Court concludes that consideration of the third *Gunter* factor -- the skill and efficiency of the attorneys involved -- counsels in favor of granting the Fee Petition. **[*34]**

4. The Complexity and Duration of the Litigation.

As to the complexity of the case, "an antitrust class action is arguably the most complex action to prosecute." *In re Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)*; see also *In re Shopping Carts Antitrust Litig., 1983 U.S. Dist. LEXIS 11555, MDL No. 451, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983)* (noting that ". . . antitrust price fixing actions are generally complex, expensive and lengthy" (citing *Detroit v. Grinnell Corp., 495 F.2d 448 at 467-68*)). "The legal and factual issues involved are always numerous and uncertain in outcome." *In re Motorsports, 112 F. Supp. 2d at 1337*. This litigation was no exception.

As to the duration of the litigation, the case is now

in its sixth year and were it to go to trial it could continue for any number of years. The Court notes that there is authority for approving a 30 percent fee in litigation that concluded much earlier in the proceeding. E.g., *In re Ikon Office Solutions Inc. Securities Litigation, 194 F.R.D. 166, 194 (E.D.Pa. 2000)* (awarded attorneys 30 percent of $ 111 million settlement after one and **[*35]** a half years of litigation).

Based on the foregoing, the Court concludes that consideration of the fourth *Gunter* factor -- the complexity and duration of the litigation -- counsels in favor of granting the Fee Petition.

5. The Risk of Nonpayment.

Petitioners faced significant risks of nonpayment. First, the FTC investigation into Stone had been, according to Professor Lawrence Sullivan, an antitrust expert whose declaration petitioners offered in support of the Fee Petition, "at the cutting edge of single firm antitrust liability." Dec. in Support of Class Settlements with the Stone and PCA Defendants and in Support of Class Counsels' Petition for Attorneys' Fees and Costs, Certification of Professor Lawrence Sullivan P 5. As Professor Sullivan explains

> To my knowledge there has never been a successfully litigated antitrust claim of a single firm attempt to conspire to raise prices or reduce out-put based solely, or even primarily, on market conduct by the defendant firm. Indeed, except for FTC's…Stone Container Corporation investigation (*In re Stone Container Corp.,125 F.T.C. 853 (FTC 1998)* there never appears to have been an allegation **[*36]** of an attempt so to conspire based solely on market conduct evidence…In Stone Container, the dissenting statement of Commissioner Swindle serves to emphasize that the Commission's market conduct allegations were far afield from conventional antitrust theories of liability.

Id.

Second, petitioners did not benefit from the fruits of a prior government investigation or prosecution. The Second Circuit has held that ***HN6*** to assess risk in antitrust class actions: "The only truly objective measurement of the strength of plaintiffs' case is found by asking: 'Was defendants' liability prima facie established by the government's successful action?'" *Grinnell, 495 F.2d at 455*. In this case the answer to that question is no. The FTC did not file an action against, or even identify, any market participant other than Stone. Further, the FTC investigation went no further than Stone's alleged invitation to conspire. Id. at P 6.

Third, prior to this case no court had ever certified a class based entirely on the exception to *Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)* announced by the Third Circuit in *In re Sugar Industry Antitrust Litigation, 579 F.2d 13 (3d Cir. 19778)*. **[*37]** This Court addressed this issue at length in its Memorandum of September 4, 2001 certifying the classes. In Illinois Brick, the Supreme Court ruled that only a direct purchaser, and not others in chain of manufacturing or distribution, is a party "injured in his business or property" within meaning of the *Clayton Act*. *431 U.S. at 736*. The Third Circuit, in Sugar ruled that if plaintiffs purchased items which incorporated a price-fixed item obtained directly from the producer, suit was not barred by the Illinois Brick decision. *Sugar, 579 F.2d at 17*. *Sugar*, however, addressed only the issue of individual standing, and not class standing, under Illinois Brick. Playing off that distinction, defendants argued that the tracing of damages from one level to another complicated proof of impact and damages such that class proceedings were impracticable. Defendants arguments were rejected both by this Court and the Third Circuit.

Fourth, defendants stated their intention to exploit at trial several perceived weaknesses in plaintiff classes' evidence of liability. There is no direct evidence of any meeting at which defendants

agreed to take downtime **[*38]** or to raise prices and there was no direct evidence of conversations in which one conspirator agreed with another to take reciprocal downtime. In addition, as the Court discussed in its Memorandum of December 8, 2003, the reduction in production caused by the alleged conspiratorial downtime accounted for a small quantity of linerboard. During the class period, October 1, 1993 through November 30, 1995 linerboard production by all defendants totaled 20,000,000 tons per year. Therefore, the alleged conspiratorial downtime during that period produced a decease in production of 385,000 to 435,000 tons, or approximately 1 percent of production.

Moreover, in the period of alleged conspirational activity, the cost of pulp and old corrugated containers -- the primary input costs of containerboard -- rose at unprecedented rates. Demand also rose during the period in question and defendants' production was unable to meet this increase. The latter fact is explained in part by low prices in the 1980s and early 1990s that led to low returns on investment in additional capacity and thus reduced investment in additional capacity. Defendants could have argued that it was this lack of capacity, not **[*39]** collusion, that prevented defendants from meeting this increased demand. In sum, defendants would have been able to argue that these two economic forces -- sharply rising costs and increased demand -- led to the steep price increases not the allegedly collusive downtime in 1993.

Based on the foregoing, the Court concludes that consideration of the fifth *Gunter* factor -- the risk of nonpayment -- counsels in favor of granting the Fee Petition.

6. The Amount of Time Devoted to the Case by Plaintiff's Counsel

Petitioners expended 51,268 hours on this litigation. See, Langer Summary Declaration, at PP 6-11 and Declaration of David White, CPA. They reported that more than 200 lawyers worked on the case over the six years of litigation. This group can be subdivided according to number of hours spent: (1) thirty-six lawyers reported between 100 and 500 hours: (2) seventeen lawyers reported between 500 and 1,000 hours; (3) six lawyers reported between 1,000 and 2,000 hours -- this included members of the core team of lawyers that managed the litigation; (4) Liaison counsel and Robert LaRocca expended over 2,500 hours -- they are the only lawyers on the case who reported more **[*40]** than 2,000 hours of recorded time.

The Court makes several observations about this distribution of attorneys' time expended in the case. First, the number of lawyers with less than 1,000 hours reflects the fact that the defendants were assigned to teams of junior lawyers to review documents and senior lawyers to take depositions. Second, the small group of lawyers with the most hours are the lawyers who managed the litigation.

While the total number reported -- 51,268 hours -- is obviously substantial, through effective management petitioners held down the number of hours and other resources required to effectively prosecute the case. Fee Petition at 22. Fewer hours of attorney time were expended in this case than in comparable litigation. For instance, In re Flat Glass involved fewer defendants and more firms and the fee petition covered 83,067 hours. In re Commercial Tissue Antitrust Litigation involved a comparable number of defendants, a similar industry, a conspiracy covering a similar time period and was resolved at a comparable stage but the fee petition covered 87,849 hours excluding time expended by the Attorney General of Florida in a separate action which was consolidated **[*41]** with the class action. Id. This development should be rewarded when it reflects, as in this case, the efficiency of counsel in maximizing total recovery to the class by minimizing attorneys' fees expenses.

Based on the foregoing, the Court concludes that consideration of the sixth *Gunter* factor -- the amount of time devoted to the case by petitioners --

counsels in favor of granting the Fee Petition.

7. The Awards in Similar Cases

The 30 percent fee is comparable to fees approved in the four most recent horizontal price fixing cases. In re Busiprone Patent Antitrust Litigation, 01-MD-1410 (S.D.N.Y. April 11, 2003) in which the court awarded class counsel in an early settlement one-third of a class action settlement of $ 200 million; *In re Vitamins Antitrust Litig., 2001 U.S. Dist. LEXIS 25067, 2001 WL 34312839 (D.D.C. July 16, 2001)* in which the court awarded counsel 34.6 percent of $ 365 million in an early settlement of a case in which there had been a prior government criminal investigation and prosecution; In re Cardizem CD Antitrust Litigation, MDL 1278 (E.D. Mi. November 26, 2002) in which the court awarded 30 percent of a settlement fund of $ 110 million; and **[*42]** *In re Lease Oil Antitrust Litigation, 186 F.R.D. 403 (S.D. Tex. 1999)* in which the court awarded 25 percent of $ 190 million settlement.

The Third Circuit in Cendant Prides, a securities case, ***HN7*** looked to cases of similar size, not necessarily similar subject matter, when it analyzed the "awards in similar cases" prong of the Gunter analysis. *243 F.3d at 737*. Many of the decisions cited by the Third Circuit involved settlements similar in size to the settlement in this litigation and the courts awarded fees in those cases comparable to the 30 percent fee requested by petitioners. *In re Ikon Office Solutions Inc. Securities Litigation, 194 F.R.D. 166 (E.D.Pa. 2000)* (30 percent of $ 111 million); *In re Rite Aid Corporation Securities Litigation, 146 F. Supp. 2d 706 (E.D. Pa. 2001)* and *269 F. Supp. 2d 603 (E.D. Pa. 2003)* (25 percent of $ 193 million); *Neiger v. Crants (In re Prison Realty Sec. Litig.), 2001 U.S. Dist. LEXIS 21943, C/A No. 3:99-0458 (M.D. Tenn. February 9, 2001)* (30 percent of $ 111 million); *In re Prudential Secs. Ltd. Pshps. Litig. , 912 F. Supp. 97 (S.D.N.Y. 1996)* (27 percent of $ **[*43]** 110 million); *Kurzwell v. Philip Morris, Co., 1999 WL 1076105 (S.D.N.Y. 1999)* (30 percent of $ 123.8 million); *In re Sumitomo Copper Litig., 74 F. Supp. 2d 393 (S.D.N.Y. 1999)* (27.5 percent of $ 116 million); *In re Combustion, Inc., 968 F. Supp. 1116 (W.D.La. 1997)* (36 percent of $ 127 million); see generally, 24 Class Action Rep. 169-170 (2003) (survey of all class action fee awards from 1973-2003).

The above figures are in accord with a recent Federal Judicial Center study that found that in federal class actions generally median attorney fee awards were in the range of 27 to 30 percent. See Dec. of Prof. Stephen Saltzburg at P 26 (quoting Dunbar, et al., Recent Trends IV: What Explains Filings and Settlements in Shareholder and Class Actions (NERA, 1996) at 12-13). More specifically, recent empirical data analyzing fee awards in securities cases indicates that "regardless of size, fees average 32 percent of the settlement. See Dec. of Prof. Stephen Saltzburg at P 26 (quoting Dunbar, et al., Recent Trends IV: What Explains Filings and Settlements in Shareholder and Class Actions (NERA, 1996) at 12-13).

In Cendant Prides **[*44]** , the Third Circuit, after engaging in a review of common fund cases that produced a range of fee awards from 2.8 to 36 percent of the total settlement, noted the following common factors in those cases: "complex and/or novel legal issues, extensive discovery, acrimonious litigation, and tens of thousands of hours spent on the case by class counsel." *243 F.3d at 741*. There are two recent cases that exhibit these characteristics and many of the same characteristics of the present litigation, and produced fee awards at the high end of this range -- Lease Oil and Ikon Office Solutions. In Lease Oil, where the district court awarded a 25 percent fee, the court explained:

> As well as being novel, this litigation was highly complex and thus required a great deal of lawyering skill. As just explained, the task of simply compiling the evidence was an unusually difficult task, requiring the assistance of experts and the investment of many hours.

> Also, being novel, the legal issues raised in the litigation required skilled attorneys to handle them.

Cendant Prides, 243 F.3d at 738 (citing *Lease Oil, 186 F.R.D. at 445*). In **[*45]** In re Ikon Office Solutions, the district court granted a 30 percent fee request because, *inter alia*, "counsel expended more than 45,000 hours on this case and paid out expenses of more than $ 3 million with no guarantee of recovery," the case presented "the legal obstacles of establishing scienter, damages, causation and like" and "derivative counsel fees will be taken from this amount." *Cendant Prides, 243 F.3d at 738* (citing *In re Ikon Office Solutions, 194 F.R.D. at 194*). Notwithstanding those legal obstacles, *Ikon Office Solutions* lacked a number of the risks present in this case. For example, in Ikon Office Solutions, the parties stipulated to class certification. *194 F.R.D. at 171*. Moreover, the result in *Ikon Office Solutions* was not nearly as favorable as the result in this case -- the settlement in that case represented between 5.2 percent and 8.7 percent of the out of pocket damages. In comparison, as discussed above, the settlements in this case represent 55 percent of the claimed damages, as calculated by plaintiffs' expert for the statute of limitations period, and approximately 42 percent of the damages **[*46]** for the full class period. Fee Petition at 20. Lastly, by the time of final approval of the settlement, the case in *Ikon Office Solutions* had only been pending for one and half years.

Petitioners' requested fee is similar to fees awarded for cases like Linerboard in the private market. The three expert declarations, that of Professor Saltzburg, who undertook a study of these mattes as co-chair of the Third Circuit Task Force on the Selection of Class Counsel; that of Jerome J. Shestack, a former president of the American Bar Association who has specialized in representing clients in major litigation; and that of Richard Arnold, the co-liaison counsel for the direct action plaintiffs in this litigation, who has specialized in representing large corporations in major antitrust litigation, all confirm that the 30 percent sought is at or below the market rate. Fee Petition at 55. These declarations are consistent with the conclusion reached by the special master appointed by Judge Dalzell in U.S Bioscience to determine the market rate for fees in a complex litigation posing less risk of nonpayment than the current case:

> After reviewing all the materials outlined **[*47]** above, it is the considered view of the Special Master that in light of the contingency fee practices in the district, the type of class action litigation at issue here; the nature of this case, including the facts known at the outset of the litigation (that is, at the point when advance "negotiating" might have occurred); and the outstanding performance of plaintiffs' counsel, a contingency fee of 30 percent of the settlement fund, plus all expenses, should be awarded.

*In re United States Bioscience Sec. Litig. , 155 F.R.D. 116. 1994 WL 485935, at *15 (E.D. Pa. 1994)*.

What the market would pay is significant because, as the Seventh Circuit has explained, the goal of the fee setting process it to "determine what the lawyer would receive if he were selling his services in the market rather than being paid by Court Order." *In re Continental Ill. Sec. Litig., 962 F.2d 566, 568 (7th Cir. 1992)*; see also, *In re RJR Nabisco Sec. Litig., 1992 U.S. Dist. LEXIS 12702 at *20, MDL No. 818 (S.D.N.Y. Aug. 24, 1992)* ***HN8*** ("What should govern such [fee] awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is **[*48]** enough in a particular case, but what the market pays in similar cases).

Based on the foregoing, the Court concludes that consideration of the seventh *Gunter* factor -- the awards in similar cases -- counsels in favor of granting the Fee Petition.

B. THE REQUESTED FEE IS REASONABLE UNDER A LODESTAR CROSS-CHECK

While the Court adopts the percentage of recovery method, the Court will also subject petitioners' proposed fee to a cross-check using the lodestar method. *Cendant Prides, 243 F.3d at 742* ("we have suggested that district courts cross-check the percentage award at which they arrive against the lodestar method"); 2002 Task Force Report at Fn. 313. The Court emphasizes that this is only a cross-check and not a full lodestar analysis. see, e.g., *Di Giacomo v. Plains All Am. Pipeline, 2001 U.S. Dist. LEXIS 25532, Civ. No. H-99-4137, at 23 (S.D. Tex. 2001)* (Court conducts a lodestar cross-check but notes that it "will not conduct a detailed analysis of charged hours and hourly rates" because to do so "would undermine the utility of the percentage method").

To apply the lodestar method, the Court must examine the number of hours petitioners worked and the rate for these **[*49]** lawyers' services, and multiply the number of hours worked by the hourly rate. The Court may also multiply the hourly rate by a factor (a lodestar "multiplier") to reflect the risks of nonpayment facing counsel, to serve as an incentive for counsel to undertake socially beneficial litigation, or as a reward to counsel for an extraordinary result. *In re Prudential, 148 F.3d at 340-341*.

Petitioners have reported to the Court spending 51,268 hours on the litigation. Fee Petition at 62. Petitioners have also reported an average mixed hourly rate of senior counsel of $ 440.00. Based on these two figures, the lodestar under the formula adopted by the Third Circuit in In *In re Cendant Corporation Prides Litigation, 243 F.3d 722 (3d Cir. 2001)* -- taking the hourly rates of the most senior lawyers in the case and multiplying them by the total hours incurred by attorneys who worked the case -- would be $ 22,557,920. [9] Given the fee petitioners have requested, the multiplier under the *Cendant Prides* formula is 2.66.

[*50] In Cendant Prides, the Third Circuit ruled that a multiplier of 3 was the appropriate ceiling using the average rate of senior counsel method based. *243 F.3d at 742*. In Prudential, the Third Circuit noted, based on a similar review of common fund cases, "multipliers ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied. *In re Prudential, 148 F.3d 283, 341 (3d Cir. 1998)* (quoting 3 Herbert Newberg & Alba Conte, Newberg on Class Actions, S 14.03 at 14-5 (3d ed. 1992). Clearly, 2.66 falls below the ceiling set by the Court in *Cendant Prides* and falls within the range the Court identified in *In re Prudential*. The Court also notes that during 2001-2003, the average multiplier approved in common fund class actions was 4.35 and during 30 year period from 1973-2003, average multiplier approved in common fund class actions was 3.89. Stuart J. Logan, et al., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Reports 167 (2003).

For all of the foregoing reasons, the Court concludes that the requested fee of 30 percent is reasonable when measured by the lodestar cross-check

[*51] C. THE COURT DOES NOT DEEM IT APPROPRIATE TO REDUCE THE 30 PERCENT FEE REQUEST BY UTILIZING A SLIDING SCALE FORMULA

Some courts have applied a "sliding scale" approach to fee awards, granting smaller fee awards

---

[9] In addition to the Cendant Prides formula, courts use a "historic lodestar method", by which hours expended by each attorney are grouped into historical time periods and multiplied by that attorney's hourly rate for that time period, and the "current lodestar method", by which total hours expended by each attorney are multiplied by that attorney's hourly rate at the conclusion of the case. See, e.g. *Missouri v. Jenkins, 491 U.S. 274, 283-84, 105 L. Ed. 2d 229, 109 S. Ct. 2463 (1980)*; *New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1153 (2d Cir. 1983)*. Petitioner's requested fee produces a multiplier of 4.08 using the historic rate calculation and 3.67 using the current rate calculation. Fee Petition at 63.

as the size of the common fund increases. The Third Circuit in In re Prudential presented one argument for such an approach: "the basis for this inverse relationship is the belief that in many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *148 F.3d at 339*.

One might argue that a fee award of 30 percent of settlements in excess of $ 200 is excessive given the absolute figure, approximately $ 60 million, that such an award produces. The Court rejects that thinking in this case because the highly favorable settlement was attributable to the petitioners' skill and it is inappropriate to penalize them for their success.

Moreover, the sliding scale approach is economically unsound. This Court agrees with Judge Easterbrook's conclusion in Synthroid Marketing Litig., a case in which the Seventh Circuit overruled a district court's application of a declining fee **[*52]** structure, that reducing fees for large awards is economically irrational:

> The district judge defined megafunds as settlements of $ 75 million and up. Fees in "megafund" cases should be capped at 10% of the recovery, the judge held, although she recognized that fees of 30% are more common and proper in smaller cases. This means that counsel for the consumer class could have received $ 22 million in fees had they settled for $ 74 million but were limited to $ 8.2 million because they obtained an extra $ 14 million for their clients (the consumer fund, recall, is $ 88 million). Why there should be such a notch is a mystery. Markets would not tolerate that effect.

Id. The Court also agrees with the Ikon Office Solutions court that:

> It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all the other facts ordinarily considered relevant in determining the percentage would support a higher percentage. Such an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex **[*53]** cases in which there is a great risk of no recovery. Nor does it give sufficient weight to the fact that large attorneys fees serve to motivate capable counsel to undertake these actions.

194 F.R.D. at 197 (cited with approval in *In re Cendant Corp. Secs. Litig. , 109 F. Supp. 2d 285 at 294-295*).

The latter point quoted from Ikon Office Solutions -- providing sufficient incentive to attorneys to undertake class actions -- is particularly important in antitrust cases. As the Second Circuit has explained, ***HN9*** the incentive for "the private attorney general" is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir.)* cert denied sub nom., *Patlogan v. Dickstein, Shapiro and Galligan, 414 U.S. 1092, 38 L. Ed. 2d 549, 94 S. Ct. 722 (1973)* (citations omitted).

D. THE COURT APPROVES THE AGGREGATE FEE AMOUNT WITH ALLOCATIONS TO SPECIFIC FIRMS TO BE DETERMINED BY LIAISON COUNSEL

The Court approves the joint fee petition for all petitioners with specific **[*54]** allocations to firms to be determined by liaison counsel. The Court notes that all petitioners have been advised of and have agreed to this procedure. Since the procedure was first utilized in *In re Magic Marker Securities Litigation, 1979 U.S. Dist. LEXIS 9777 (E.D. Pa. 1979)*, submission of a combined fee application with actual allocation to be made by lead counsel has generally been adopted by the courts. See, e.g.,

*Brown v. Am. Home Prods. (In re Diet Drugs Prods. Liab. Litig.), 2002 U.S. Dist. LEXIS 19396, at *10 (E.D. Pa. Oct. 3, 2002)*; see also, In re Flat Glass Antitrust Litig., MDL No. 1200 (W.D. Pa. May 28, 2002).

Liaison counsel has led the case from its inception and is the attorney "better able to describe the weight and merit of each [counsel's] contribution, *In re Diet Drugs Litig., 2002 U.S. Dist. LEXIS 19396 (E.D.Pa. Oct. 3, 2002)*. Likewise, from the standpoint of judicial economy, leaving allocation to such counsel makes sense because it relieves the Court of the "difficult task of assessing counsel's relative contributions." *In re Prudential, 148 F.3d at 329 n. 96*. [10]

[*55] E. PETITIONERS ARE ENTITLED TO REIMBURSEMENT OF LITIGATION AND SETTLEMENT EXPENSES FROM THE SETTLEMENT FUND

The Court has reviewed the expenses advanced by counsel and concludes they were reasonable and necessary to the prosecution of the case. Therefore, the Court will order that petitioners be reimbursed for these expenses from the Settlement Fund. See, e.g., *Danny Kresky Enters. Corp. v. Magid, 716 F.2d 215, 219-220 (3d Cir. 1983)*; *In re Chambers Dev. Secs. Litig., 912 F. Supp. 852, 863 (W.D. Pa. 1995)* ("Plaintiffs' counsel also are entitled to be reimbursed for all reasonable expenses necessary for the successful prosecution of this litigation).

F. PETITION FOR PAYMENT OF INCENTIVE FEES TO THE FIVE CLASS REPRESENTATIVES

The Court also writes at this time in ruling on class counsel's unopposed Petition for Payment of Incentive Fees to the Five Class Representatives (Docket No. 301, filed February 2, 2004) ("Incentive Fee Petition"). [11] Petitioner have requested $ 25,000 for each of the five representatives of the classes and the Court concludes that such an award is appropriate.

[*56] The Court finds ample authority in this district and in other circuits for such an incentive award. *Tenuto v. Transworld Sys., 2002 U.S. Dist. LEXIS 1764, No. Civ. A 99-4228. 2002 WL 188569 (E.D. Pa. Jan. 31, 2002)*; *In re Residential Doors Antitrust Litigation, 1998 U.S. Dist. LEXIS 4292, Nos. 94-3744, Civ. A. 96-2125, 1998 WL 151804, *8 (E.D. Pa. April 2, 1998)*; *Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1999)*; *In re Lease Oil Antitrust Litigation, 186 F.R.D. 402, 229 (S.D. Tex. 1999)*; *In re Domestic Air Transp. Antitrust Litigation, 148 F.R.D. 297, 357 (N.D. Ga. 1993)*.

Like the attorneys in this case, the class representatives have conferred benefits on all other class members and they deserve to be compensated accordingly. *In re Plastic Tableware Antitrust Litig., 1995 U.S. Dist. LEXIS 18166, No. 94-CV-3564, 2002 WL 188569 (E.D.Pa. Dec. 4, 1995)* ***HN10*** ("Payments to class representatives may be considered a form of restitutionary relief within the discretion of the trial court. . . They may also be treated as a reward for public service and for the conferring of a benefit on the entire class"). Such awards are particularly appropriate in this case because **[*57]** there was no preceding governmental action alleging a conspiracy and taking a high-profile role threatened to jeopardize class representatives relationships with their suppliers. Cullen v. Whiteman Medical Corp., 197 F.R.D. 1236 (E.D. Pa. 2000) ("courts routinely

[10] The Court notes that a Pennsylvania state court action has been filed against designated counsel and removed to this Court, Richard Golomb, Ruben Honik and Golomb & Honik, P.C. v. Howard Langer and Langer & Grogan, P.C., No. 04-2321, filed May 27, 2004. The parties in that litigation have raised no objections to the issuance of this Memorandum at this time.

[11] The three Class Representatives on behalf of the Box Class are Garrett Paper, Inc., Local Baking Products, Inc., and Oak Valley Farms, Inc. General Refractories Co. and Albert I. Halper Corrugated Box Company are the representatives for the sheet class. Two other plaintiffs, a box purchaser, Winoff Industries, and a sheet purchaser, Crest Meat Co., voluntarily dismissed their complaints.

approve incentive awards for the services they provide and the risks they incurred during the course of the class action litigation").

The five class representatives performed considerable work advancing the litigation. Each of the class representatives provided verified answers to interrogatories and produced documents in response to document requests. Incentive Fee Petition 5. Each of them also expended time in preparing for depositions and gave testimony at depositions. Id. Finally, Judge Reed required that representatives of each class be present at the initial mediation sessions. Id.

Lastly, the Court notes that the amount requested, $ 25,000, is comparable to incentive awards granted by courts in this district and in other circuits. See, e.g., In re Graphite Electrodes Antitrust Litigation, MDL No. 1244 (E.D.Pa. Order of September 8, 2003) ($ 80,000); *Bogosian v. Gulf Oil Corp., 621 F. Supp. 27 (E.D. Pa. 1985)* **[*58]** ($ 20,000); In First Jersey Securities, Inc., MDL No. 681 (E.D. Pa. 1989) ($ 24,000); *In re Revco Securities Litigation, Nos. 851 & 89 CV 593, 1992 WL 118800 (N.D. Ohio May 6, 1992)* ($ 90,000); In re Busiprone Antitrust Litigation, MDL No. 1413 (S.D.N.Y. Order of April 7, 2003) ($ 25,000); *Brotherton v. Cleveland, 141 F. Supp. 2d 907 (S.D. Ohio 2001)* ($ 50,000); In re Cardizem CD Antitrust Litigation, MDL No. 1278 (S.D. Mich., Order of Nov. 26, 2002) ($ 20,000).

IV. CONCLUSION

For the foregoing reasons, the Court concludes that consideration of the seven *Gunter* factors counsels in favor of awarding petitioners their requested fee. Accordingly, the Court grants Plaintiff Counsel's Petition for Award of Attorneys' Fees and Reimbursement of Expenses and awards petitioners 30 percent of the Settlement Fund and reimbursement of expenses totaling $ 1,391,203.36.

In addition, the Court concludes that petitioners' request for payment of $ 25,000 to each of five named plaintiffs is appropriate. Accordingly, the Court grants class counsel's unopposed Petition for Payment of Incentive Fees to the Five Class Representatives.

An appropriate **[*59]** Order follows.

End of Document

Exhibit 8

Caution
As of: March 26, 2026 6:52 PM Z

Elkins v. Equitable Life Ins. Co.

United States District Court for the Middle District of Florida, Tampa Division

January 27, 1998, Decided ; January 28, 1998, Filed

Civil Action No. 96-296-CIV-T-17B

Reporter
1998 U.S. Dist. LEXIS 1557 *

BRENDA G. ELKINS and JERRY BEDENBAUGH, Individually and On Behalf of A Class of Persons Similarly Situated, Plaintiffs, vs. EQUITABLE LIFE INSURANCE COMPANY OF IOWA, EQUITABLE OF IOWA COMPANIES and EQUITABLE AMERICAN LIFE INSURANCE COMPANY, Defendants.

Disposition: [*1] Plaintiffs' request for $ 5 million in attorneys' fees and expenses granted.

Core Terms

settlement, class member, notice, class action, proposed settlement, premium, enhancement, certificate, life insurance policy, dividend, misrepresent, policyowners, attorney's fees, eligible, enhanced value, annuity, discovery, package, score, individual notice, mail, life insurance, deceptive, negotiate, class representative, member of the class, estimate, elect, lawsuit, claimant

Case Summary

Procedural Posture

Representative plaintiff policy holders brought an action against defendant life insurance companies. The policy holders alleged that the life insurance companies induced them to purchase whole life and universal life insurance policies issued by the life insurance companies based upon uniform, misleading, and deceptive sales practices. The parties reached a settlement and sought approval of the agreement and related attorney fees.

Overview

The court held that the class met numerosity, commonality and typicality requirements and was properly certified under *Fed. R. Civ. P. 23*. The court held that the notice of the settlement to the class members satisfied the requirements of applicable law, the rules of the court, and due process under the federal constitution. The court held that notice of a proposed class action settlement was adequate when it was the best notice practicable and was reasonably calculated to reach absent class members. The court had original jurisdiction to implement the settlement and had personal jurisdiction over the class members. The court considered seven factors in determining whether to approve settlements of class actions and held that the settlement compelled the conclusion that the proposed settlement was fair, adequate and reasonable. The value of the settlement was fair. The court approved the proposed attorney fees, finding that that the fee negotiations were conducted at arm's-length, and only after all material terms of the settlement had been agreed upon. There was no evidence that the settlement was in any way collusive.

Outcome

The court approved the class certification, and the proposed settlement, and granted the policy holders' motion to approve attorneys' fees and expenses.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN1 The four prerequisites of *fed. R. Civ. P. 23(a)* are that: (1) the class be so numerous that joinder of all members is impracticable; (2) there be questions of law or fact common to the class; (3) the claims or defenses of the representative parties be typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN2 The class must be so numerous that joinder of all members is impracticable. *Fed. R. Civ. P. 23(a)(1)*. To meet this requirement, the class representatives need only show that it is difficult or inconvenient to join all the members of the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3 For a class action to be certified, there must be questions of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*. *Fed. R. Civ. P. 23(a)* does not require that all questions of law or fact be common to all class members. The claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs. Accordingly, the main inquiry is whether at least one issue exists that affects all or a significant number of proposed class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4 The commonality requirement is also satisfied where plaintiffs allege common or standardized conduct by the defendant directed toward members of the proposed class. One indicia of a common scheme to deceive alleged in the complaint is the existence of uniform written materials on which the oral representations were based. In such cases, any factual distinctions that may exist among class members are far less important than the common issues bearing on the existence of a "common scheme" of misrepresentations and omissions.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN5 The typicality requirement of *Fed. R. Civ. P. 23(a)* is satisfied where the claims of the class representatives arise from the same broad course of conduct that gives rise to the claims of the other class members and are based on the same legal theory.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN6 *Fed. R. Civ. P. 23(a)(4)* requires that the representative parties will fairly and adequately protect the interests of the class. The adequacy-of-representation requirement under *Rule 23* is a two-prong test. First, the named class representatives must appear to be capable of prosecuting the

actions through qualified, experienced and competent counsel. Second, there can be no antagonism or disabling conflict between the interests of the named class representatives and the interests of the members of the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN7 *Fed. R. Civ. P. 23(b)(3)* authorizes certification where common questions of law or fact predominate over individual questions and the class action is superior to other available means of adjudication.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN8 Where confronted with a class of purchasers allegedly defrauded over a period of time by a similar common thread or scheme to which all alleged non-disclosures or misrepresentations relate, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Labor & Employment Law > ... > Disability Discrimination > Evidence > General Overview

HN9 At the certification stage, the court need only determine which state law is "likely" to apply.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN10 *Fed. R. Civ. P. 23(b)(3)* considers whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN11 The first superiority factor identified in *Fed. R. Civ. P. 23(b)(3)* is the interest of members of the class in individually controlling the prosecution or defense of separate actions. This factor addresses whether the interest of most class members in conducting separate lawsuits is so strong as to require denial of class certification. Considerations relevant to this inquiry include the degree of "cohesion" among class members, whether the amounts at stake for individuals are so small that separate suits would be impracticable and the extent to which separate suits would impose burdens on the party opposing the class, or upon the court calendars.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN12 In determining the superiority issue, the court should also consider the extent and nature of any litigation concerning the controversy already commenced by or against members of the class. The existence of other litigation may either indicate the availability of other methods to adjudicate the controversy or the superiority of class certification.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN13 A factor set forth on *Fed. R. Civ. P. 23(b)(3)* is the desirability or undesirability of concentrating the litigation of the claims in the particular forum. However, this factor is not significant and is conceptually irrelevant in the context of settlement.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN14 Notice of a proposed class action settlement is adequate when it is the best notice practicable, reasonably calculated, under the circumstances, to reach absent class members. *Fed. R. Civ. P. 23(c)(2)*.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN15 With the enactment of *28 U.S.C.S. § 1367*, in the diversity jurisdiction context, there is no need for each class member to meet the required jurisdictional amount individually so long as there is complete diversity among the named parties, and the named plaintiffs have alleged claims that exceed the requisite amount in controversy.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN16 The court acquires personal jurisdiction over present and absent class members so long as class members have been afforded, through adequate notice, the right to exclude themselves from the class.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN17 The court considers seven factors in determining whether to approve settlements of class actions: a. The likelihood of success at trial and potential recovery; b. The complexity, expense and duration of litigation; c. The terms of the settlement; d. The procedures afforded to notify the class members of the proposed settlement, and to allow them to present their views; e. The judgment of experienced counsel for the plaintiff class; f. The

substance and amount of opposition to the settlement; and g. The stage of the proceedings at which the settlement was achieved.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN18 It is not necessary to try the merits of the case in connection with reviewing a settlement. Thus, the court can limit its inquiry to determining whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement. This inquiry is premised upon balancing the probabilities, not assuring that the plaintiff class receives every benefit that might have been won after a full trial. The expense of achieving a more favorable result for the class at trial must be considered.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN19 Plaintiffs in a class action settlement are not required to justify the terms of their settlement based on speculation of what they might have obtained. Inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN20 The federal courts have long recognized that compromises of disputed claims are favored by the courts. Particularly in class action suits, there is an overriding public interest in favor of settlement.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN21 The terms of a settlement in a class action need not provide the optimal relief, so long as there appears to be a genuine quid pro quo.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN22 Even in class action contexts, the trial court is entitled to rely upon the judgment of experienced counsel for the parties in evaluating the appropriateness of a settlement agreement. Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN23 A class action settlement should be examined in light of the objections raised by class members.

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN24 Since class action settlements are to be encouraged, it follows that only some reasonable amount of discovery should be required to make these determinations.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN25 The approach to determining an appropriate fee award in the Eleventh Circuit is the percentage of recovery approach.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN26 There is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case.

Civil Procedure > ... > Class Actions > Class Attorneys > Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN27 The economics involved in prosecuting a class action is one of the factors to be considered by the court in determining a fee.

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN28 Competence of opposing counsel is a factor in establishing plaintiff's counsel's fee award.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN29 The lack of objections is itself important evidence that the requested fees are fair in a class action.

Counsel: For BRENDA G. ELKINS, JERRY BEDENBAUGH, plaintiffs: Barry A. Weprin, Melvyn I. Weiss, Brad N. Friedman, Milberg, Weiss, Bershad, Hynes & Lerach, LLP, New York, NY USA.

For BRENDA G. ELKINS, JERRY BEDENBAUGH, plaintiffs: John Ray Newcomer, Jr., W. Christian Hoyer, James, Hoyer, Newcomer, Forizs & Smiljanich, P.A., Tampa, FL.

For BRENDA G. ELKINS, JERRY BEDENBAUGH, plaintiffs: Ronald R. Parry, Arnzen, Parry & Wentz, P.S.C., Covington, KY.

For BRENDA G. ELKINS, JERRY BEDENBAUGH, plaintiffs: John J. Stoia, Jr., Andrew Hutton, Ted J. Pintar, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego, CA.

For BRENDA G. ELKINS, JERRY BEDENBAUGH, plaintiffs: Andrew S. Friedman, H. Sullivan Bunch, Bonnett, Fairbourn, Friedma, Hienton, Miner & Fry, P.C., Pheonix, AZ.

For BRENDA G. ELKINS, JERRY BEDENBAUGH, plaintiffs: Stephen L. Hubbard, Cantilo, Maisel & Hubbard, Dallas, TX.

For BRENDA G. ELKINS, JERRY

BEDENBAUGH, plaintiffs: David W. Dunn, Davis, Brown, Koehn, Shors, & Roberts, P.C., Des Moines, IA.

For EQUITABLE LIFE INSURANCE COMPANY OF IOWA, defendant: Robert V. Williams, R. Marshall **[*2]** Rainey, Ricardo A. Roig, Williams, Reed, Weinstein, Schifino & Mangione, P.A., Tampa, FL USA.

For EQUITABLE LIFE INSURANCE COMPANY OF IOWA, defendant: Thomas M. Zurek, Randall G. Horstmann, Nyemaster, Goode, McLaughlin, Voigts, Des Moines, IA.

For EQUITABLE OF IOWA COMPANIES, defendant: R. Marshall Rainey, Williams, Reed, Weinstein, Schifino & Mangione, P.A., Tampa, FL USA.

For EQUITABLE OF IOWA COMPANIES, defendant: Thomas M. Zurek, Randall G. Horstmann, Gerald J. Newbrough, Nyemaster, Goode, McLaughlin, Voigts, Des Moines, IA.

SHERI KEPHART, movant, Pro se, Irving, CA.

KYLE E. STEWART, movant, Pro se, Dubuque, IA.

JOHN HOPPEY, JR., movant, Pro se, Hazleton, PA.

PATRICK A. STALOCH, movant, Pro se, Hartland, MN.

For EUGENE R. OLSON, movant: Mark R. Kerfeld, Tewksbury, Kerfeld & Zimmer.

For DAVID H. FLECK, movant: David H. Fleck, Law Office of David H. Fleck, Whitefish Bay, WI.

Judges: ELIZABETH A. KOVACHEVICH, UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA.

Opinion by: ELIZABETH A. KOVACHEVICH

Opinion

CLASS ACTION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER *NUNC PRO TUNC*

INTRODUCTION

1. The matter of the final approval of **[*3]** the proposed settlement of this class action lawsuit came on for hearing on December 19, 1997. The hearing ("Fairness Hearing"), as set forth in the Court's Hearing Order dated August 14, 1997 ("Hearing Order"), was convened at 10:25 a.m., with plaintiffs appearing through counsel and defendants appearing through counsel and by a company representative. Although the Fairness Hearing was well publicized, as described below, no Class Members attended the Fairness Hearing. The proposed settlement, embodied in the parties' First Amended Stipulation of Settlement (including Exhibits A through L), dated July 18, 1997 and filed with the Court on August 8, 1997, was thoroughly briefed by the parties, and was supported with affidavits and declarations of fact and of expert witnesses. Oral presentations of plaintiffs' and defendants' counsel were received at the Fairness Hearing. At the conclusion of the Fairness Hearing, with the parties having met their burden for final approval of the settlement and for the proposed award of attorneys' fees and expenses, the Court requested and received from the parties a proposed form of order, called Final Order and Judgment, finally approving the settlement, **[*4]** certifying the Class, and awarding plaintiffs' counsel the requested fees and expenses, which the Court then signed, to be effective December 19, 1997. The Court also informed the parties it would be supporting the Final Order and Judgment with additional findings of fact and conclusions of law, to be entered *nunc pro tunc*, and instructed the parties to present proposed findings of fact and conclusions of law for the Court's consideration.

2. Now, having further considered the evidence and other submissions of the parties, and all objections to the settlement, the Court makes the following

findings of fact and conclusions of law, effective as of December 19, 1997, to be added to and made a part of the Court's Final Order and Judgment dated December 19, 1997, *nunc pro tunc*. Further, the Final Order and Judgment dated December 19, 1997 is also modified as follows, as of December 19, 1997, *nunc pro tunc*:

a. The date December 19, 1997 in clause (iv) in the second sentence of paragraph 2 of the Final Order and Judgment is changed to the correct and actual date, August 14, 1997;

b. The sixteen subparagraphs numbered B.1.(b)(i) through B.1.(b)(xvi) in paragraph 8 (Release and **[*5]** Waiver) of the Final Order and Judgment are renumbered B.1.(b)(1) through B.1.(b)(16), to reflect their correct and actual numbers;

c. The words "and enjoined," unintentionally omitted before, are added to the first clause following the semicolon in the first sentence of paragraph 10 of the Final Order and Judgment, immediately following the words "and all persons are barred"; and

d. The first sentence of paragraph 15 of the Final Order and Judgment is changed to read as follows:

> Neither this Final Order and Judgment (including the Court's Findings of Fact and Conclusions of Law thereto and therefor) nor the Stipulation of Settlement (including any document referred to in the Stipulation of Settlement and any action taken to implement the Stipulation of Settlement) is, may be construed as, or may be used as an admission by or against defendants of: (i) the validity of any claim, or (ii) any actual or potential fault, wrongdoing or liability, or (iii) any fact or legal issue in another case.

e. Clause (i) beginning on the first line of paragraph 1 of the Final Order and Judgment is changed to read as follows:

> (i) the First Amended Stipulation of Settlement, dated **[*6]** as of July 18, 1997 and filed with the Court on August 8, 1997; and

Otherwise, the Court's Final Order and Judgment is unchanged, and remains effective as of December 19, 1997.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. *BACKGROUND*

A. *The Complaint*

3. Representative plaintiffs Brenda G. Elkins and Jerry Bedenbaugh ("plaintiffs" or "named plaintiffs") filed this action on behalf of themselves and a putative nationwide class on February 14, 1996. They amended their complaint on July 26, 1996, and filed their Second Amended Class Action Complaint (hereinafter the "Complaint" or "Compl. P ") on July 17, 1997.

4. Defendant Equitable Life Insurance Company of Iowa ("Equitable of Iowa") answered plaintiffs' amended Complaint on August 22, 1996, and all three defendants, including Equitable of Iowa, Equitable of Iowa Companies and Equitable American Life Insurance Company (collectively the "defendants") answered the Second Amended Class Action Complaint on August 6, 1997.

5. This action is brought on behalf of a nationwide class of persons or entities (the "Class" or "Class Members") who have or had an ownership interest in certain life insurance policies **[*7]** upon which Equitable of Iowa was or is obligated and that were issued between January 1, 1984 and December 31, 1996 (the "Class Period"), with certain persons and entities excluded by definition. The Class is fully described in the Final Order and Judgment. The Complaint asserts claims based upon, among other things, negligent misrepresentation, negligent supervision, breach of contract, breach of duty of good faith and fair dealing, breach of fiduciary duty, fraudulent inducement and common law fraud. It seeks (i) compensatory and punitive damages, (ii) attachment, impounding, disgorgement or the imposition of a constructive

trust, (iii) declaratory and injunctive relief, and (iv) expenses and attorneys' fees.

6. At the heart of the Complaint are plaintiffs' allegations that defendants induced Class Members to purchase whole life and universal life insurance policies issued by Equitable of Iowa [1] based upon uniform, misleading and deceptive sales practices. In particular, the Complaint alleges: (i) that defendants misled Class Members into believing that their life insurance policies would remain in force after the payment of a single out-of-pocket premium or a fixed or limited **[*8]** number of out-of-pocket premiums; (ii) that defendants induced Class Members to use the cash values of existing permanent life insurance policies to purchase new Equitable of Iowa policies; and (iii) that defendants sold life insurance principally as an investment, savings or retirement plan, without adequately disclosing that the product being sold was life insurance. Plaintiffs also allege: (a) that defendants injured Class Members through its policies, practices and actions concerning dividend scales, interest crediting rates and monthly deduction rates, as well as how it administered and serviced the life insurance policies owned by Class Members; (b) that defendants misled Class Members to believe that the dividend scales and interest rates illustrated at the time their policies were sold were reasonable, were not likely to change, or would not change in an amount sufficient to cause the policies to perform differently than was represented at the time of sale; (c) that defendants improperly decreased dividend scales and interest crediting rates on Class Members' policies to compensate for the "Deferred Acquisition Cost" or "DAC tax," when the policies did not permit such decreases; **[*9]** and (d) that defendants' "direct recognition practices" (*i.e.*, its reduction of dividends or interest credits on Class Members' policies with outstanding policy loans) were improper.

[1] Almost all of the life insurance policies involved in this action and the settlement were issued by Equitable of Iowa. The others were issued by defendant Equitable American Life Insurance Company and were assumed by Equitable of Iowa in 1984.

7. Defendants strongly deny the wrongdoings alleged by plaintiffs. These denials, including defendants' explanation of Equitable of Iowa's conduct and practices, are set out in § 3 of the Notice of Class Action (Ex. A to the Declaration of Jeffrey D. Dahl ("Dahl Decl."). *See also* Declaration of Richard L. Bailey ("Bailey Decl.") (No. 2), PP10-14.

B. *The Parties*

1. *The Class Representatives*

8. **Plaintiff Brenda G. Elkins ("Ms. Elkins")**. Ms. Elkins is a resident of Arizona. When she purchased her four Equitable of Iowa life insurance policies in 1990, and when she **[*10]** filed this class action lawsuit in 1996, she was a resident and citizen of Florida. Ms. Elkins claims she was induced to buy her policies based on misrepresentations that after five additional annual premiums were paid, no more premiums would be necessary, *i.e.*, her premiums would "vanish." She also claims to be a "twisting" (replacement) victim, in that she was improperly induced to terminate her existing life insurance policies, having cumulative death benefits of $ 200,000, to purchase new cash value life insurance policies from Equitable of Iowa, having cumulative death benefits of $ 700,000. In addition, she claims the four Equitable of Iowa policies were sold to her not as life insurance but as a retirement plan for herself and as investment plans for her daughters.

9. **Plaintiff Jerry Bedenbaugh ("Mr. Bedenbaugh")**. Mr. Bedenbaugh is a resident and citizen of the State of Florida. He bought his $ 350,000 Equitable of Iowa life insurance policy in 1992, based on an allegedly misleading and inaccurate vanishing premium presentation. Like Ms. Elkins, Mr. Bedenbaugh also claims he was twisted, in that an existing cash value life insurance policy was cashed out to fund the **[*11]** purchase of his Equitable of Iowa policy. He also claims the Equitable of Iowa policy was sold to him as a retirement vehicle. Mr. Bedenbaugh, like Ms. Elkins, further alleges that the substantial

commission and surrender charges attending the purchase of the Equitable of Iowa policy were not disclosed to him.

10. **Class Counsel**. Ms. Elkins, Mr. Bedenbaugh and the Class are represented by the law firms of Milberg Weiss Bershad Hynes & Lerach LLP and James, Hoyer & Newcomer, P.A. (collectively and individually "Co-Lead Counsel"). Plaintiffs and the Class are also represented by the law firms of Bonnett, Fairbourn, Friedman & Balint, P.C.; Arnzen, Parry & Wentz, P.S.C.; Cantilo, Maisel & Hubbard, LLP; and Davis, Brown, Koehn, Shors & Roberts, P.C. All are experienced plaintiffs' counsel with expertise in the insurance, consumer and class action litigation fields. *See* Affidavit of Melvyn I. Weiss and John J. Stoia, Jr. in Support of Final Certification of the Class, Approval of Settlement and Award of Fees and Expenses ("Weiss/Stoia Aff.") P5.

2. *Defendants*

11. Defendant Equitable Life Insurance Company of Iowa is a stock life insurance company incorporated under the laws **[*12]** of the State of Iowa. Its principal place of business is Des Moines, Iowa. Defendant Equitable American Life Insurance Company was an Iowa corporation before it was merged into Equitable Life Insurance Company of Iowa in 1984. Defendant Equitable of Iowa Companies was an Iowa corporation with its principal place of business in Des Moines, Iowa until October of 1997, when it was merged into Equitable of Iowa Companies, Inc., a Delaware corporation. Bailey Decl. (No. 1) P6. Defendants are represented by their outside attorneys, Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C., in the persons of Thomas M. Zurek and Gerald J. Newbrough.

C. *History Of The Litigation*

12. The claims of plaintiffs and the defenses of defendants have been vigorously contested in this case, and in precursor litigation in the Iowa District Court for Polk County in 1995. The parties' factual and legal skirmishes, plus numerous discovery disputes, are well-chronicled in their adversary papers and more recently in their submissions respecting the proposed settlement. Weiss/Stoia Aff. PP20-25, 32-43; Bailey Decl. (No. 2) PP10-15. *See also* Plaintiffs' Memorandum in Support of Application for Final **[*13]** Certification of the Class and of Approval of the Proposed Settlement ("Plaintiffs' Mem."). It is not necessary for the Court to itemize these contests and disputes in this Order.

13. It is also not necessary for the Court to recount the lengthy discussions and negotiations between the parties precipitating the proposed settlement, other than to note that these discussions and negotiations, which did not proceed substantively until plaintiffs had virtually completed their broad and thorough discovery, were intense, continuous and hard fought, and involved numerous capable and experienced attorneys on both sides. These negotiations took over a year to complete and ultimately culminated in the Stipulation of Settlement filed with this Court on July 18, 1997. Weiss/Stoia Aff. PP49-54; Bailey Decl. (No. 2) P20. The discussions and negotiations respecting plaintiffs' attorneys' fees did not commence until all material terms of the proposed settlement had been agreed to by the parties. Weiss/Stoia Aff. PP54, 56; Bailey Decl. (No. 2) P21.

14. By the end of the discovery process, Equitable of Iowa had produced and plaintiffs' counsel had reviewed voluminous materials, *e.g.*, papers, computer **[*14]** media and videotapes, relevant to the issues in this case. These materials included, *inter alia*, policy forms, product materials, training materials, sales illustrations software, other sales material, pricing and interest crediting materials, agent files, complaint files and relevant communications between Equitable of Iowa and its agents. In addition, plaintiffs' counsel deposed five officers of Equitable of Iowa familiar with its products, sales and marketing activities, pricing and interest crediting practices, complaint resolution procedures and other relevant matters. They also conducted extensive and on-going interviews of a

senior actuary in the company, and interviewed the actuarial consulting firm retained by Equitable of Iowa on several occasions. Plaintiffs' counsel also conducted extensive informal discovery, including, *inter alia*, obtaining complaint files from various departments of insurance, and the review and analysis of media reports, SEC filings, state regulatory filings, industry bulletins and periodicals. They also utilized an expert for evaluation of Equitable of Iowa's sales illustrations. Bailey Decl. (No. 2) P19; Weiss/Stoia Aff. PP32-43.

15. The **[*15]** Stipulation of Settlement, dated July 18, 1997, including Exhibit A thereto, was presented to the Court by the parties on July 18, 1997 at a previously scheduled status conference. The Stipulation of Settlement was presented with a proposed form of hearing order (now Exhibit K to the Stipulation of Settlement), which, *inter alia*, scheduled a fairness hearing on the proposed settlement and described the form and procedures of notice to the Class respecting the proposed settlement. The Court took the Stipulation of Settlement and the proposed hearing order under advisement.

16. On August 8, 1997, the parties filed their First Amended Stipulation of Settlement ("Stipulation of Settlement"), dated as of July 18, 1997, which was identical to their original Stipulation of Settlement, except Exhibits B through L to the Stipulation of Settlement were now also attached.

17. On August 14, 1997, after reviewing the Stipulation of Settlement, the Court signed the Hearing Order that, among other things, (i) preliminarily certified, for settlement purposes, the Class described in the Stipulation of Settlement, (ii) found that the Stipulation of Settlement was sufficient to warrant providing **[*16]** notice to the Class, and scheduled a final hearing to consider approval of the proposed settlement, (iii) directed the forms and methods of notice to the Class, (iv) authorized defendants to retain one or more class action administrators, (v) set forth procedures whereby Class Members could exclude themselves from the Class or object to any aspect of the proposed settlement, (vi) appointed Co-Lead Counsel for the Class and directed Co-Lead Counsel to make available to all Class Members the documents produced to Co-Lead Counsel by defendants as well as the deposition transcripts and accompanying exhibits generated in this action, and (vii) preliminarily enjoined Class Members who had not timely excluded themselves from the Class from participating in any lawsuit relating to the claims in this action or their underlying transactions, and preliminarily enjoined all persons from commencing or prosecuting a lawsuit as a class action in any jurisdiction, based on or relating to the claims or causes of action in this case and/or the "Released Transactions" (as defined in the Stipulation of Settlement). Paragraph 6(a) of the Hearing Order was corrected *nunc pro tunc* on September 2, 1997.

[*17] 18. After issuance of the Hearing Order, extensive notice, describing the proposed settlement and Class Members' options in connection with the settlement, was provided to the Class, using the forms and methods proscribed in the Hearing Order. Among other things, this notice consisted of (i) comprehensive individual notice sent by first class mail to the approximately 109,000 Class Members (respecting the approximately 130,000 policies covered by the proposed settlement), and (ii) publication notice that appeared in the national editions of *The Wall Street Journal, USA Today* and *The Chicago Tribune* and also in *The Tampa Tribune, The Arizona Daily Star* and *The Arizona Citizen*. In addition, Equitable of Iowa established and operated a toll-free telephone information center -- in consultation with and monitored by Co-Lead Counsel -- staffed with trained operators who provided Class Members with additional information about the proposed settlement. As of November 21, 1997, the class action information center had received approximately 6,627 calls on its policyowner hotline. The Court's findings concerning the notice provided to the Class are set

forth in Part IV below.

[*18] D. *The Fairness Hearing*

19. On December 19, 1997, this Court held the Fairness Hearing to hear argument and consider evidence concerning the fairness, adequacy and reasonableness of the proposed settlement, which the parties had fully briefed and documented with declarations and affidavits, including extensive exhibits, in support of the settlement.

20. The Court considered all of the written objections of Class Members who objected to the settlement, including objections to plaintiffs' counsel's request for attorneys' fees and expenses. Although all objectors had the opportunity to appear in person or through counsel and present objections at the Fairness Hearing, no objectors availed themselves of that opportunity.

21. The Court considered the testimony submitted by plaintiffs in support of the settlement through (i) the joint affidavit of Melvyn I. Weiss and John J. Stoia, Jr. of Milberg Weiss Bershad Hynes & Lerach LLP; (ii) the affidavit of Terry M. Long of Lewis & Ellis, Inc. ("Long Aff."); (iii) the declaration of Geoffrey P. Miller, Professor of Law, New York University Law School ("Miller Decl."); and (iv) the affidavits of Co-Lead Counsel and other counsel (collectively, **[*19]** "Plaintiffs' Counsel Declarations") in support of plaintiffs' application for attorneys' fees and expenses.

22. The Court also considered the testimony submitted by Equitable of Iowa in support of the settlement through (i) the declarations of Richard L. Bailey; (ii) Exhibit A to the declaration of John Snyder of Milliman & Robertson, Inc. ("M&R Report") and the Declaration of Dale S. Hagstrom of Milliman & Robertson, Inc. ("Hagstrom Decl."); (iii) the declaration of Professor George L. Priest ("Priest Decl."), the John M. Olin Professor of Law and Economics, Yale Law School; (iv) the declaration of Thomas Tew ("Tew Decl."), former outside litigation counsel to the Florida Department of Insurance and presently with the law firm of Tew & Beasley, L.L.P.; and (v) the declaration of Jeffrey D. Dahl ("Dahl Decl."), of Rust Consulting, Inc., the Administrator retained in this action.

23. The Court has also considered the reaction of the state insurance departments to the proposed settlement. *See* Bailey Decl. (No. 2) PP24-25.

24. At the conclusion of the Fairness Hearing, this Court entered its Final Order and Judgment, which, among other things: (i) approved the settlement as fair, **[*20]** adequate and reasonable, (ii) certified the Class, (iii) approved plaintiffs' request for attorneys' fees and expenses totalling $ 5 million, and (iv) ordered the parties to submit proposed findings of fact and conclusions of law for the Court's consideration.

II. *THE SETTLEMENT*

A. *Overview*

25. The settlement provides the Class with an innovative package of relief options that are specifically responsive to the allegations of the Complaint. Although the basic structure of the settlement resembles that employed in court-approved settlements of other life insurance sales practices class actions across the country -- *see, e.g., Spitz v. Connecticut General Life Ins. Co.*, MDL No. 1136, Nos. CV95-3566-HLH & CV96-8484-HLH, Order (C.D. Cal. Jan. 13, 1997) (Weiss/Stoia Aff. Ex. 4); *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450 (D.N.J. 1997)*; *Michels v. Phoenix Home Life Mut. Ins. Co.*, No. 95/5318, *1997 N.Y. Misc. LEXIS 171* (N.Y. Sup. Ct. Jan. 3, 1997) (Weiss/Stoia Aff. Ex. 2); *Willson v. New York Life Ins. Co.*, No. 94/127804, *1995 N.Y. Misc. LEXIS 652 (N.Y. Sup. Ct. Nov. 8, 1995), 228 A.D.2d 368, 645 N.Y.S.2d 11*, (1996), *appeal denied, 89 N.Y.2d 807, 654 N.Y.S.2d 717, 677 N.E.* ***[*21]*** *2d 289 (1997)* (Weiss/Stoia Aff. Ex. 1); *Natal v. Transamerica Life Insurance Co.*, Case No. 694829 (San Diego Superior Ct., July 28, 1997) (Weiss/Stoia Aff. Ex. 3) -- that structure has been substantially modified to address the allegations in the Complaint and to

meet the particular needs of individual Class Members. *See* Weiss/Stoia Aff. PP8, 10-17.

26. Under the settlement, each Class Member will be offered the choice of Individual Claim-Review Relief through a Claim-Review Process or General Policy Relief. The Claim-Review Process provides all Class Members with the opportunity to submit policy-related claims to a two-tiered claim resolution system that is designed to be a fair, efficient and cost-free alternative to court litigation. Class Members who choose not to participate in the Claim-Review Process will be eligible to apply for one or more forms of General Policy Relief, which require no showing of fault or wrongdoing on defendants' part. The forms of relief made available under the settlement are summarized below and are described in detail in the Stipulation of Settlement.

B. *The Claim-Review Process*

27. Any Class Member who believes that he or she was misled **[*22]** by a misrepresentation or omission of material information or otherwise harmed by wrongdoing in connection with a policy covered by the settlement will have the opportunity to submit a claim for relief to the Claim-Review Process. The Claim-Review Process is described in detail at § IV of the Stipulation of Settlement.

28. Under the Claim-Review Process, which is provided to individual Class Members at no cost, the Class Member will submit a claim form describing his or her claim, along with all documents in his or her possession relating to the claim. The agent who sold the policy will be asked to provide a sworn statement about the claim and documents relating to the claim. Equitable of Iowa is obligated to investigate the Class Member's claim, as described in the Stipulation of Settlement, and to provide information obtained through that investigation, including relevant documents, to the Claim-Review Team that initially reviews the claim.

29. Under the Claim-Review Process, claims will initially be reviewed and scored, and relief (if any) will be awarded, by a Claim-Review Team appointed by Equitable of Iowa. The Claim-Review Team will evaluate claims using procedures, including **[*23]** detailed substantive evaluation and relief criteria, agreed to by plaintiffs and Equitable of Iowa and set forth in the Stipulation of Settlement (particularly, Exhibits A and B to the Stipulation of Settlement). For each claim, scores will be assigned to the several claim-resolution factors set forth in the Stipulation of Settlement for that type of claim, based on scoring guidelines set forth in the Stipulation of Settlement. The score ultimately assigned to a claim-resolution factor may not be averaged with the score assigned to any other claim-resolution factor; instead, relief will be awarded based on the highest score merited by any claim-resolution factor. Once scoring is complete, decisions to award relief must be based only on the relief criteria set forth in the Stipulation of Settlement.

30. The relief available through the Claim-Review Process varies depending on the type of claim and the highest score awarded it. The various types of relief are designed to provide substantial compensation that addresses the harm associated with each type of claim. If a Class Member submits a claim that alleges more than one type of misrepresentation, he or she may be able to choose between **[*24]** different relief options, depending on the scores awarded to the claim. Punitive or exemplary damages may not be awarded.

31. Importantly, there is no cap on the aggregate relief for which Equitable of Iowa may be liable by way of awards made pursuant to the Claim-Review Process. Equitable of Iowa will provide relief to all Class Members who submit claims and establish their entitlement to relief under the Claim-Review Process, and each Class Member's award under the process will be determined without regard to the value of awards provided to other Class Members. Weiss/Stoia Aff. P10; Priest Decl. P35; Tew Decl. P10.c.

32. Claim-Review Team decisions will be binding

on Equitable of Iowa. However, a Class Member who is dissatisfied with the Claim-Review Team's disposition of his or her claim may appeal, at Equitable of Iowa's expense, to a Claim-Appeal Panel, a panel of independent arbitrators selected by Co-Lead Counsel from a list approved by the parties. The Claim-Appeal Panel that reviews a claim on appeal may first attempt to informally resolve the claim. If this attempt is unsuccessful, the Claim-Appeal Panel will review the claim *de novo*, using the same criteria employed **[*25]** by the Claim-Review Team. A Class Member who appeals a decision of a Claim-Review Team will have the right to appear at an appeal hearing, either in person, by telephone, or through an attorney retained at the Class Member's expense. Equitable of Iowa may appear at such a hearing only through the method chosen by the Class Member. The outcome of an appeal is binding on the Class Member; Equitable of Iowa may seek reconsideration only if the Claim-Appeal Panel awards relief that is not specified under the Stipulation of Settlement.

33. To help ensure that claims are fairly evaluated and that relief is awarded in accordance with the Stipulation of Settlement, a Policyowner Representative selected by Co-Lead Counsel and compensated by Equitable of Iowa will participate as each Class Member's advocate throughout the Claim-Review Process. Among other things, the Policyowner Representative will be able to participate (but not vote) in Claim-Review Team discussions, submit materials from the discovery record and written statements for consideration in connection with individual claims, and, under circumstances specified in the Stipulation of Settlement, appear and present oral argument at **[*26]** appeal hearings.

34. The Claim-Review Process is not restricted to claims expressly alleged in the Complaint. Rather, so long as they comply with the requirements set forth in the Stipulation of Settlement, Class Members may, if they so desire, submit to the Claim-Review Process any claim with respect to a policy included in the Class definition. Stipulation of Settlement, Ex. A (Parts VIII.A.1(i) and VIII.A.2).

35. The settlement also provides for the resolution of certain claims outside the Claim-Review Process. Specifically, the settlement provides that Equitable of Iowa may require Class Members to resolve certain claims other than those submitted to the Claim-Review Process through certain procedures, called "Part VIII.A.ii Claim-Review Procedures," described in Part VIII of Exhibit A to the Stipulation of Settlement. *See* Stipulation of Settlement, Ex. A, Parts VIII.A.(ii) and VIII.A.3. In addition, if a Class Member can demonstrate that, through the exercise of reasonable care, he or she could not have known at the time the settlement became final of a released claim involving the administration or servicing of a policy (included within the Class definition) after its purchase, **[*27]** under the settlement Equitable of Iowa will be required to resolve that claim through the Part VIII.A.ii Claim-Review Procedures, even though the deadline for submission of claims to the Claim-Review Process has passed. *Id.; see also* Stipulation of Settlement, §§ IV.B and IX.B.4.

C. *General Policy Relief*

36. As an alternative to Individual Claim-Review Relief through the Claim-Review Process, the settlement makes six types of General Policy Relief available to Class Members. General Policy Relief is described in detail in § V of the Stipulation of Settlement. It is also described in the individual notice sent to Class Members pursuant to the Hearing Order. *See* Dahl Decl. Ex. A.

37. Depending on eligibility, every Class Member who does not choose to submit a claim to the Claim-Review Process may obtain or apply for one or more of the six types of General Policy Relief. Eligibility for specific types of General Policy Relief is based on characteristics of the policy that makes each policyowner a member of the Class, such as policy type, face amount and status (in-force or terminated). Class Members need not show

fault, injury or damages to be entitled to General Policy **[*28]** Relief. Eligibility criteria are set forth in § V.B of the Stipulation of Settlement. They are also described in the individual notice to Class Members. *See* Dahl Decl. Ex. A.

38. The six types of General Policy Relief may be generally described as follows:

a. **Dividend Enhancement**. Eligible Class Members will receive Dividend Enhancement on each of their policies equal to a 60 basis-point enhancement to the unloaned interest component of the annual base dividend for the policy, plus another 60 basis-point enhancement to the unloaned interest component of the annual paid-up additions dividend for the policy (if it has paid-up additions), for the policy year ending on the policy's anniversary date following the date 120 days after the settlement is final. For policies that terminate after July 31, 1997, and before they are credited with dividend enhancement, Equitable of Iowa will pay dividend enhancement directly to the Class Members within 30 days after the date their policies would have been credited dividend enhancement had they not terminated.

b. **Interest Enhancement**. Eligible Class Members will receive Interest Enhancement on each of their policies. For policies **[*29]** where excess interest is used to purchase paid-up additions, Equitable of Iowa will pay interest enhancement by crediting each such policy with an amount equal to a 60 basis-point enhancement to the current interest rate applied to the unloaned policy value of the policy, including the unloaned value of any paid-up additions for the policy (if it has paid-up additions) for the policy year ending on the policy's anniversary date first following the date 120 days after the settlement is final. For policies where interest is applied to the policy account value or policy accumulation value, Equitable of Iowa will pay, within 120 days of the date the settlement is final, interest enhancement by crediting each such policy with an amount equal to a 60 basis-point enhancement of the policy's unloaned account value as it existed on July 31, 1997.

c. **Optional Premium Loans**. Eligible Class members may obtain Optional Premium Loans at a rate substantially equivalent to Equitable of Iowa's cost of borrowing. Optional premium loans are a special type of loan and are not policy loans pursuant to the policy loan provisions of the Class Members' policies. The maximum number of Optional Premium **[*30]** Loans an eligible Class Member may obtain will depend on the year his or her policy was issued. Optional Premium Loans can only be used to pay all or portions of one or more premiums due under the policies that make the Class Members eligible for Optional Premium Loans.

d. **Enhanced Value Policies**. Eligible Class Members may apply for Enhanced Value Policies. Enhanced Value Policies are whole life and universal life insurance policies, issued by Equitable of Iowa from its current product line, enhanced with a financial contribution from Equitable of Iowa equal to 50% of the first year premium and, if the Class Member keeps the enhanced value policy in force for five years, an additional 25% of the first year premium. Enhanced Value Policies have relaxed underwriting requirements and special contestability and suicide provisions. Failure to make a timely election disqualifies otherwise eligible Class Members from this type of General Policy Relief.

e. **Enhanced Value Deferred Annuities**. Eligible Class Members may obtain Enhanced Value Deferred Annuities, which are non-qualified, single-premium, fixed, deferred annuities issued by Equitable of Iowa from its current product **[*31]** line, and enhanced with contributions from Equitable of Iowa. Each Enhanced Value Deferred Annuity will receive from Equitable of Iowa, at the end of its first policy year, a contribution equal to 2% or 3% of the annuity's premium, depending on the size of the premium, plus another contribution at the end of the fifth policy year equal to 1% or 1.5% of the annuity's premium, depending on the

size of the premium. Each Enhanced Value Deferred Annuity will have its applicable surrender charge waived when the Class Member reaches age 59-1/2 or the annuity has been in force for four years, whichever is later. Failure to make a timely election disqualifies otherwise eligible Class Members for this type of General Policy Relief.

f. **Enhanced Value Immediate Annuities**. Eligible Class Members may obtain Enhanced Value Immediate Annuities, which are non-qualified, single-premium, fixed, life-contingent, immediate annuities issued by Equitable of Iowa from its current product line, and enhanced with contributions from Equitable of Iowa. Each Enhanced Value Immediate Annuity will receive, at the time of issue, a contribution equal to 2.5% of the annuity's premium. Failure to make a timely **[*32]** election disqualifies otherwise eligible Class Members for this type of General Policy Relief.

39. The parties designed each of the six types of General Policy Relief to respond to the various circumstances described in the Complaint and to assist Class Members (who do not wish to participate in the Claim-Review Process) in achieving financial security objectives that might have influenced their original purchasing decisions. The purpose of Dividend Enhancement is to enhance the dividend accumulation component of Class Members' in-force policies and thereby increase the policies' ability to bear the cost of future premiums. The purpose of Interest Enhancement is to enhance the cash accumulation component of Class Members' policies and thereby increase the policies' ability to bear the cost of mortality and administrative charges or future premiums. The purpose of Optional Premium Loans is to lessen the burden to Class Members of additional out-of-pocket premiums, which may be due beyond those originally illustrated. Enhanced Value Policies are designed for Class Members who terminated their policies, or who have borrowed heavily against their policies and want a fresh start, to obtain **[*33]** new policies, enhanced by Equitable of Iowa, to help them attain their original insurance objectives. Enhanced Value Deferred Annuities and Enhanced Value Immediate Annuities are intended to address the savings and investment or income and cash flow objectives of Class Members whose need for life insurance death benefits may be outweighed by other considerations. *See* Stipulation of Settlement § V.A; Plaintiffs' Mem. pp. 14-15.

D. *Release*

40. In exchange for the settlement benefits described above, the Stipulation of Settlement releases defendants from all claims covered by the Release, which is set forth in full in § IX of the Stipulation of Settlement and in Appendix A (pp. 28-31) to the individual notice mailed to Class Members. Dahl Decl. Ex. A.

III. *CLASS CERTIFICATION*

A. *Introduction*

41. The legitimacy of a settlement class was recently confirmed by the Supreme Court in *Amchem Prods. v. Windsor, U.S. , 138 L. Ed. 2d 689, 117 S. Ct. 2231, 2252 (1997)*. There, the Court established that not only is the proposed settlement and its terms relevant to the class certification analysis, it alleviates the need to address potential management **[*34]** problems that might arise were the case to be tried. *Id. at 2252*. Most importantly, the Supreme Court reiterated the "dominant concern" that governs the proper analysis under each *Rule 23* subsection: "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id. at 2248*. Here the proposed Class satisfies this dominant concern, as well as all other prerequisites to certification set forth in *Amchem* and Eleventh Circuit precedent.

B. *The Requirements Of Rule 23(a) Are Satisfied*

42. ***HN1*** The four prerequisites of *Rule 23(a)* are that:

(1) the class be so numerous that joinder of all

members is impracticable;

(2) there be questions of law or fact common to the class;

(3) the claims or defenses of the representative parties be typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Amchem, 117 S. Ct. at 2240*.

a. *Numerosity*

43. ***HN2*** The class must be so numerous that "joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. To meet this requirement, **[*35]** the class representatives need only show that it is difficult or inconvenient to join all the members of the class. *Phillips v. Joint Legis. Comm., 637 F.2d 1014, 1022* (5th Cir. Feb. 23, 1981). [2]

44. Here, members of the Class live nationwide and number approximately 109,000. *See* Bailey Decl. (No. 1) P10. In these circumstances, joinder is impractical and the numerosity requirement is easily satisfied. *Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986)* (generally, more than 40 class members satisfies numerosity).

b. *Commonality*

45. ***HN3*** There must be "questions of law *or* fact common to the class." *Fed. R. Civ. P. 23(a)(2)* (emphasis added). *Rule 23(a)* does not require that *all* questions of law or fact be common to *all* class members. "The claims actually litigated **[*36]** in the suit must simply be those fairly represented by the named plaintiffs." *Cox, 784 F.2d at 1557*. Accordingly, the main inquiry is whether at least one issue exists that affects all or a significant number of proposed class members. *Kreuzfeld A.G. v. Carnehammar, 138 F.R.D. 594, 599 (S.D. Fla. 1991)*.

46. ***HN4*** The commonality requirement is also satisfied where plaintiffs allege common or standardized conduct by the defendant directed toward members of the proposed class. *See Kennedy v. Tallant, 710 F.2d 711, 718 (11th Cir. 1983)* ("a single conspiracy and fraudulent scheme against a large number of individuals is particularly appropriate for class action"). One indicia of a common scheme to deceive alleged in the Complaint is the existence of uniform written materials on which the oral representations were based. *See, e.g., Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 724-25 (11th Cir. 1987)* (observing that where oral communications are based on and consistent with, deceptive written materials, the fact that individual brokers provided information through oral communications does not preclude class certification). In such cases, any factual distinctions that may **[*37]** exist among class members are "far less important than the common issues bearing on the existence of a 'common scheme' of misrepresentations and omissions." *CV Reit, Inc. v. Levy, 144 F.R.D. 690, 696 (S.D. Fla. 1992)* (citation omitted).

47. Plaintiffs allege that defendants engaged in a common course of conduct intended to defraud all Class Members through the use of substantially uniform omissions and misrepresentations. The Complaint alleges 22 common issues of fact and law, based on alleged standardized omissions and misrepresentations emanating from Equitable of Iowa. *See* Compl. P15. These common issues are susceptible to classwide proof that will not vary appreciably from one Class Member to another. The common issues include, *inter alia*:

. Whether defendants routinely engaged in fraudulent and deceptive acts and practices and courses of business in the sale of its life insurance policies;

---

[2] The decisions of the former Fifth Circuit before October 1, 1981 have been adopted as binding precedent in this Circuit. *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (*en banc*).

. Whether defendants failed to supervise and train its agents who engaged in the schemes described in the Complaint and also failed to prevent its agents from violating uniformly applicable state insurance laws and regulations;

. Whether defendants engaged in deceptive **[*38]** acts and practices in the sale of "vanishing premium" policies by representing through policy illustrations, marketing materials and uniform sales presentations approved and prepared by it that the single prepayment of premiums made by Class Members at the time of purchase, or that the fixed number of premiums paid during a fixed period of years, would be sufficient to carry the cost of the policies for the life of the insured or to maturity;

. Whether defendants failed to disclose to those Class Members who believed they were purchasing "investment," "retirement" or "savings" plans, instead of life insurance, that a substantial part of their "investment" would be used to pay mortality charges for life insurance, pay agents' commissions and pay administrative charges to Equitable of Iowa and, thus, would not earn any interest or investment income whatsoever;

. Whether defendants concealed from plaintiffs and Class Members that the dividends payable and excess interest crediting rates as illustrated in the uniform sales presentations and policy illustrations approved and prepared by them were not guaranteed at the illustrated levels and would likely decrease in future payment **[*39]** periods;

. Whether the dividend scales, excess interest crediting rates, values, assumptions, mortality experience, expenses, lapse rates, interest rate and investment return projections underlying Equitable of Iowa's policy illustrations lacked any reasonable basis in fact and were so flawed as to have an adverse impact on plaintiffs and Class Members; and

. Whether defendants failed to disclose to plaintiffs and Class Members material information concerning the impact or results of using some or all of an existing policy's cash value to purchase a new policy issued by Equitable of Iowa by means of a surrender or withdrawal/partial surrender of, or loan(s) from, the existing policy.

48. The primary theory of plaintiffs' Complaint is that defendants devised and implemented a scheme to sell, service and administer permanent life insurance policies through a nationwide common course of deceptive conduct that emanated from Equitable of Iowa's home offices in Des Moines, Iowa and was implemented through its nationwide sales force. *See* Compl. PP24-28. Plaintiffs allege that all Class Members were injured, separately or in combination, by a broad array of centrally-orchestrated **[*40]** deceptive practices that permeated Equitable of Iowa's marketing and sales presentations (Compl. PP4, 24-25), agent training and supervision (Compl. P28), illustration, dividend and interest crediting practices (Compl. PP26, 34) and investment strategies (Compl. P34).

49. As alleged by plaintiffs, all of these practices and policies allegedly were determined and implemented in a uniform fashion by Equitable of Iowa's home office management and would be proven at trial through common evidence. All Class Members thus share a common interest in establishing that defendants knew that deceptive sales practices were being utilized, and that Class Members suffered losses as a consequence of that conduct. In sum, the Complaint's allegations of a centralized scheme raise issues common to every Class Member, amply satisfying the commonality requirement of *Rule 23(a)(2)*.

c. *Typicality*

50. ***HN5*** The typicality requirement of *Rule 23(a)* is satisfied where the claims of the class representatives arise from the same broad course of conduct that gives rise to the claims of the other class members and are based on the same legal

theory. *Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985)* **[*41]** (typicality requirement met where named plaintiffs' claims have same essential characteristics as claims of class even if there are factual distinctions among the claims of the plaintiffs of the class); *Powers v. Stuart-James Co., 707 F. Supp. 499, 503 (M.D. Fla. 1989)* (Kovachevich, J.) ("The reasoning behind this requirement is that where all interests are sufficiently parallel, all interests will enjoy vigorous and full presentation."). Here, Ms. Elkins and Mr. Bedenbaugh are representative of both current and former Equitable of Iowa policyowners allegedly defrauded by the same deceptive sales practices and schemes allegedly utilized by defendants against other Class Members. *See* Miller Decl. P13 ("The claims of the representative class plaintiffs are typical of those of the Class as a whole."). Any slight factual differences that may exist between the named class representatives and other Class Members will not defeat typicality. *Appleyard, 754 F.2d at 958*.

d. *Adequacy Of Representation*

51. ***HN6*** *Rule 23(a)(4)* requires that "the representative parties will fairly and adequately protect the interests of the class." This requirement serves to protect the legal rights **[*42]** of absent class members. As the Supreme Court recently observed in *Amchem*, the adequacy "inquiry [under *Rule 23(a)(4)*] serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem, 117 S. Ct. at 2236*. The adequacy-of-representation requirement under *Rule 23* is a two-prong test. First, the named class representatives must appear to be capable of prosecuting the actions through qualified, experienced and competent counsel. Second, there can be no antagonism or disabling conflict between the interests of the named class representatives and the interests of the members of the class. *See, e.g., Kirkpatrick, 827 F.2d at 726*, (citing *Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985))*.

52. This action meets both prongs of the "adequacy" test. First, plaintiffs' counsel are well-qualified to prosecute this litigation effectively and efficiently on behalf of plaintiffs and the Class. *See, e.g., In re Prudential, 962 F. Supp. at 519-20* (finding the same legal counsel "extremely qualified" and "extremely committed to the class"); *Willson, 1995 N.Y. Misc. LEXIS 652*, at *28 (finding the same legal counsel competent and **[*43]** zealous, in a "vanishing premium" case that produced settlement for policyowners conservatively valued in excess of $ 300 million) (Weiss/Stoia Aff. Ex. 1); *In re Prudential Sec. Inc. Ltd. Partnerships Litig., 163 F.R.D. 200, 208 (S.D.N.Y. 1995)* (finding the same legal counsel "have successfully conducted numerous class actions, including class actions under the federal securities laws and RICO, in this Court and in federal district courts throughout the United States").

53. Second, there are no conflicts or antagonisms here between the named plaintiffs and the Class Members. All Class Members can claim to be harmed by defendants' alleged misconduct and all Class Members have the mutual incentive to establish the alleged fraudulent scheme. Consequently, plaintiffs' interests are co-extensive with those of other Class Members, and thus plaintiffs have every incentive to vigorously pursue these claims as representatives of the Class. *See In re Corrugated Container Antitrust Litig., 643 F.2d 195, 208 (5th Cir. Apr. 1981)* ("'so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are **[*44]** not antagonistic for representation purposes'") (citation omitted).

54. Furthermore, unlike personal injury actions, here the restitution and/or money damages sought are subject to objective quantification and are reasonably calculable without speculation. [3]

---

[3] Unlike *Amchem*, this case presents no set of class members comparable to the "exposure only" plaintiffs who "claimed no damages and no present injury." *Amchem, 117 S. Ct. at 2240-43*.

55. Nor is any impermissible intra-Class conflict or antagonism **[*45]** created by the settlement. *See Amchem, 117 S. Ct. at 2236*. The settlement affords all eligible Class Members relief unfettered by monetary or numerical "caps." The settlement does not discriminate or allocate relief among different segments of the Class; every Claim Member is eligible for General Policy Relief or Individual Claim-Review Relief tailored to his or her individual circumstances. Under the settlement, Class Members are entitled to compensation based on the strength of their individual claims, and no theoretical subgroup's interest (such as Class Members with replacement claims) have been traded off to the benefit of any other theoretical subgroup (such as Class Members with vanishing premium claims). *Contrast Amchem, 117 S. Ct. at 2236* (finding interest of currently injured Class Members not aligned with that of potentially injured Class Members). Nor is the settlement geared to protecting one part of the class at the expense of the other. Those were the sorts of class conflicts that alarmed the Supreme Court in *Amchem*, but they are absent here.

56. The settlement also incorporates procedural and substantive protections that virtually insure adequate representation. **[*46]** The settlement establishes specific and uniform criteria under which all claims for Individual Claim-Review Relief will be administered. Importantly, these criteria include rebuttable and conclusive presumptions favoring the claimants, and objective factors that operate to increase the claimants' scores in many cases. The settlement also provides individual representation to claimants through a Policyowner Representative appointed by plaintiffs' counsel and an independent, simplified appeals process. As the end product of plaintiffs' efforts on behalf of the Class, the settlement resoundingly confirms that all Class Members have been adequately represented in this litigation.

C. *The Requirements Of Rule 23(b)(3) Are Satisfied*

57. ***HN7*** *Rule 23(b)(3)* authorizes certification where common questions of law or fact predominate over individual questions and the class action is superior to other available means of adjudication. *Amchem, 117 S. Ct. at 2232-35*.

a. *Common Legal And Factual Questions Predominate In This Action*

58. ***HN8*** Where confronted with a class of purchasers allegedly defrauded over a period of time by a similar common thread or scheme to which all alleged non-disclosures **[*47]** or misrepresentations relate, "courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit." *Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975)*; *Kirkpatrick, 827 F.2d at 725*; *In re Prudential, 962 F. Supp. at 510-11*.

59. In this case, plaintiffs and the Class have allegedly been defrauded by the same common course of conduct. Although Class Members purchased their policies separately, plaintiffs allege that defendants induced them to do so through a uniform marketing scheme that was standardized, coordinated and ultimately deceptive. First, proof of defendants' alleged common course of conduct insures that common questions would predominate over individual issues at trial. *See, e.g., Davis v. Avco Corp., 371 F. Supp. 782, 791-92 (N.D. Ohio 1974)* (the fact that some of the class members received oral rather than written statements creates no impediment to class certification). Second, proof of defendants' alleged fraudulent **[*48]** concealment, the appropriateness of equitable relief and feasibility of classwide damages methodologies

---

Here all Class Members can claim to have suffered a quantifiable, existing injury from defendants' alleged practices, as typified by the named plaintiffs. *See* Miller Decl. P15 ("All class members [here] suffered pecuniary and financial injury, in contrast to the diverse and complex individual medical conditions for which recovery was sought in *Amchem*. There are no significant fissures in this class, much less the chasm which was presented in *Amchem* between present and future claimants.").

likewise insure predominance. *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 517 (S.D.N.Y. 1996)*; *In re Prudential, 962 F. Supp. at 512*. Likewise, the damages issues in this case are suited for classwide resolution because Equitable of Iowa maintains computerized records of transactions with the Class Members. *In re NASDAQ, 169 F.R.D. at 522*; *see also In re Prudential, 962 F. Supp. at 516* (use of class damage calculation methodology raised common question).

60. This is therefore not a case, as in *Amchem*, where the class members' claims vary widely in character. There, the class purported to preclude members who were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods, such that some class members suffered no physical injury, some had only asymptomatic pleural changes, others had lung cancer (some of whom were smokers), other disabling asbestosis, and still others mesothelioma -- a disease with a latency period of 15 to 40 years. *Amchem, 138 L. Ed. 2d 689, 117 S. Ct. 2231 at 2240*. Indeed, as **[*49]** to some class members, it was unclear whether they would ever contract an asbestos-related disease and, if so, which one. *Id*.

61. Additionally, this case is distinguishable from *Motel 6*, which required individualized proof of "highly case-specific factual issues." *Jackson, et al. v. Motel 6 Multipurpose, Inc., et al., 130 F.3d 999, 1997 U.S. App. LEXIS 36132 (11th Cir. 1997)*. There, specific fact inquiries included:

> Not only whether a particular plaintiff was denied a room or was rented a substandard room, but also whether there were any rooms vacant when that plaintiff inquired; whether the plaintiff had reservations; whether unclean rooms were rented to the plaintiff for reasons having nothing to do with the plaintiff's race; whether the plaintiff, at the time that he requested a room, exhibited any non-racial characteristics legitimately counseling against renting him a room; and so on. . . . Indeed, we expect that most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether Motel 6 has a practice or policy of racial discrimination, but on the resolution of these highly case-specific factual issues.

*Id., **[*50]** at *18*.

62. Here, by contrast, the Class is limited to purchasers of a particular product (a life insurance policy) from a particular company (Equitable of Iowa or Equitable American) through allegedly uniform and fraudulent sales practices, including uniform misrepresentations and omissions of material information, at the time of sale and thereafter, which was common to all Class Members. Furthermore, the Class Members are readily identifiable, and all can claim to have already suffered injury in the purchase of a product that was other than as represented. In short, defendants' alleged intentional company-wide development and implementation of fraudulent sales practices involving uniform misrepresentations and omissions of material fact provides the "single central issue" lacking in *Amchem* and avoids the predominance concerns of *Motel 6*, *130 F.3d 999, 1997 U.S. App. LEXIS 36132*, at *15-*20. *See In re Prudential, 962 F. Supp. at 511 n.45*. *See also* Miller Decl. P15 (contrasting personal injury claims in *Amchem* with economic damages here).

63. Defendants' alleged deceptive sales practices consisted, in part, of oral misrepresentations, which arguably may be susceptible to **[*51]** individual variation. However, these individual issues do not outweigh the substantial number of common questions, and therefore the commonality requirement has been met. *See In re Carbon Dioxide, 149 F.R.D. 229, 234 (M.D. Fla. 1993)*; *Walco Invs. v. Thenen, 168 F.R.D. 315 (S.D. Fla. 1996)*. Allegations of a common scheme of deception can establish predominance even where the scheme is implemented through oral

misrepresentations by sales agents. *See, e.g., In re Prudential, 962 F. Supp. at 512-16*; *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 140 F.R.D. 425, 430-31 (D. Ariz. 1992)*; *Davis, 371 F. Supp. at 792*. *See also Amchem, 117 S. Ct. at 2250* ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

64. Predominance is not undermined by any theoretical choice of law issues that might also arise if this case were to be litigated. ***HN9*** At the certification stage, the Court need only determine which state law is "likely" to apply. *See Randle v. SpecTran, 129 F.R.D. 386, 393 (D. Mass. 1988)*; *Gruber v. Price Waterhouse, 117 F.R.D. 75, 82 (E.D. Pa. 1987)*; *In re Pizza* **[*52]** *Time Theatre Sec. Litig., 112 F.R.D. 15, 19 (N.D. Cal. 1986)*. Here, one option available to the Court, were this case to be tried, would be to apply the law of Iowa -- the location of Equitable of Iowa's headquarters and principal place of business, and the source of the challenged marketing policies. *See, e.g., Randle, 129 F.R.D. at 393* ("high likelihood" that law of state where defendant's offices located and in which decisions regarding the timing and context of corporate disclosures were made would apply). [4] **[*53]** Iowa is the state from which Equitable of Iowa conducted its nationwide activities and from which its alleged campaign of fraud emanated. [5] The relationship of other states, by contrast, is limited to protecting the interests of policyowners residing in those states -- interests that would be served by application of Iowa law.

65. Also, any state-by-state variations on the legal standards are neither particularly great nor insurmountable. *In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986)*; *Pizza Time, 112 F.R.D. 15 at 20* ("It is evident that the similarities in [the various states' common law concerning fraud] vastly outweigh any differences."). [6] Plaintiffs' counsel have already successfully done so in other cases involving the same legal theories asserted here. *See, e.g., In re* **[*54]** *Prudential, 962 F. Supp. at 524-26*. [7] *See also* Miller Decl. P27 (applicable state law can be grouped into two or three categories and is not so great as to undermine predominance of common questions of law or fact).

[*55] b. *A Class Action Is The Superior Means To Adjudicate Plaintiffs' Claims*

66. ***HN10*** *Rule 23(b)(3)* considers whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." [8]

---

[4] *See also Fry v. UAL Corp., 136 F.R.D. 626, 631 (N.D. Ill. 1991)* (choice of law no obstacle to certification of class claims where law of state in which defendant maintained its corporate offices and from which alleged misrepresentations issued would be applied); *Kirschner [Medical Corporation Seccurities Litigation]*, *139 F.R.D. [74] at 84* (law of the state of defendant's principal place of business and from which many of the allegedly false statements were made may apply); *Martin v. Heinold Commodities, Inc., 117 Ill. 2d 67, 510 N.E.2d 840, 847, 109 Ill. Dec. 772 (Ill. 1987)* (law of defendant's principal place of business applied); *In re ORFA Sec. Litig., 654 F. Supp. 1449 (D.N.J. 1987)*.

[5] Under *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*, Iowa law constitutionally may be applied to class members nationwide so long as Iowa has a sufficient aggregation of contacts to the class members' claims to ensure that application of Iowa law would not be arbitrary or unfair. Those conditions are satisfied when, as here, the named defendants maintain their business offices in Iowa, many of the alleged fraudulent statements emanated from that state, many Class Members are Iowa residents, and Iowa has a strong policy in preventing fraud from within its borders.

[6] This is not a case, such as *Castano v. American Tobacco Co., 84 F.3d 734, 747-48 (5th Cir. 1996)*, where a novel or "immature" tort is alleged. A definite "track record" exists for these types of cases against insurers. Such cases have been litigated through trial. *See, e.g., Cartwright v. The Equitable Life Assurance Society, 276 Mont. 1, 914 P.2d 976 (Mont. 1996)* (vanishing premium case tried to jury and affirmed on appeal).

[7] Any significant variations in state law encountered in a theoretical trial could be handled by the use of available management techniques. *See generally* L. Kramer, *Class Actions and Jurisdictional Boundaries: Choice of Law in Complex Litigation, 71 N.Y.U.L. Rev. 547, 584-585 (1996)* (application of multiple states laws feasible through "sensible use of the tools available to manage litigation," including the grouping of substantive laws as in *School Asbestos*, "careful [jury] instructions and the availability of special verdicts . . .").

[8] The majority rule is that a district court should consider the settlement when evaluating the superiority of a class action under

Rule 23(b)(3) lists four non-exclusive factors bearing on the superiority determination. Amchem, 117 S. Ct. at 2246. Applied here, these factors show that a class action is the only feasible method for the fair and efficient adjudication of the claims of most Class Members.

(1) *Interest In The Case*

67. **HN11** The first superiority factor identified in Rule 23(b)(3) is "the interest of members of the class in individually controlling the prosecution or defense of separate actions." This factor **[*56]** addresses whether the interest of most class members in conducting separate lawsuits is so strong as to require denial of class certification. *See, e.g.*, Bonilla v. Trebol Motors Corp., 1993 U.S. Dist. LEXIS 5775, at *4, No. 92-1795 (JP), (D.P.R. 1993) (class action superior where individual class members have no interest in controlling litigation) (Weiss/Stoia Aff. Ex. 9); *In re Prudential, 962 F. Supp. at 523-24* (same); McClendon v. Continental Group, Inc., 113 F.R.D. 39, 45 (D.N.J. 1986) (same). Considerations relevant to this inquiry include the degree of "cohesion" among class members, whether "the amounts at stake for individuals . . . [are] so small that separate suits would be impracticable" and the extent to which "separate suits would impose . . . [burdens] on the party opposing the class, or upon the court calendars . . . ." *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 104 (1966) (Rule 23, Advisory Committee's Notes).

68. Most Class Members in this case have little incentive or ability to prosecute their claims against defendants in separate individual actions. The Class is estimated to encompass approximately 109,000 former and current Equitable **[*57]** of Iowa policyowners located throughout the United States. Unlike the personal injury claims in *Amchem*, many of the policyowners' claims present "negative value" actions, as it would not be economically feasible for them to retain attorneys to pursue individual litigation against defendants. [9]

69. The likelihood that Class Members could obtain meaningful redress through individual actions is further diminished by the legal defenses available to defendants, defenses that would prevent or deter individual **[*58]** actions by Class Members. For example, most of the policies at issue were sold by Equitable of Iowa during the 1980s. As a consequence, should the benefits of tolling be lost upon a refusal to certify, many thousands of Class Members could find their claims time-barred by applicable statute of limitations, even if they eventually could find lawyers willing to represent them in separate lawsuits. *See General Motors Corp. v. Bloyed, 916 S.W.2d 949, 957 (Tex. 1996)* ("There was a strong likelihood that a large proportion of the class members' claims . . . would have been barred by the statute of limitations.").

70. The relative absence of policyowner suits presently pending against Equitable of Iowa compared to complaints lodged by policyowners with the Company confirms that individual Class Members lack any compelling interest to control the prosecution of separate actions. *See, e.g.*, Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 105 F.R.D. 506, 510 (S.D. Ohio 1985) (finding that existence of small number of suits pending in other courts as a result of same underlying action represented that individual investors were not interested in pursuing suit alone).

(2) *Other* **[*59]** *Pending Proceedings*

71. **HN12** In determining the superiority issue, the Court should also consider "the extent and nature of

---

Rule 23(b)(3). In re Asbestos Litig., 90 F.3d 963, 975 (5th Cir. 1996); *see also* In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1543 (11th Cir. 1987).

[9] *See, e.g.*, In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir.), *cert. denied*, ***516 U.S. 824, 133 L. Ed. 2d 45, 116 S. Ct. 88 (1995)*** ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980)).

any litigation concerning the controversy already commenced by or against members of the class." The existence of other litigation may either indicate the availability of other methods to adjudicate the controversy or the superiority of class certification. 1 Herbert B. Newberg & Alba Conte *Newberg on Class Actions* § 4.30 at 4-121 (3d Ed. 1992). In addition to the companion action in Arizona, two other class action lawsuits were filed against defendants seeking to recover damages for putative classes similar to the Class in this case. *See* Weiss/Stoia Aff. P48. These two class actions, filed substantially *after* this case, have been resolved as part of this settlement. As a result, the existence of these suits does not undermine the propriety of class certification in this litigation.

72. The several individual actions pending against defendants will not, separately or collectively, "adjudicate . . . the controversy" that underlies this class action litigation. Traditional alternatives to the class action device -- joinder, intervention and consolidation **[*60]** -- are not feasible and in any event would not permit resolution of the entire controversy.

c. *Manageability In This Forum*

73. ***HN13*** Another factor set forth on *Rule 23(b)(3)* is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." However, this factor is not significant and is conceptually irrelevant in the context of settlement. *See* *Amchem, 117 S. Ct. at 2248* ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

74. With the settlement in hand, the desirability of concentrating the litigation in one forum is obvious; and for this purpose this forum is as good or better than any other, given the parties' and many of the Class Members' close ties to the forum. Without a settlement, the issue might be closer, but not controlling, in the Court's view, with other weightier factors all favoring certification.

75. Even if considered, however, the inquiry is whether reasonably foreseeable difficulties render some other method of adjudication superior to class **[*61]** certification. *In re Prudential, 962 F. Supp. at 524-26*; *In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 282 (S.D.N.Y. 1971)* ("defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one"); *see also* *In re NASDAQ 169 F.R.D. at 527* ("Manageability problems are significant only if they create a situation that is less fair and efficient than other available techniques.") (citation omitted). Because the Class includes only current or former Equitable of Iowa policyowners, identifying the Class Members and providing them with notice has not proved difficult.

IV. *NOTICE AND JURISDICTION*

A. *The Settlement Notice*

76. Upon consideration of the extensive record concerning the manner in which notice was provided to the Class, the Court reiterates its earlier findings (Hearing Order P7) and concludes that the form and methodology of notice in this case satisfied the requirements of applicable law, the rules of this Court, and due process under the federal constitution.

1. *Content of Notice*

77. The notice package mailed to each Class Member included at least one 31-page Class Notice (entitled **[*62]** "Notice of Class Action, Proposed Settlement, Fairness Hearing and Right to Appear"), at least one two-page cover letter and six-page question-and-answer brochure, and at least one customized Policy Information Statement, all as specified and required in paragraph 6(a) of the Hearing Order and §§ VI.A through VI.D of the Stipulation of Settlement. *See* Dahl Decl. P11 and Ex. A.

78. The 31-page Class Notice included (i) the case

caption; (ii) a description of the litigation; (iii) a description of the Class; (iv) identification of Co-Lead Counsel for the Class; (v) a description of the proposed settlement, including the relief available to the Class Members and the Release to be given to defendants; (vi) the date and time of the Fairness Hearing; (vii) information about how Class Members could appear at the Fairness Hearing, individually or through counsel; (viii) the procedure and deadline for filing objections to any aspect of the proposed settlement; (ix) the manner in which Class Members could obtain access to discovery materials produced in this action and companion litigation; (x) information about obtaining a complete copy of the Stipulation of Settlement; (xi) the procedure **[*63]** and deadline for filing requests for exclusion from the Class; (xii) the consequences of being excluded from the Class; (xiii) the consequences of remaining in the Class; (xiv) a description of Equitable of Iowa's responsibility for plaintiffs' attorneys' fees and expenses, and of its agreement to pay attorneys' fees and expenses awarded by the Court up to a maximum of $ 5 million; (xv) a description of the preliminary injunction issued by the Court in the Hearing Order; and (xvi) the procedure for obtaining additional information, including the toll-free number established to respond to Class Member inquiries. *See* Dahl Decl. Ex. A.

79. The individual notice materials provided to Class Members are clear and comprehensive documents that presented, in plain language and a reader-friendly format, detailed and accurate information about this action, the proposed settlement and the options available to Class Members. *See* Priest Decl. P25.

80. Individual notice of the settlement was supplemented by publication notice. This plain-language publication notice (called the "Summary Notice" in the Stipulation of Settlement and the Hearing Order) included (i) the case caption; (ii) a **[*64]** description of the Class; (iii) a brief description of the proposed settlement, including Individual Claim-Review Relief through the Claim-Review Process and General Policy Relief; (iv) identification of Co-Lead Counsel for the Class; (v) the date, time and location of the Fairness Hearing; (vi) information about appearing at the Fairness Hearing; (vii) information about and the deadline for filing objections to the settlement; (viii) information about and the deadline for filing requests for exclusion from the Class; (ix) the consequences of exclusion from the Class; (x) the consequences of remaining in the Class; (xi) a description of Equitable of Iowa's responsibility for plaintiffs' attorneys' fees and expenses, and of its agreement to pay attorneys' fees and expenses awarded by the Court up to a maximum of $ 5 million; (xii) a description of the preliminary injunction issued by the Court in the Hearing Order; (xiii) the procedure for obtaining additional information, including the toll-free number established to respond to Class Member inquiries; and (xiv) the manner in which Class Members could secure the notice package (individual notice materials) described above. *See* Dahl **[*65]** Decl. Ex. B.

81. Based on its review of the individual and publication notice materials and the expert testimony concerning those materials, the Court concludes that the notices provided to the Class were more than adequate, equalling or exceeding the requirements of *Federal Rule of Civil Procedure 23* and due process. The individual and publication notices fairly apprised Class Members of the existence of this action, the terms of the proposed settlement and the three options available to Class Members, *i.e.*, remaining in the Class and not objecting to the proposed settlement, remaining in the Class and objecting to the settlement and electing out of the Class. The notices also set forth, in clear, precise and neutral language, all information material to making an informed and intelligent decision respecting the Class Members' three options, how to elect each of the options, and the effect of each option on electing Class Members. *Fed. R. Civ. P. 23(c)(2)*; *In Re Prudential, 962 F. Supp. at 526-29*; *Mendoza v. United States, 623 F.2d 1338, 1351-52 (9th Cir.*

1980); *see also* Priest Decl. P25.

2. *Form Of Notice*

82. The Hearing Order (as corrected *nunc pro tunc* **[*66]**) required that individual notice be sent, by first-class mail, postage prepaid at Equitable of Iowa's expense, no later than 60 days before the Fairness Hearing, to the last known address of each reasonably identifiable Class Member. Hearing Order P6(a). In accordance with the Hearing Order, approximately 133,000 notice packages (containing the individual notice materials described above) were mailed to the approximately 109,000 Class Members (respecting the approximately 130,000 separate policies involved in this action) by Rust Consulting, Inc., the Class Action Administrator, prior to October 20, 1997. In fact, almost all of these notice packages were mailed by September 10, 1997. Approximately 2,300 notice packages were mailed on or before October 3, 1997, and the final 116 notice packages were mailed on October 15, 1997. Dahl Decl. PP10-16. In addition, Rust Consulting mailed additional notice packages to Class Members who requested them by mail or through telephone calls to the policyowner hotline. Dahl Decl. P22.

83. Also in accordance with the Hearing Order (PP6(c) and 6(d)), Rust Consulting caused notice packages that were returned by the United States Postal Service to be **[*67]** remailed to Class Members.

a. Approximately 491 notice packages were returned to Rust Consulting, Inc. by the United States Postal Service with forwarding addresses. These notice packages were promptly remailed in accordance with the Hearing Order. Dahl Decl. P19.

b. Approximately 16,804 notice packages were returned by the Postal Service without forwarding addresses. In accordance with the Hearing Order, Rust Consulting, Inc. caused the addresses for these notice packages to be researched, and new addresses were found for 9,464 of them; and they were remailed to the new addresses at least 40 days prior to the Fairness Hearing, as required in the Hearing Order. The balance of the returned notice packages (many of them duplicates) did not have reasonably obtainable forwarding addresses. Dahl Decl. PP20, 21.

84. The Hearing Order further provided that the publication notice be published in certain newspapers at Equitable of Iowa's expense no later than 50 days before the Fairness Hearing. Hearing Order P6(b). In accordance with the Hearing Order, Equitable of Iowa published the publication notice on September 16, 1997 in the national editions of *The Wall Street Journal, USA Today*, **[*68]** and the *Chicago Tribune*; and also *The Tampa Tribune, The Arizona Daily Star* and *The Arizona Citizen*. These newspapers had a combined average daily circulation of approximately 4.9 million. Dahl Decl. P24.

85. As contemplated by the Stipulation of Settlement, Rust Consulting, Inc. also established and maintained a toll-free information hotline for Class Members to call for further information about the proposed settlement. The hotline was available Monday through Friday, from 8:00 a.m. to 10:00 p.m. Central Time, beginning on September 8, 1997. The telephone number for the hotline was included in the individual notice materials and publication notice. As of the close of business on November 21, 1997, Rust Consulting, Inc. had received 6,627 calls on the hotline. Hotline calls were monitored both on-site and off-site by plaintiffs' counsel, and Class Members using the hotline were given the opportunity to speak to Class Counsel. Dahl Decl. PP26-37; Weiss/Stoia Aff. P30.

86. ***HN14*** Notice of a proposed class action settlement is adequate when it is the best notice practicable, reasonably calculated, under the circumstances, to reach absent class members. *Fed. R. Civ. P. 23(c)(2)*; **[*69]** *see also Phillips Petroleum, 472 U.S. at 812*; *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-77, 40 L. Ed. 2d 732,*

94 S. Ct. 2140 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15, 318, 94 L. Ed. 865, 70 S. Ct. 652 (1950); and Mendoza, 623 F.2d at 1351. Here the court finds that the combination of the individual and publication notices described above clearly satisfied this standard.

87. A small percentage of the Class could not be located through reasonable effort, and for various reasons some individual notices that were mailed may not have been received. Supplementing individual notice with publication notice represents an appropriate balance between protecting Class Members and making class actions workable. *See* Gross v. Barnett Banks, Inc., 934 F. Supp. 1340, 1345 (M.D. Fla. 1995).

88. As a result of the parties' efforts, extensive and comprehensive notice of the proposed settlement was provided to the Class. This notice not only complied in full with the terms of the Hearing Order, but was the most effective and best practicable notice, reasonably calculated, under all the circumstances, to apprise Class Members of the pendency **[*70]** of this action, the issues before the parties, the terms of the proposed settlement, the effects of staying in the Class and the options available to Class Members, including their right to exclude themselves from the Class, object to any aspect of the proposed settlement, participate in the action *pro se* or through counsel, and appear at the Fairness Hearing. Accordingly, the notice provided to the Class constituted due, adequate and sufficient notice to all persons entitled to be provided with notice, and it exceeded the requirements of applicable law, the rules of this Court, and due process under the federal constitution.

89. In the course of implementing the settlement, the parties will provide an extensive second round of notice to Class Members, informing them of their options under the settlement and enabling them to take advantage of those options. Stipulation of Settlement, §§ VI.G-VI.I and Exs. C, G, H & I. The Court finds that the materials to be provided to the Class in the implementation of the settlement (the Post-Settlement Notice, the Post-Settlement Summary Notice, the Election Forms and the Claim Forms), together with the post-settlement notice methodology set **[*71]** forth in the Stipulation of Settlement, are reasonably calculated, under all the circumstances, to apprise Class Members of their rights pursuant to the settlement; constitute due, adequate and reasonable notice to all Class Members; and otherwise satisfy the requirements of applicable law, the rules of this Court, and due process under the federal constitution.

3. *Exclusion Requests*

90. As of November 19, 1997, the deadline for exclusions, only 191 Class Members, respecting only 260 separate life insurance policies, had timely excluded themselves from the Class. [10] *See* Dahl Decl. PP38-40 and Exs. A-D thereto. The Court finds that the individuals and entities listed on Exhibit C to the Declaration of Jeffrey D. Dahl are excluded from the Class, and from this date forward are no longer bound by prior orders of the Court in this action and, unless otherwise ordered, will not be bound by the Final Order and Judgment (or any further orders in this action). Any other requests for exclusion are denied as untimely or improperly made.

[*72] 91. The Court has reviewed the exclusion requests and cannot infer from them a general dissatisfaction with the proposed settlement. They cover less than one-fifth of one percent of the life insurance policies covered by the settlement. Also, 21 of the 260 policies covered by the exclusion requests were owned by insurance companies (competitors of Equitable of Iowa), and 84 of the policies were owned by persons represented by several Alabama lawyer groups.

4. *Objections*

---

[10] The procedures for a current or former policyowner excluding himself or herself from the Class were set out in the Hearing Order and the individual and publication notices discussed above. Hearing Order P10; Dahl Decl. Exs. A-B thereto.

92. Not including any of the exclusion requests described above, a total of only six written communications were served upon counsel and/or filed with the Court in compliance with, or in an apparent attempt to comply with, the procedures for objecting to the proposed settlement. [11] Of these six communications, only four are proper objections, since two of the objections were not properly made. *See* Plaintiffs' Mem. pp. 58-63. The communication from Class Member David H. Fleck was by far the lengthiest and most detailed objection filed. *See id*. As discussed in detail in Part V.F. below, the objections, including the objection of Mr. Fleck, do not warrant disapproval of the settlement.

[*73] B. *Jurisdiction*

1. *This Court Has Original Jurisdiction To Implement The Settlement*

93. This Court has diversity jurisdiction under *28 U.S.C. § 1332*. First, complete diversity exists between the named plaintiffs and defendants. *See*. Compl. PP8, 10, 11. Second, plaintiffs have alleged in good faith damages in excess of the $ 50,000 amount in controversy requirement in effect at the time the original pleadings were filed. [12] *See* Compl. P8 and pp. 45-57; *see generally St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 82 L. Ed. 845, 58 S. Ct. 586 (1938)* (the sum claimed by the plaintiff controls if the claim is apparently made in good faith). [13]

[*74] 94. With complete diversity and the requisite amount in controversy established among the named parties, subject matter jurisdiction extends to the balance of the Class Members' claims under *28 U.S.C. § 1367*. *See In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997)*; *Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 931 (7th Cir. 1996)*; *In re Abbott Labs, 51 F.3d 524, 528-29 (5th Cir. 1995)*; *In re Prudential, 962 F. Supp. at 503-05* (and authorities cited therein). ***HN15*** With the enactment of *§ 1367*, in the diversity jurisdiction context, there is no need for each Class Member to meet the required jurisdictional amount individually so long as there is complete diversity among the named parties, and the named plaintiffs have alleged claims that exceed the requisite amount in controversy. *Id*. That is the case here. [14]

[*75] 2. *The Court Has Personal Jurisdiction Over The Class Members*

95. ***HN16*** The court acquires personal jurisdiction over present and absent class members so long as class members have been afforded, through adequate notice, the right to exclude themselves from the class. *See Phillips Petroleum, 472 U.S. at 811-12*. As described above, notice to the Class has been more than adequate. Accordingly, this Court has acquired personal jurisdiction over present and absent Class Members who have not opted out of the Class. *See In re Prudential, 962 F. Supp. at 507*.

V. *THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE AND SATISFIES CRITERIA APPLIED BY THE ELEVENTH CIRCUIT AND*

---

[11] These objection procedures were established in the Hearing Order and communicated to the Class, in clear and precise language, in the individual and publication notices discussed above. Hearing Order P11; Dahl Decl. Exs. A-B thereto.

[12] Because the original federal Complaint was filed in this Court on February 14, 1996, when jurisdiction is measured, the new amount in controversy threshold of $ 75,000 effective as of January 17, 1997 is inapplicable. *See 28 U.S.C.A. § 1332 (1997 Supp.)*, Historical and Statutory Notes.

[13] The question whether the jurisdictional amount is satisfied is answered by referring to the complaint, not to the ultimate outcome of the case. *Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1997)* ("Once a good faith pleading of the amount in controversy vests the district court with diversity jurisdiction, the court retains jurisdiction even if the plaintiff cannot ultimately prove all of the counts of the complaint or does not actually recover damages in excess of $ 50,000.") (citing *St. Paul, 303 U.S. at 288*); ***In re Prudential, 962 F. Supp. at 502-03***.

[14] The amount in controversy requirement is also met in this case by aggregating the Class Members' punitive damages claims in the Complaint. *See Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1357 (11th Cir. 1996)*.

THIS COURT

96. The Eleventh Circuit and ***HN17*** this Court consider seven factors in determining whether to approve settlements of class actions:

> a. The likelihood of success at trial and potential recovery;
>
> b. The complexity, expense and duration of litigation;
>
> c. The terms of the settlement;
>
> d. The procedures afforded to notify the class members of the proposed settlement, and to allow them to present their views;
>
> e. The judgment of experienced counsel for the plaintiff class;
>
> f. The **[*76]** substance and amount of opposition to the settlement; and
>
> g. The stage of the proceedings at which the settlement was achieved.

Warren v. City of Tampa, 693 F. Supp. 1051, 1055 (M.D. Fla. 1988); *In re Corrugated Container, 643 F.2d at 212*. Application of these criteria to the instant settlement compels the conclusion that the proposed Settlement is fair, adequate and reasonable.

A. *The Likelihood Of Success At Trial And Potential Recovery*

97. ***HN18*** It is not necessary to try the merits of the case in connection with reviewing the settlement. *In re Corrugated Container, 643 F.2d at 212*; *Meyer v. Citizens & Southern Nat'l Bank, 677 F. Supp. 1196, 1201 (M.D. Ga. 1988)*. Thus, the Court can limit its inquiry to determining "whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement." *Ressler v. Jacobson, 822 F. Supp. 1551, 1553 (M.D. Fla. 1992)*; *see also Mashburn v. National Healthcare, Inc., 684 F. Supp. 660, 670 (M.D. Ala. 1988)* (in the class action settlement context, courts do not decide the merits of the case or resolve unsettled legal questions). This inquiry is premised upon "balancing **[*77]** the probabilities, not assuring that the plaintiff class receives every benefit that might have been won after a full trial." *In re Chicken Antitrust Litig., 560 F. Supp. 957, 960 (N.D. Ga. 1980)*. The expense of achieving a more favorable result for the class at trial must be considered. *Ressler, 822 F. Supp. at 1555*; *Young v. Katz, 447 F.2d 431, 433 (5th Cir. 1971)*. Factually, this was a complicated case. Plaintiffs and their counsel believe that their case was exceedingly strong; however, defendants nevertheless had a number of potentially strong defenses.

98. ***HN19*** Plaintiffs are not required to justify the terms of their settlement based on speculation of what they might have obtained. "'Inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'" *Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)* (citation omitted); *Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984)*. The risks of maintaining this litigation as a class action through trial and appeal weigh in favor of approving this settlement with its certain outcome, especially where, as here, the Class Members' individual claims are relatively small, and where Class Members **[*78]** have the right to opt-out and pursue their own remedy, if they so desire.

99. As for risks attendant to litigation, the following are examples of issues that could potentially present obstacles to plaintiffs' success at trial, if this case were not settled:

a. Proving that the practices complained of were systemic in nature;

b. Establishing the elements of the various causes of action and, in particular, overcoming defendants' contentions, among others, that: (i) the contract rights that plaintiffs assert are contradicted by the plain and unambiguous language of the policies that constitute their contracts with Equitable of Iowa, and thus are barred by the parol evidence rule and the contract merger doctrine; (ii) the fraud,

negligent misrepresentation and other fraud-related claims asserted by plaintiffs are not tenable because (a) plaintiffs would not be able to establish actual, reasonable or justifiable reliance on the alleged misrepresentations, and (b) plaintiffs have alleged promises of future conduct or opinions rather than misrepresentations of existing fact; (iii) plaintiffs' cause of action for breach of fiduciary duty is defective because plaintiffs cannot show that **[*79]** Equitable of Iowa is a fiduciary to its insureds; and (iv) plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing is defective because the precontractual conduct alleged by the plaintiffs cannot provide the basis for such a claim;

c. Establishing that Class Members' claims are timely under applicable statutes of limitation;

d. Proving that Class Members were unaware that dividend scales, interest crediting rates or monthly deduction rates could fluctuate, and that such fluctuations would affect planned premium amounts, and the number of out-of-pocket premiums needed to maintain policy values;

e. Proving that Class Members were unaware of the economic effects of using existing policy values to fund the purchase of new insurance policies;

f. Proving that Class Members were unaware that they had purchased life insurance or that, because of the costs associated with providing the guaranteed benefits of life insurance, their cash values would not accumulate at the rates they might accumulate in other investment vehicles;

g. Proving that Equitable of Iowa's decision to reduce dividends or interest credits on certain policies due to the so-called **[*80]** "DAC Tax" was improper in light of the written provisions of those policies; and

h. Proving that Equitable of Iowa's "direct recognition practices" were improper or contrary to express policy language.

B. *The Complexity, Expense And Duration Of Litigation*

100. ***HN20*** The federal courts have long recognized that "compromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank, 216 U.S. 582, 595, 54 L. Ed. 625, 30 S. Ct. 441 (1910)*. "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton, 559 F.2d at 1331*.

101. This litigation involves the marketing and sale of a variety of Equitable of Iowa life insurance products over a 13-year period of time involving approximately 130,000 insurance policies. Among other things, plaintiffs challenge the methods used to market Equitable of Iowa's products to consumers, the adequacy of its disclosures, and the training and supervision of its agents. The work necessary to prepare this case for trial would be complicated, enormous in scope, logistically difficult, time-consuming and expensive. Continued litigation, just to the point of trial, would be lengthy, complex **[*81]** and expensive.

102. In addition, the life insurance policies at issue in this case are complex and would require extensive actuarial and financial expert testimony to evaluate the assumptions underlying these policies and the illustrations through which they were marketed to consumers, and also arcane actuarial standards, statutory and insurance accounting practices, and sophisticated financial theory.

103. Trial of this case, which would likely last for many months, would require additional time and expense for consultation with additional experts (whom the jury might or might not believe), preparation of trial memoranda on various legal issues, and post-trial memoranda and appeals that would inevitably follow rulings on any final judgment, which could prolong the case for many years. Judicial economy and public policy will be well served, because the settlement will result in an efficient and economical procedure for aggrieved Class Members to obtain appropriate relief.

C. *The Terms Of The Settlement*

104. ***HN21*** The terms of the settlement need not provide the optimal relief, so long as there appears to be a genuine *quid pro quo*. *Warren, 693 F. Supp. at 1059*. Here, *all* **[*82]** Class Members have a right to multiple types of relief based upon their individual circumstances. Additionally, the terms of the settlement were carefully crafted to tailor relief for those Class Members who felt they were harmed by defendants. Finally, this result was achieved through extensive negotiation by experienced and capable attorneys. Weiss/Stoia Aff. at §§ I-III.

D. *The Procedures Afforded To Notify The Class Members Of The Proposed Settlement, And To Allow Them To Present Their Views*

105. As discussed in detail in § IV.A. above, the procedures afforded to notify the Class of the proposed settlement and of the opportunity to exclude themselves and present their views have been more than adequate.

E. *Judgment Of Experienced Counsel For The Class*

106. Counsel for plaintiffs and the Class are experienced in this type of litigation. *See* Weiss/Stoia Aff. PP5-7. *See also* Plaintiffs' Mem. § IV.B.4. Counsel have voiced their beliefs that the proposed settlement is fair, adequate and reasonable.

107. ***HN22*** Even in class action contexts, "the trial court is entitled to rely upon the judgment of experienced counsel for the parties . . . . Indeed, the trial judge, absent **[*83]** fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Ressler, 822 F. Supp. at 1555* (quoting *Cotton, 559 F.2d 1326 at 1330)*; *Holmes v. Continental Can Co., 706 F.2d 1144, 1149 (11th Cir. 1983)* (deference afforded to opinions of class counsel in class actions); *Behrens v. Wometco Enters., 118 F.R.D. 534, 539 (S.D. Fla. 1988)* (the court can rely upon the judgment of experienced counsel and should not substitute its judgment for that of counsel, absent fraud).

108. Absent the settlement, the plaintiffs faced a protracted, expensive, and uncertain trial. Weiss/Stoia Aff. at § V.D. Likewise, the settlement strikes a balance that protects the interests of all Class Members. Considering the wealth of experience of plaintiffs' counsel, their endorsement of the settlement strongly militates in favor of approval of the settlement.

F. *The Substance And Amount Of Opposition To The Settlement*

109. ***HN23*** The settlement should be examined in light of the objections raised by Class Members. *Cotton, 559 F.2d 1326 at 1331*; *Meyer, 677 F. Supp. at 1210*. There have been only six objections received from a Class of approximately 109,000 policyowners, **[*84]** which is a *de minimus* number relative to the settlement. *Hill v. Art Rice Realty Co., 66 F.R.D. 449, 456 (N.D. Ala. 1974)* (receipt of only one objection is compelling evidence that the attitude of the overwhelming percentage of the class affected by the settlement supports the reasonableness and appropriateness of the settlement), *aff'd without op., 511 F.2d 1400 (5th Cir. 1975)*.

110. The "general objection" of *Kyle Stewart* is that he does not want to "purchase" something additional from Equitable of Iowa, apparently referring to General Policy Relief. He also says he has no evidence to introduce, which may be an objection, or it may be an acknowledgement he has no claim. Whatever, the objection does not recognize that relief is available without documentary evidence, even under the Claim-Review Process, and the settlement does not require Class Members to purchase anything. Plaintiffs' counsel sent Mr. Stewart a letter offering to discuss his objection and further explain the favorable presumptions of the Claim-Review Process. Mr. Stewart did not respond and ultimately excluded himself from the Class. Therefore, Mr. Stewart's objection to the settlement also lacks **[*85]** standing, because only Class Members have

standing to object. For all these reasons, Mr. Stewart's objection is overruled.

111. The objection of *Sheri Kephart* is that her options are limited to purchasing a new policy from Equitable of Iowa. Ms. Kephart's objection is an apparent reference to the types of relief available to former policyowners as General Policy Relief. This objection reflects a misunderstanding of the settlement's terms. Additional purchases are not required, and aggrieved policyowners may obtain significant relief in the form of Individual Claim-Review Relief through the Claim-Review Process. Weiss/Stoia Aff. P12. As with Mr. Kyle, plaintiffs' counsel wrote Ms. Kephart to offer to clarify and discuss the options available to her under the Claim-Review Process, but she did not respond to the offer. Weiss/Stoia Aff. P64. Accordingly, Ms. Kephart's objection is overruled.

112. The objection of *Patrick A. Staloch* concerns a policy purchased in 1981, *before* the Class Period. Therefore, because Mr. Staloch is not a Class Member with respect to this policy, he does not have standing to object. Moreover, the Class Period was determined based upon plaintiffs' **[*86]** investigation, discovery and conclusion that the alleged wrongdoing did not occur on a classwide basis before that time. Weiss/Stoia Aff. PP44-47. Mr. Staloch's objection is overruled.

113. The objection of *Tom Kluzak* is that he feels it is "distasteful" that someone would "file a lawsuit on his behalf without [his] knowledge." Mr. Kluzak's objection is not an objection to the settlement itself, but to the class action device generally. The benefits of the settlement -- obtained at no out-of-pocket expense to any policyowner -- should not be denied to those policyowners who wish to participate, and, of course, Mr. Kluzak had the opportunity to opt-out. Mr. Kluzak's objection is overruled.

114. The objection of *John Hoppey, Jr.* does not appear to be an objection at all, but an "objection to making any more premium payments." Like other Class Members, Mr. Hoppey will have an opportunity to submit a claim in the Claim-Review Process and support his contention that he should not have to make any more premium payments. Accordingly, Mr. Hoppey's objection is also overruled.

115. The sixth objection, that of David D. Fleck, is more substantial than the others, in size and in **[*87]** effort, and has received the Court's careful consideration. Mr. Fleck's objection is also an endorsement of the proposed settlement. He states on page two of his objection:

> I wish to compliment the parties and their attorneys for bringing these actions to this point and fashioning a Settlement Agreement under which the defendants offer the whole class member group benefits sufficient to merit the conclusion that, as to such group as a whole, the settlement is fair, adequate and reasonable.

116. Mr. Fleck does not complain about what is arguably the most important, at least most valuable, aspect of the proposed settlement, that being Individual Claim-Review Relief through the Claim-Review Process. His objection is only to General Policy Relief.

117. Mr. Fleck's objection to General Policy Relief is twofold -- General Policy Relief should be different or more valuable, and it discriminates between Class Members. To correct these perceived problems, Mr. Fleck has drafted, and proposes to the Court for its consideration, a number of material changes to the Stipulation of Settlement.

118. Like the Court, the parties did not take Mr. Fleck's objection lightly. In their point-by-point **[*88]** responses they dealt with his objection, including his proposed modifications, explaining in reasonable and persuasive terms why, for practical, financial, and legal reasons, they could not or would not change the settlement to meet his specifications. Several of Mr. Fleck's proposed changes would have made General Policy Relief more like Individual Claim-Review Relief, in relief

to Class Members and in expense to Equitable of Iowa, even though Class Members electing General Policy Relief would not have to demonstrate any wrongdoing by defendants or any harm to themselves. It is understandable why the parties would not agree to these changes. Also, his personal claim of prejudice for not being eligible for Optional Premium Loans ignores the purpose of that particular type of General Policy Relief. Optional Premium Loans are to provide policyowners, whose policies have required modal premiums, with special low interest loans to assist them in making out-of-pocket premium payments beyond those originally anticipated. However, Mr. Fleck's policy is a flexible premium universal life insurance policy. It does not have required premiums, and he can withdraw cash value from the policy without **[*89]** having to make a policy loan. Plaintiffs' Mem. pp.59-62; Defendants' Mem. pp.45-51.

119. It is not appropriate that the settlement be restructured to fit Mr. Fleck's real or perceived personal circumstances, and his proposed changes are not necessary to make the settlement fair, adequate and reasonable as to the Class. Mr. Fleck had the option to elect out of the Class, and he still has the option to elect Individual Claim-Review Relief and pursue a claim through the Claim-Review Process, if he believes he has been harmed by wrongdoings in connection with his policy. Class certification and approval of the proposed settlement cannot be denied on the strength of Mr. Fleck's objection. It is therefore overruled.

120. The Court finds that there is a rational basis for the parties' allocation of General Policy Relief. It is not discriminatory, in design or effect. *See Holmes, 706 F.2d at 1148* (allocation permissible if "rationally based on legitimate considerations"; to provide different relief for different claims/needs).

121. Likewise, the issue here is whether the relief provided in the settlement, taken as a whole, is adequate and reasonable, not whether something more lucrative **[*90]** might make the settlement more favorable to Class Members or certain Class Members. *See In re Warner Communications Sec. Litig., 798 F.2d 35, 37 (2d Cir. 1986)* ("it is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms"); *Cotton, 559 F.2d at 1333* ("the settlement must stand or fall as a whole"); *Jeff D. v. Andrus, 899 F.2d 753, 758 (9th Cir. 1989)* ("Courts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties."); *In re Domestic Air Trans. Antitrust Litig., 148 F.R.D. 297, 305 (N.D. Ga. 1993)* ("Court may only approve or disapprove the settlement as presented . . . it [] may not rewrite the settlement as requested by numerous objectors.").

122. Here, the settlement offers a range of valuable and innovative relief that corresponds to the allegations and claims asserted in the Complaint and to the separate needs of the individual Class Members. *See In re Xoma Corp. Sec. Litig., 1992 U.S. Dist. LEXIS 10502*, at *10, Master File No. C-91-2252 TEH (N.D. Cal. July 10, **[*91]** 1992) ("The Court must be concerned with ensuring fairness to the class as a whole, rather than with satisfying any particular plaintiffs' demands.") (Weiss/Stoia Aff. Ex. 11).

123. Finally, the Court finds the fact that so very few objections -- only four with legal standing -- were received from approximately 109,000 Class Members demonstrates that the response of the Class to the proposed settlement has been overwhelmingly positive.

124. The Court also notes that no governmental entities have appeared in this litigation. Before notifying Class Members of the proposed settlement, Equitable of Iowa met with staff insurance officials in Iowa, its state of domicile, and briefed them on this action and proposed settlement. Equitable of Iowa characterizes the Iowa Insurance Department's reception to the settlement as positive. Equitable of Iowa also

notified the insurance departments in the other states in which it does business of this action and the proposed settlement by mail, and none of these departments expressed reservations about the settlement to Equitable of Iowa or the Court. These reactions by the state insurance departments, although not essential, favor approval of the **[*92]** settlement.

G. *The Stage Of Proceedings At Which This Settlement Was Achieved*

125. This litigation had reached the stage at which "the parties certainly had a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig., 618 F. Supp. 735, 745 (S.D.N.Y. 1985)*, *aff'd 798 F.2d 35 (2d Cir. 1986)*.

126. "Plaintiffs have conducted sufficient discovery to be able to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation." *Ressler, 822 F. Supp. at 1554-55*; *Mashburn, 684 F. Supp. at 669*. This is particularly true when it is remembered that settlements are strongly encouraged. *Id*. ***HN24*** Since settlements are to be encouraged, it follows that "only some reasonable amount of discovery should be required to make these determinations." *Ressler, 822 F. Supp. at 1555*; *Mashburn, 684 F. Supp. at 669*; *In re Corrugated Container, 643 F.2d at 211* (lack of presettlement discovery does not in itself invalidate settlement, since plaintiffs' negotiators had access to a plethora of information regarding the facts of their case); *Cotton, 559 F.2d **[*93]** at 1332*.

127. The investigation and thorough discovery undertaken by plaintiffs' counsel in this case illuminated the strengths and weaknesses of both claims and defenses. The benefits achieved by plaintiffs' counsel's investigation and discovery will also accrue to Class Members during the administration phase of the settlement. Significantly, the fruits of plaintiffs' counsel's investigation, discovery and analysis will benefit Class Members who elect to participate in the Claim-Review Process.

VI. *VALUATION OF THE SETTLEMENT*

128. The value of the settlement consists of the following elements: (i) the value of the Claim-Review Process, including the value of the process itself and the value of the uncapped, aggregate relief to be paid successful claimants; (ii) the value of the General Policy Relief; (iii) the attorneys' fees and expenses that Equitable of Iowa will pay to plaintiffs' counsel, which will not reduce the amount of relief being made available to the Class; and (iv) the substantial amounts that Equitable of Iowa has paid and expects to pay in settlement and administrative expenses for the benefit of the Class.

129. Although the innovative nature of the settlement **[*94]** makes it difficult to put a maximum value on the benefits to be provided to the Class, it is clear that the value of those benefits is substantial, and the Court so finds.

A. *Claim-Review Process*

130. Defendants' actuarial experts, Milliman & Robertson, have analyzed the potential recoveries under the Claim-Review Process for three hypothetical Class Members (claimants), each a male non-smoker, age 40, and each owning a different one of Equitable of Iowa's more popular life insurance policies, all with $ 100,000 face amounts. Assuming scores of 4 (the highest available under the process), and depending on the age of the policy, the type of claim (performance, replacement or retirement/investment) and other factors that vary among claimants, Milliman & Robertson valued Individual Claim-Review Relief for these hypothetical claimants from a minimum of $ 3,990 up to a maximum of $ 23,554. M&R Report § III. Lewis & Ellis, Inc., plaintiffs' actuarial experts, have reviewed Milliman & Robertson's valuations and found them to be reasonable. Long Aff. P8.

131. Using Milliman & Robertson's analysis as a starting point, Lewis & Ellis, Inc., plaintiffs' experts, have estimated the potential **[*95]** value of

relief awarded through the Claim-Review Process to a sample of one percent of Class Members who submit claims and whose scores exceed a "1." Depending on the distribution of the types of claims submitted and the scores awarded on those claims, Lewis & Ellis have determined that the value of Claim-Review Process awards to the one-percent sample would range from $ 2.8 million to $ 4.1 million. Long Aff. P9 and App. 2 thereto.

B. *General Policy Relief*

132. Milliman & Robertson and Lewis & Ellis have both estimated that the General Policy Relief will make in excess of $ 271 million in economic value available to the Class. M&R Report p. 11; Long Aff. P6. Milliman & Robertson further estimated that, based on utilization rates consistent with historical marketing results for each form of General Policy Relief, it is likely that the total value of General Policy Relief that will actually be realized by the Class is $ 22.9 million. M&R Report p. 24. Lewis & Ellis has determined that "the best estimate of the economic value of the benefits that are likely to be utilized by Class Members under General Policy Relief" is $ 28.9 million. Long Aff. P7.

133. The Court finds these **[*96]** expert analyses credible and well-reasoned. No opponent of the settlement has proffered evidence disputing these analyses.

134. Without adopting any of the particular value estimates provided by these experts, the Court finds that the parties have established that significant and substantial value will be provided to the Class through this settlement. Although the actual amount of value that will be realized by the Class cannot be foretold with precision, the Court finds that it is reasonable to expect that as much as $ 28.9 million in economic value will actually be realized by the Class through General Policy Relief alone, plus the value of relief to be provided through the Claim-Review Process, for which Equitable of Iowa's aggregate liability is unlimited.

135. The Court notes several other factors that enhance the value of the settlement for the Class.

a. The Claim-Review Process provides every Class Member with an opportunity to have his or her individual claim reviewed in a timely, cost-free manner, with an assurance that claims will be evaluated in accordance with fair and objective evidentiary and relief criteria that have been agreed upon by the parties and approved by **[*97]** this Court. The involvement of a Policyowner Representative throughout the process and the right to appeal initial determinations to independent arbitrators enhance the fairness of the Claim-Review Process. Because every Class Member has access to the Claim-Review Process, every Class Member therefore receives value from the settlement.

b. There is no cap on the aggregate value of the relief to be afforded claimants in the Claim-Review Process. Thus, every claimant who demonstrates his or her claim will receive the full relief to which he or she is entitled, as determined by the criteria specified in the Stipulation of Settlement, without regard to the value of relief provided to other Class Members. This aspect of the settlement distinguishes it from the usual class action settlement, in which a defendant agrees to pay a fixed sum of money that is then allocated among members of the class, and renders the settlement "a far superior approach to that taken in most fraud class action settlements." *Connecticut General*, MDL No. 1136, Order p. 3 (Weiss/Stoia Aff. Ex. 4); *see also* Tew Decl. P10; Priest Decl. P35.

c. Unlike class action settlements where the value of the relief **[*98]** provided depends entirely on future purchases that are highly contingent in nature and suspect in value, the General Policy Relief here is tailored to meet the allegations of the Complaint and the specific insurance and investment needs of the Class Members. *See* Priest Decl. PP29-34; Tew Decl. P9.a.

136. The Court hereby approves the settlement and finds that it is fair, adequate and reasonable, in the

best interests of the Class, and fully in accord with constitutional dictates.

VII. *FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFFS' ATTORNEYS' FEES AND EXPENSES*

A. *Overview*

137. Only after all substantive terms of the proposed settlement were agreed upon, counsel for the parties negotiated terms under which Equitable of Iowa agreed to pay plaintiffs' counsel's fees and to reimburse plaintiffs' counsel's expenses up to a total of $ 5 million, subject to approval by the Court. *See* Weiss/Stoia Aff. PP54, 56, 76; Bailey Decl. (No. 2) P21. The particulars of the fee agreement are set out in § X of the Stipulation of Settlement.

138. In accordance with the Stipulation of Settlement, plaintiffs' counsel have requested attorneys' fees and expenses **[*99]** in the total aggregate amount of $ 5 million. *See* Weiss/Stoia Aff. PP56, 75.

139. The Court finds that the fee negotiations in this case were conducted at arm's-length, and only after all material terms of the settlement had been agreed upon. Weiss/Stoia Aff. P56. Because the previously negotiated settlement structure provided that the fee awarded would be paid by Equitable of Iowa, separate and apart from any recovery to the Class, Equitable of Iowa had a particular incentive to bargain strenuously to keep the fee as low as possible. There is absolutely no evidence in this case that the settlement was in any way collusive.

140. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee request. *Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974)* ("In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees."); *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig., [1992 Transfer Binder] 1992 U.S. Dist. LEXIS 14337*, Fed. Sec. L. Rep. (CCH) P96,937, at 93,969 (C.D. Cal. June 10, 1992).

B. *The "Percentage* **[*100]** *of Recovery" or "Common Fund" Method*

141. ***HN25*** The approach to determining an appropriate fee award in the Eleventh Circuit is the percentage of recovery approach. In *Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991)*, the Eleventh Circuit observed:

> The majority of common fund fee awards fall between 20% to 30% of the fund . . . . An upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded.

Id. at 774-75 (citations omitted). Even though the fees sought in this case are less than 1.7% of the estimated total values of the settlement and less than 14.5% of the utilization value of GPR, they are well *below* the range of reasonableness set forth in *Camden I*, where the court recognizes that "***HN26*** there is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Id. at 774*.

142. The court in *Camden I* enumerated the "*Johnson* factors" (established in *Johnson, 488 F.2d 714*) that the court may consider in determining the appropriate percentage of the **[*101]** fund to be applied to each case. In the instant case, a very favorable result was obtained as the result of the intensive, yet efficient, efforts of plaintiffs' counsel.

1. *The Results Obtained*

143. This settlement involves a creative and innovative two-part settlement structure to carefully craft relief for Class Members, tailored to the particular and complex facts of this action. Weiss/Stoia Aff. P17. Plaintiffs' counsel have carefully assessed the strengths and weaknesses of their case. Weiss/Stoia Aff. PP44-47. Plaintiffs and

their counsel felt that, based on their investigation, they could prove their case at trial -- but a host of risks were involved, including the substantial risk of *no relief* for the Class. Weiss/Stoia Aff. PP65-69. When all these factors are weighed, plaintiffs' counsel have obtained a very good result for the Class. These factors support the fee requested. [15]

[*102] 2. *Economics Involved In The Prosecution Of The Class Action And The Experience Of Counsel*

144. "***HN27*** The economics involved in prosecuting a class action" is one of the factors to be considered by the court in determining a fee. *Camden I, 946 F.2d at 775*. This action was prosecuted by plaintiffs' counsel on an "at-risk" contingent fee basis. Weiss/Stoia Aff. P85. Counsel would be paid only if they achieved a successful result for the Class. Courts have long recognized, particularly in this Circuit, that the attorneys' contingent risk is an important factor in determining the fee award. *See Jones v. Central Soya Co., 748 F.2d 586, 591 (11th Cir. 1984)*; *see also Ressler, 149 F.R.D. 651 at 656*.

145. Plaintiffs' counsel in this case are experienced class action and complex action attorneys, including extensive class action experience relating to life insurance company deceptive sales practices. Weiss/Stoia Aff. P5. Courts have recognized the importance of providing incentives to experienced counsel who take on complex litigation cases on a contingent fee basis so those cases can be prosecuted effectively. Weiss/Stoia Aff. PP4-9. Conversely, defendants' counsel in this case are **[*103]** highly respected in the area of class action life insurance litigation, and were paid on a current basis. Plaintiffs' counsel, who assumed the risk of a successful result, should likewise be compensated for their efforts by a premium above their hourly rates. *See Ressler, 149 F.R.D. 651 at 654* (***HN28*** competence of opposing counsel is a factor in establishing plaintiff's counsel's fee award).

3. *The Customary Fee For Similar Cases*

146. The requested fee is below the typical range of common fund awards to counsel in other class actions in the Southern and Middle Districts of Florida since the percentage-of-fund approach was adopted by the Eleventh Circuit in *Camden I*. *See, e.g., Lopez v. Checkers Drive-In Restaurants, Inc.*, 94-282-CIV-T-17C (M.D. Fla. 1996) (awarding 30%) (Weiss/Stoia Aff. Ex. 13); *Minnick v. Pages, Inc.*, 95-277-CIV-T-21C (M.D. Fla. 1996) (awarding 30%) (Weiss/Stoia Aff. Ex. 14); *In Re: Belmac Corp. Sec. Litig.*, 92-1814-CIV-T-23-(C) (M.D. Fla. 1994) (awarding 31%) (Weiss/Stoia Aff. Ex. 15); and *Ressler, 149 F.R.D. 651 at 653* (awarding 30%). Thus, this Court on at least four prior occasions awarded a percentage fee in a common fund case in excess of 30% **[*104]** -- far more than counsel are seeking here.

4. *The Time And Labor Required*

147. The hours expended by plaintiffs' counsel in this litigation are set forth in the Affidavit of Melvyn I. Weiss and John J. Stoia, Jr. and Plaintiffs' Counsel Declarations. The total amount of time expended -- particularly with regard to investigation and settlement negotiations -- reflects the complexity of this action. Administration of the settlement will require additional time and expense. Under regular hourly rates the "lodestar" of plaintiffs' counsel in this action totals $ 2,038,170.13. Thus, even under the lodestar method, the fee requested would result in a multiplier much lower than the midrange of the multipliers in contingent fee awards in such cases. The multiplier here would be only 2.34, not including the extensive future work required by plaintiffs' counsel. *See* Weiss/Stoia Aff. P73. *See*

---

[15] While the requested fee would, at this point in time, represent a modest multiplier over the lodestar, that multiplier is justified by the substantial settlement benefits obtained, efficiency in achieving them, and concerted effort by all counsel to avoid wasted time and expense. Plaintiffs' counsel in this case sought to achieve a good result for the Class, irrespective of how much, or how little, time it took.

also Behrens 118 F.R.D. at 548 ("the range of lodestar multipliers in large and complicated class actions runs from a *low* of 2.26 . . . to a *high* of 4.5") (citations omitted, emphasis added).

148. Plaintiffs' counsel seek reimbursement of $ 227,513.13 in expenses incurred in this action **[*105]** as part of the entire $ 5 million negotiated fee and expense payment. Plaintiffs' counsel's expenses incurred to date for which reimbursement is sought appear reasonable.

5. *The Reaction Of The Class Confirms That The Requested Fee Is Reasonable*

149. The individual notice mailed to approximately 109,000 Class Members and the publication notice published in national newspapers across the country advised Class Members that counsel would apply for an award of fees and expenses not to exceed $ 5 million and that Class Members could object to the fee and expense application. Only *one* objection to the fee request has been made. [16] ***HN29*** The lack of objections is itself important evidence that the requested fees are fair. *See, e.g.*, Ressler, 149 F.R.D. 651 at 656 (noting that the lack of objections is "strong evidence of the propriety and acceptability" of fee request); Mashburn, 684 F. Supp. 679 at 695.

[*106] 150. The evidence in this case, including the expert affidavits and declarations submitted by the parties, establishes that the General Policy Relief will make in excess of $ 271 million in economic value available to the Class. *See* Long Aff. P6; M&R Report p. 11. Milliman & Robertson estimate that the economic value of the General Policy Relief likely to be utilized by the Class will be $ 22.9 million. M&R Report p. 24. Lewis & Ellis further estimate that the economic value of the General Policy Relief likely to be utilized by the Class will be $ 28.9 million. Long Aff. P7. These estimates do not include the benefits conferred under the uncapped Claim-Review Process, estimated by Lewis & Ellis at between $ 2.8 million and $ 4.1 million per one percent of Class Members who participate in the process and obtain a score higher than "1." Id. at P9. They also do not include certain other substantial benefits to the Class, including the costs Equitable of Iowa has incurred and will continue to incur in providing notice to the Class, a cost which is ordinarily borne by plaintiffs; administering the class action information center; and implementing and administering the settlement. **[*107]** Moreover, it is important to note that the amount of fees and expenses to be paid by Equitable of Iowa are separate and apart from any recovery by the Class, and will in no way diminish the value of settlement benefits to be provided to the Class. *See* Weiss/Stoia Aff. P57.

151. Accordingly, the Court overrules the one objection to plaintiffs' request for $ 5 million in attorneys' fees and expenses, and hereby grants that request, with the fees and expenses to be paid in accordance with the Stipulation of Settlement. Furthermore, the Court hereby authorizes Milberg Weiss Bershad Hynes & Lerach LLP, Co-Lead Counsel herein and the primary law firm responsible for prosecution, coordination and oversight of this lawsuit and settlement, to allocate, in its sole discretion, the award of attorneys' fees and expenses.

The foregoing being the findings of fact and conclusions of law of this Court,

IT IS SO ORDERED.

ELIZABETH A. KOVACHEVICH

---

[16] David H. Fleck objects to "the provisions of the proposed settlement under which the Defendants abandon responsibility for policing the amount of plaintiff attorney's fees and disbursements and impose the entire burden upon the Courts." Such a "policing by defendants" is not necessary -- this Court may act as expert in such matters. *See* Loranger v. Stierheim, 10 F.3d 776, 781 (11th Cir. 1994) (noting that court is expert in such matters and may use own judgment and experience in determining reasonable fees (citing Norman v. Housing Auth. of City of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988)). Also, the amount of attorneys' fees that the Court ultimately awards to plaintiffs' counsel does not affect whether the Court should approve the settlement and the fees and expenses paid to plaintiffs' counsel will *not* reduce or otherwise affect the relief available to Class Members.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

Dated: January 27th, 1998

End of Document

Exhibit 9

FILED

June 24, 2022

Hon. Jeffrey B. Beacham, J.S.C.

THE LAW OFFICE OF HOWARD DAVIS, P.C.
***d.b.a.* Davis Environmental Law**
Howard P. Davis, Esq.
(Attorney ID # 031551990)
580 Sylvan Avenue, Suite 2D
Englewood Cliffs, New Jersey 07632
(201) 541-9737 (ph)
(201) 541-6785 (fax)

LEVIN, SEDRAN & BERMAN
Austin B. Cohen, Esq.
(Attorney ID # 035221996)
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106
(215) 592-1500 (ph)
(215) 592-4663 (fax)

Counsel for Plaintiffs

JACQUELINE SUTTON and MELANIE RYAN, On behalf of Themselves and all Others Similarly Situated,

Plaintiffs,
v.

HOFFMANN-LA ROCHE INC.; THE CITY OF CLIFTON, NEW JERSEY; THE TOWNSHIP OF NUTLEY, NEW JERSEY; DELUXE CORPORATION; JOHN DOES 1-100 (names being fictitious and unknown); and XYZ CORPORATIONS 1-100 (names being fictitious and unknown),

Defendants.

HOFFMANN-LA ROCHE INC.,

Defendant/Third-Party Plaintiff,
v.

THE TOWNSHIP OF NUTLEY, NEW JERSEY, DELUXE CORPORATION;

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

DOCKET NO. ESX-L-008724-14

CIVIL ACTION

ORDER OF FINAL APPROVAL OF SETTLEMENT AND PLAN FOR ALLOCATION OF SETTLEMENT FUND, OF AWARD OF ATTORNEYS' FEES AND REIMBURSMENT OF EXPENSES, AND OF AWARD OF SERVICE PAYMENTS TO CLASS REPRESENTATIVES

GRANTED

BRIAD GROUP; S&H Ltd.; CLIFTON LIFESTYLE CENTER, LLC; MERCER ENGINEERING WORKS; MERCER-ROBINSON COMPANY; BENNETT MACHINERY CORPORATION; JOHN DUSENBERY CO., INC.; INTERNATIONAL PAPER COMPANY; NEVINS COMPANY; NEVINS-CHURCH PRESS; UNION BAG-CAMP PAPER CORPORATION; UNION CAMP CORPORATION; LUBRIZOL CORPORATION; LUBRIZOL ADVANCED MATERIAL, INC.; SCHER BROTHERS; SCHER CHEMICAL, INC.; NOVEON, INC.; MAJOR AUTOMOTIVE PRODUCTS COMPANY; MAJOR ENTERPRISES, INC.; SCANDIA PACKAGING MACHINERY COMPANY; MOTIVA ENTERPRISES, LLC; SHELL OIL COMPANY; UTZTI, LLC; UTZ TECHNOLOGIES, INC.; UTZ ENGINEERING, INC.; LYNN HOLDINGS, LLC; DIME REALTY, LLC; and THIRD PARTY DOES 1-50,

Third-Party Defendants.

THE CITY OF CLIFTON, NEW JERSEY,

Third-Party Plaintiff,

v.

E.I. DU PONT DE NEMOURS AND COMPANY; JOHN DOES 1-200 (names being fictitious and unknown; and ABC CORPORATIONS 1-100 (names being fictitious and unknown),

Third-Party Defendants.

HOFFMANN-LA ROCHE INC.,

Defendant/Third-Party Plaintiff,

v.

LOCKHEED MARTIN CORPORATION

Third-Party Defendant.

DELUXE CORPORATION

Defendant /Third-Party Defendant/Third-Party Plaintiff,

v.

LOUIS BERGER GROUP, INC.; LOUIS BERGER & ASSOCIATES, INC.; JOHN DOES 1-100 (names being fictitious and unknown); and ABC CORPORATIONS 1-100 (names being fictitious and unknown)

Third-Party Defendants.

THIS MATTER, having been brought before the Court by Plaintiffs' unopposed Motion seeking final approval of a preliminarily approved class action Settlement, as set forth in the Settlement Agreement[1], and for an award of Attorneys' Fees and Costs, and Class Representative Service Awards, including a Memorandum of Law and Certifications in Support of Plaintiffs' motions, presenting the Settlement Agreement intended to resolve this matter and other supporting materials; and

The Court having entered an Order, on October 21, 2021, after holding a hearing to consider preliminary approval of the proposed Settlement Agreement and related matters, conditionally approving the Settlement Agreement, conditionally certifying a Settlement Class,

[1] The Settlement Agreement is attached as Exhibit A to the Declaration of Austin B. Cohen filed in Support of Plaintiffs' Motion for final approval of the Settlement with all Defendants (the "Cohen Declaration").

conditionally appointing Class Representatives, appointing Settlement Class Counsel, appointing Rust Consulting, Inc. ("Rust") to serve as Settlement Administrator, and approving a proposed Notice Program (the "Preliminary Approval Order"); and

The Court having held a "Final Fairness Hearing" on June 20, 2022, to consider final approval of the Settlement Agreement and related matters; and

The Court, having considered Plaintiffs' motion, the submissions of the Parties relating to the proposed Settlement, any objections, the arguments of counsel at the Final Fairness Hearing as well as the pleadings and papers on file herein, is of the opinion that the Motion for Final Approval of Class Action Settlement should be granted, and that the Motion for Attorneys' Fees, Costs, and Class Representative Service Awards should be granted:

It is therefore on this 24TH day of June, 2022 **ORDERED**: GRANTED

1. The definitions of words and terms contained in the Settlement Agreement are incorporated into this Order.

2. The terms of and findings made in the Preliminary Approval Order are adopted and incorporated into this Order.

3. **Final Class Certification for Settlement Purposes.** Pursuant to New Jersey Rules of Court, the Court finally certifies, for settlement purposes only, the conditionally certified Settlement Class, defined as:

> All current and former owners of the 427 residential properties identified on Exhibit A to the Settlement Agreement (the "Settlement Properties") as of the date that Roche sent regulatory notice letters regarding environmental contamination, determined as of December 23, 2020, but excluding Roche, its parent, subsidiaries, and controlled entities, and government entities. Also excluded from the Settlement Class are former

owners that sold, transferred, or relinquished title to a Settlement Property on or prior to the date that Roche sent its initial regulatory notice to that specific Settlement Property.

4. **Appointment of Class Representatives.** The Court finds that Jacqueline Sutton and Melanie Ryan, who were conditionally appointed to serve as Class Representatives for the Settlement Class, are adequate Class Representatives for the Settlement Class.

5. **Prerequisites for Class Action.** Solely for the purposes of settlement, the Court finds that the prerequisites for a class action under Rule 4:32-1(a) are satisfied for the following reasons:

a. R.4:32-1(a)(1): The Settlement Class appears so numerous that joinder of all members is impracticable;

b. R.4:32-1(a)(2): There appear to be questions of law or fact common to the Settlement Class for purposes of determining whether the Settlement should be approved;

c. R.4:32-1(a)(3): The Class Representatives' claims appear to be typical of the claims of the Settlement Class; and

d. R.4:32-1(a)(4): The Class Representatives and Class Counsel appear to be capable of fairly and adequately protecting the interests of the Settlement Class members in connection with the proposed Settlement.

6. The Court finds, for settlement purposes, that this action is maintainable as a class action under Rule 4:32-2(1)(b) because common questions of law and fact appear to predominate over questions affecting only individual persons in the Settlement Class; and certification of the

Settlement Class appears to be superior to other available methods for the fair and efficient resolution of the claims of Settlement Class members.

7. **Notice of Class Action Settlement to the Settlement Class.** Pursuant to the Preliminary Order, Rust mailed the approved Notice to 684 members of the Settlement Class who could be reasonably identified. Additionally, 592 reminder postcards were sent to Settlement Class members before the claim filing deadline. The approved Summary Notice was published in the December 20, 2021, edition of the Newark Star Ledger. A dedicated settlement website providing more detailed information and access to relevant documents, including the Notice and Claim Form, was established. A dedicated phone line with live operators was also established to handle phone inquiries. The Court finds that the form, content, and method for notifying the Settlement Class complies with the Preliminary Approval Order, meets the requirements of Rule 4:32-2(b) and all Due Process requirements, is the best notice practicable under the circumstances and constitutes due and sufficient notice to all persons entitled to notice. The Court further finds that the Claims Administrator has complied with the Preliminary Approval Order regarding distribution of Notice to the Settlement Class.

8. **Exclusions.** Settlement Class members were notified in the Notice of this class action Settlement of their opportunity to request to be excluded from, or to opt out of, the Settlement Class. No members of the Settlement Class submitted timely written exclusion/opt-out statements to the Claims Administrator. This factor favors approval of the Settlement.

9. **Objections to Settlement.** Settlement Class members were also notified in the Notice of their opportunity to object to the terms of the Settlement by filing written objections with the Court. Not a single Settlement Class member filed an objection. This factor favors approval of the Settlement.

10. **Final Approval of the Settlement and Settlement Agreement.** The Court grants final approval of the proposed Settlement and the Settlement Agreement. The Court finds that settlement on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and that the Settlement is, in all respects, in the best interests of the Settlement Class. Factors considered to assess the fairness, reasonableness, and adequacy of a class action settlement, including the positive reaction of the Settlement Class to the terms of the Settlement, warrant final approval of the Settlement and the Settlement Agreement. The Court further finds that the Settlement set forth in the Settlement Agreement resulted from arm's-length negotiations.

11. **Payment to Settlement Class.** The Court holds that the plan for allocation of the Settlement Fund to members of the Settlement Class as set forth in the proposed plan for allocation prepared by Dr. Robert Simons Ph.D., attached to the Cohen Declaration at Exhibit C, is fair and reasonable. Accordingly, the Claims Administrator shall cause payment to be issued to Settlement Class members in accordance with the terms for calculating the Claimant Allocations set forth in the Settlement Allocation Plan proposed by Dr. Simons and supported by Class Counsel. The Claims Administrator shall mail settlement checks to Settlement Class members at their last known addresses via first class United States mail.

12. **Service Payment to current and former Class Representatives.** Class Counsel have requested service awards in the amount of $20,000 each for the two currently named Settlement Class representatives Jacqueline Sutton and Melanie Ryan, and for service awards in the amount of $10,000 each for the formerly named Class representative Areilly Laszlo and Ezzedin Bautista. Class Counsel's requests for the Service Awards are granted. The Settlement Administrator shall pay these Service Awards from the Settlement Fund before allocating the balance of the fund to Settlement Class members pursuant to Paragraph 11 above.

13. **Attorneys' Fees to Class Counsel.** Class Counsel have applied for an award of attorneys' fees calculated as one-third of the Settlement Fund, plus recovery of identified out-of-pocket costs incurred in this Action. In accordance with the terms of the Settlement Agreement, the Claims Administrator shall calculate and pay the requested attorneys' fees calculated by reference to the Settlement Fund (including interest) before reimbursing out-of-pocket expenses and before paying Service Awards allowed in Paragraph 12 above. Class Counsel are also allowed a payment for out-of-pocket costs in the requested amount of $410,471.58 which includes a *de-minimis* balance of $1,737.51 for expected future expenses, with any unspent remainder of that $1,737.51 being allowed as additional fees upon completion of the Settlement administration.

14. **Settlement Expenses.** All reasonable costs incurred in notifying members of the Settlement Class, as well as administering the Settlement Agreement, shall be paid as set forth in the Settlement Agreement. To the extent that the Settlement Expenses exceed the agreement of Defendant Hoffmann-La Roche, Inc. to separately pay settlement expenses, those costs shall be paid from the Settlement Fund after calculation of Attorneys' Fees as set forth in Paragraph 13 above.

15. **Release of Claims by Settlement Class Members.** In accordance with the terms of the Settlement Agreement and this Final Approval Order, all Settlement Class members have released the Released Parties from any and all Released Claims as defined in Paragraph 19 of the Settlement Agreement. It is expressly intended and understood by the Parties that the Settlement Agreement is to be construed as a complete settlement, accord, and satisfaction of the Settlement Class members' Released Claims.

16. **Dismissal of Action.** The Court dismisses with prejudice all Released Claims on behalf of the Settlement Class.

17. **Binding Effect of Agreement, Order, and Judgment.** The Settlement Agreement and this Final Approval Order are binding on Plaintiffs and on all Settlement Class members and their respective heirs, administrators, executors, representatives, trustees, successors, and assigns, and shall inure to the benefit of Defendants and the other Released Parties, as well as to their respective, heirs, administrators, representatives, trustees, successors, and assigns.

18. **Jurisdiction.** Without affecting the finality of this Order in any way, the Court retains jurisdiction of matters relating to this Order and the administration, interpretation, consummation, and enforcement of the Settlement.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____



Honorable Jeffrey B. Beacham, J.S.C.

UNOPPOSED

Exhibit 10

Caution
As of: March 25, 2026 6:41 PM Z

In re Merck & Co. Vytorin ERISA Litig.

United States District Court for the District of New Jersey

February 9, 2010, Decided; February 9, 2010, Filed

Civil Action No. 08-CV-285 (DMC)

Reporter
2010 U.S. Dist. LEXIS 12344 *; 2010 WL 547613

IN RE MERCK & CO., INC. VYTORIN ERISA LITIGATION THIS DOCUMENT RELATES TO: ALL CASES

Notice: NOT FOR PUBLICATION

Prior History: *In re Merck & Co. Vytorin ERISA Litig., 2009 U.S. Dist. LEXIS 78681 (D.N.J., Aug. 31, 2009)*

Core Terms

settlement, lodestar, attorney's fees, factors, weighs, class action, hourly, costs, class certification, multi-district, expenses, cases, risks, reimbursement, Plaintiffs', expended, purposes, ranges, fee award, Subclass, billion, non-weighted, approving, consumers, documents, billing rate, class member, unreimbursable, negotiations, expenditure

Counsel: **[*1]** For ELLIS EISEN, Objector: ELLIS EISEN, LEAD ATTORNEY, DOLCHIN SLOTKIN & TODD, PHILADELPHIA, PA.

For BLUE CROSS BLUE SHIELD OF ALABAMA, BLUE CROSS BLUE SHIELD OF MICHIGAN, Objectors: AUDREY R. CHANNELL, KIMBERLY R. WEST, LEAD ATTORNEYS, WALLACE, JORDAN, RATLIFF & BRANDT, LLC, BIRMINGHAM, AL; PAMELA SLATE, LEAD ATTORNEY, SLATE, CARTER & COMER LLC, MONTGOMERY, AL.

For Sam Cannata, Dennis P Levin, Objectors: STEPHEN TSAI, LEAD ATTORNEY, STEPHEN TSAI LAW OFFICES, BRIDGEWATER, NJ.

For RITA POLK, in behalf of herself and all others similarly situated, Plaintiff: ANDREW R. WOLF, LEAD ATTORNEY, GALEX WOLF LLC, NORTH BRUNSWICK, NJ; BARRY R. EICHEN, LEAD ATTORNEY, EICHEN, LEVINSON & CRUTCHLOW, LLP, EDISON, NJ; BRYAN L. CLOBES, LEAD ATTORNEY, CAFFERTY FAUCHER LLP, PHILADELPHIA, PA; CHRISTOPHER A. SEEGER, LEAD ATTORNEY, SEEGER WEISS LLP, NEW YORK, NY; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; MICHAEL J. WILLNER, TIMOTHY FRASER, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, PHILADELPHIA, PA; STEPHEN A. WEISS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SEEGER WEISS LLP, NEW YORK, NY; ADAM J LEVITT, COUNSEL NOT ADMITTED TO USDC-NJ **[*2]** BAR, CHICAGO, IL; LINDSEY H. TAYLOR, CARELLA BYRNE BAIN GILFILLAN CECCHI STEWART & OLSTEIN, PC, ROSELAND, NJ.

For MARC CRAWFORD, Plaintiff: ANDREW R. WOLF, LEAD ATTORNEY, GALEX WOLF LLC, NORTH BRUNSWICK, NJ; DAVID J. COHEN, LEAD ATTORNEY, SALTZ MONGELUZZI BARRETT & BENDESKY, PHILADELPHIA, PA.

For CHARLES D. MAURER, SIDNEY COOPER, Plaintiffs: ALLYN ZISSEL LITE, BRUCE DANIEL GREENBERG, LEAD ATTORNEYS,

LITE DEPALMA GREENBERG, LLC, NEWARK, NJ; ANDREW R. WOLF, LEAD ATTORNEY, GALEX WOLF LLC, NORTH BRUNSWICK, NJ; JASON ELLIOT MACIAS, LEAD ATTORNEY, LITE, DEPALMA, GREENBERG, LLC, NEWARK, NJ.

For PLUMBERS AND PIPEFITTERS LOCAL 572 HEALTH AND WELFARE FUND, Plaintiff: ANDREW R. WOLF, LEAD ATTORNEY, GALEX WOLF LLC, NORTH BRUNSWICK, NJ; EDITH M. KALLAS, JOE R. WHATLEY, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, NEW YORK, NY; JAMES GERARD STRANCH, III, JAMES GERARD STRANCH, IV, JOEY P. LENISKI, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, NASHVILLE, TN; MITCHELL MARK BREIT, LEAD ATTORNEY, WHATLEY, DRAKE & KALLAS, LLC, NEW YORK, NY.

For ANNA IANNUZZI, Plaintiff: DANIEL R. LAPINSKI, LEAD ATTORNEY, WILENTZ, GOLDMAN & SPITZER, PC, WOODBRIDGE, NJ; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA **[*3]** BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For PEGGY LEMASTER, Plaintiff: DANIEL R. LAPINSKI, LEAD ATTORNEY, WILENTZ, GOLDMAN & SPITZER, PC, WOODBRIDGE, NJ.

For ALMA HOOKS, Plaintiff in civ. 08-2603, BARRY ZIMMERMAN, Plaintiff in 08-2503, JUNE WILKINS, Plaintiff in 08-2554, Thomas L. Sizemore, Plaintiff in 08-2448, Donald Pierce, Plaintiff in 08-2867, BERNARD PHELAN, Plaintiff in 08-3520, Mitchell Peiser, Plaintiff in 08-2552, JANET LAMPING, Plaintiff in 08-2739, Susan Bodnar, Plaintiff in 08-2482, Sharon Loeffler, Plaintiff in 08-2510, GILBERT FRIMET, Plaintiff in 08-3440, Elaine Hawk, Plaintiff in 08-2609, Plaintiffs: STEVEN R. MAHER, LEAD ATTORNEY, MAHER LAW FIRM, WINTER PARK, FL; THOMAS V. GIRARDI, LEAD ATTORNEY, GIRARDI KEESE, LOS ANGELES, CA.

For SHARON PURVIS, Plaintiff in civ. 08-2603, Plaintiff: STEVEN R. MAHER, LEAD ATTORNEY, MAHER LAW FIRM, WINTER PARK, FL.

For ASEA/AFSCME LOCAL 52 HEALTH BENEFITS TRUST, LUCIANO MARIONI, Claudia Edwards, Plaintiffs: BARRY ROBERT HIMMELSTEIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, NEW YORK, NY; DANIEL EDWARD SELTZ, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LIEFF CABRASER HEIMANN & BERNSTEIN, NEW YORK, NY; **[*4]** ELIZABETH J. CABRASER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SAN FRANCISCO, CA.

For FIRE & POLICE RETIREE HEALTH CARE FUND OF SAN ANTONIO, Plaintiff: BARRY ROBERT HIMMELSTEIN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, NEW YORK, NY; DANIEL EDWARD SELTZ, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LIEFF CABRASER HEIMANN & BERNSTEIN, NEW YORK, NY; ELIZABETH J. CABRASER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SAN FRANCISCO, CA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For IBEW LOCAL NO. 164 WELFARE FUND, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; KIRK EMERY CHAPMAN, ROLANDO G. MARQUEZ, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MILBERG LLP, NEW YORK, NY; ROSS BELTON BROOKS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, NEW YORK, NY.

For NATIONAL JOINT POWER ALLIANCE, Plaintiff: RONALD S. GOLDSER, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO

USDC-NJ BAR, MINNEAPOLIS, MN.

For Evelyn Igou, Angela Franklin, Plaintiffs: JAMES ROBERT GRISHAM, JASON A. STUCKEY, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, GULAS & **[*5]** STUCKEY PC, BIRMINGHAM, AL.

For COUNTY OF SUFFOLK, NEW YORK, In Civ. 08-3711, Plaintiff: ABRAM I. BOHRER, LEAD ATTORNEY, DANKNER & LUKEMAN, ENGLEWOOD, NJ; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

Panayiotis Balaovras, Plaintiff, Pro se.

For Jeffrey D Morgan, CIV. 08-2481, Plaintiff: WILLIAM ANGUS MCKINNON, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MCGOWAN, HOOD & FELDER, LLC, ROCK HILL, SC.

For Ann Hildreth, Plaintiff: JOSEPH GORDON STEWART, JR., LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, MONTGOMERY, AL.

For Iley Joe Payne, Plaintiff: APRIL C. LADNER, DAVID L. MARTINDALE, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, LAUREL, MS.

For GOVERNMENT EMPLOYEES HEALTH ASSOCIATION, INC., Daniel Tollefson, Frances Weiland, DONALD VARINO, ROBERT LOVE, ROBERT MASTONDREA, CHARLES MILLER, ROY COSGROVE, Kenneth Bever, Teamsters Healthcare, Pipefitters Local 537 Trust Fund, Plaintiffs: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For MIDWESTERN TEAMSTERS HEALTH & WELFARE FUND, UFCW & Employers Arizona Health & Welfare Trust, Plaintiffs: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA **[*6]** BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; RALPH N. SIANNI, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WILMINGTON, DE.

For Louisiana Health Insurance Indemnity Company d/b/a Bluecross Blueshield of Louisiana, Plaintiff: DOUGLAS ROBERT PLYMALE, JAMES R DUGAN, II, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, NEW ORLEANS, LA; JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For Helen Aronis, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; KIRK J. WOLDEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SACRAMENTO, CA.

For GLENDA MORGAN, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ; STEVEN R. MAHER, LEAD ATTORNEY, MAHER LAW FIRM, WINTER PARK, FL; THOMAS V. GIRARDI, LEAD ATTORNEY, GIRARDI KEESE, LOS ANGELES, CA.

For JOHN STANLEY, Plaintiff in 08-2483, Plaintiff: THOMAS V. GIRARDI, LEAD ATTORNEY, GIRARDI KEESE, LOS ANGELES, CA; STEVEN R. MAHER, MAHER LAW FIRM, WINTER PARK, FL.

Jacqueline Schenke, Plaintiff, Pro se.

For CHARLES SWANSON, Plaintiff in 08-2006, Plaintiff: BENJAMIN A. BERTRAM, **[*7]** J. SCOTT BERTRAM, LEAD ATTORNEYS, COUNSEL NOT ADMITTED TO USDC-NJ BAR, KANSAS CITY, MO; STEVEN R. MAHER, MAHER LAW FIRM, WINTER PARK, FL.

MICHAEL JURICH, Plaintiff, Pro se.

For Beverly Walden, Plaintiff in 08-2500, Plaintiff:

BENJAMIN A. BERTRAM, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERTRAM & GRAF LLC, KANSAS CITY, MO; J. SCOTT BERTRAM, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERTRAM GRAF LLC, KANSAS CITY, MO; STEVEN R. MAHER, MAHER LAW FIRM, WINTER PARK, FL.

Liaison Counsel for Plaintiffs, Plaintiff, Pro se.

For BRUCE J. BITTER, DUANE W. LOWRIE, Plaintiffs: BENJAMIN A. BERTRAM, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERTRAM & GRAF LLC, KANSAS CITY, MO; J. SCOTT BERTRAM, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERTRAM GRAF LLC, KANSAS CITY, MO; J. STEWART WHITE, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, WHITE, MEANY & WETHERALL, LLP, RENO, NV.

For Anthony Neland, Plaintiff: BENJAMIN A. BERTRAM, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERTRAM & GRAF LLC, KANSAS CITY, MO; J. SCOTT BERTRAM, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, BERTRAM GRAF LLC, KANSAS CITY, MO.

For GEORGE ARTENSTEIN, Plaintiff: KIRK J. **[*8]** WOLDEN, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SACRAMENTO, CA.

Mahzer Jaweed, Plaintiff, Pro se.

For Stephen Greenwell, Consol Plaintiff: SCOTT WM. WEINSTEIN, COUNSEL NOT ADMITTED TO USDC-NJ BAR, FT. MYERS, FL.

For Alexis Figueroa, James Cumba, Consol Plaintiffs: ERIC M. QUETGLAS, LEAD ATTORNEY, COUNSEL NOT ADMITTED TO USDC-NJ BAR, SAN JUAN, PR.

For SCHERING-PLOUGH CORPORATION, MERCK & CO., INC., Defendants: CHRISTOPHER J. MICHIE, LEAD ATTORNEY, DECHERT LLP, PRINCETON, NJ; EZRA D. ROSENBERG, LEAD ATTORNEY, DECHERT LLP, PRINCETON PIKE CORPORATE CENTER, PRINCETON, NJ; REGAN H. CROTTY, LEAD ATTORNEY, DECHERT LLP, PRINCETON CORPORATE CENTER, PRINCETON, NJ; WILFRED P. CORONATO, LEAD ATTORNEY, HUGHES, HUBBARD & REED LLP, JERSEY CITY, NJ.

For GOVERNMENT EMPLOYEES HEALTH ASSOCIATION, INC., Defendant: JAMES E. CECCHI, LEAD ATTORNEY, CARELLA BYRNE CECCHI OLSTEIN BRODY & AGNELLO, P.C., ROSELAND, NJ.

For MERCK/SCHERING-PLOUGH PHARMACEUTICALS, Defendant: CHRISTOPHER J. MICHIE, LEAD ATTORNEY, DECHERT LLP, PRINCETON, NJ.

Judges: Hon. Dennis M. Cavanaugh, United States District Judge.

Opinion by: Dennis M. Cavanaugh

Opinion

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon motion for final approval of **[*9]** class certification and final approval of the proposed Settlement and Release Agreement and by Co-Lead Class Counsel, seeking an award of attorneys' fees and reimbursement of expenses. After considering the submissions of the parties, and based upon the following, it is the decision of this Court for the reasons herein expressed, class certification is **granted** for settlement purposes, approval of the Settlement Agreement and Release is **granted** and the motion to award attorneys' fees and reimbursement of costs is **granted.**

I. BACKGROUND

A. Factual

A joint venture arose between Merck & Co., Inc. ("Merck") and Schering-Plough Corporation ("Schering-Plough") (collectively, "Defendants") when Merck's patented drug Zocor was used in combination with another cholesterol lowering drug developed by Schering-Plough, Zetia, to create Vytorin. (Plaintiffs' Complaint ("Pl. Compl."), PP 4, 8). Vytorin and Zetia, patented by Schering-Plough, are marketed and sold by Merck/Schering-Plough Pharmaceuticals ("MSP"). The Food and Drug Administration ("FDA") approved each drug for the lowering of LDL (or "bad") cholesterol. (See Pl. Compl., PP 5, 7). Vytorin, however, was not approved for the reduction of **[*10]** heart disease. (Pl. Compl., P 10). Plaintiffs' Master Complaint asserts that Vytorin was marketed as the new and improved Zocor and as effective in reducing cholesterol along with arterial plaque, known to cause heart attacks and other adverse cardiac conditions. (Pl. Compl., PP 9, 11).

In 2002, a study was performed called "Effect of Combination Exetimibe [sic] and High-Dose Simvastatin v. Simvastatin Alone on the Atherosclerotic Process in Patients with Heterozygous Familial Hypercholestorolemia." ("ENHANCE"). (Pl. Compl., P 12). Zetia contains ezetimibe alone while Vytorin consists of both ezetimibe and simvastatin. The Master Complaint asserts that the purpose of the study was to prove that "Vytorin's combination of Zetia and Zocor stops or reduces the growth of fatty arterial plaque better than Zocor alone." (Pl. Compl., P 12). However, the study concluded not only that Vytorin was "less effective in reducing arterial plaque build-up than Zocor, but also that Vytorin posed serious safety concerns." **[*11]** (Pl. Compl., P 13). Plaintiffs allege that Defendants had financial incentive to and actively sought to conceal the results of this study until January 14, 2008. (Pl. Compl., P 14-16).

Specifically, Merck's 2006 and 2007 10K Forms reveal global Vytorin sales for 2004, 2005, 2006 and 2007 at $ 132.4 million, $ 1.028 billion, $ 1.995 billion and $ 2.779 billion, respectively. (Pl. Compl., P 15). With respect to Zetia, global sales in those same years were respectively, $ 1.053 billion, 1,379 [sic] billion, $ 1.929 billion and $ 2.407 billion. (Pl. Compl., P 15). Further, Vytorin and Zetia are alleged to account for 60%-70% of Schering-Plough's earnings per share. (Pl. Compl., P 15).

Plaintiffs' core allegations concerning deceptive advertising and concealment are disputed by Defendants. Defendants contend that drug advertising and promotion was consistent with product labeling as approved by the FDA. Further, Defendants contend that the ENHANCE study involved a small group of patients afflicted with a preexisting condition only affecting 0.2 percent of the population and as a result, the findings cannot be extrapolated to the population of Vytorin and Zetia purchasers as a whole. Indeed, **[*12]** Defendants assert that the ENHANCE study demonstrates reductions in LDL. Finally, Defendants suggest that problems with the quality of digital images generated during the study delayed the release of the study results.

B. Procedural

Plaintiffs filed an initial complaint in this multi-district matter on January 15, 2008. On April 8, 2008, the Judicial Panel on Multi-district Litigation centralized all federal litigation involving Vytorin and Zetia before this Court. By way of case management order, entered by this Court on June 4, 2008, an organizational structure consisting of a Plaintiffs' Steering Committee, an Executive Committee of Plaintiffs' Steering Committee, Consumer Liaison to Executive Committee and appointment of Co-Liaison Counsel was instituted. The present litigation consists of more than 140 putative class actions seeking certification of nationwide and state-wide classes on behalf of consumers and third party payors ("TPPs").

An Amended and Proposed Class Action Master Complaint ("Master Complaint") was filed on

September 25, 2008. The Master Complaint asserts legal and equitable claims pursuant to statutory and state law. By way of response, Defendants filed a motion **[*13]** to dismiss the Master Complaint on December 8, 2008. This motion was later stayed pending the outcome of settlement negotiations instituted in May 2009. A motion for preliminary approval of settlement was filed on September 8, 2009. On September 17, 2009, this Court entered an order granting preliminary approval of settlement, preliminary class certification and approving class notice. On February 3, 2010, a motion for final settlement approval was filed. On February 8, 2010, a fairness hearing concerning the settlement was held before this Court.

Pursuant to the arms length settlement negotiations beginning in 2009, the proposed settlement agreement identifies a Master Class and two Subclasses. The Master Class includes:

> [a]ll individuals and entities in the United States and its territories who, for purposes other than resale, purchased, reimbursed, used and/or paid for VYTORIN or ZETIA during the period from November 1, 2002 through [September 17, 2009]. For purposes of the Class definition, individuals and entities "purchased" VYTORIN or ZETIA if they paid or made a co-payment for some or all of the purchase amount.

The Consumer Subclass includes:

> [a]ll individual persons in the United **[*14]** States and its territories who, for purposes other than resale, purchased, reimbursed, used and/or paid for VYTORIN or ZETIA during the period from November 1, 2002 through [September 17, 2009]. For purposes of the Subclass definition, individuals "purchased" VYTORIN or ZETIA if they paid or made a co-payment pursuant to the terms of a health insurance plan, for some or all of the purchase amount.

The Third Party-Payor Subclass includes:

> [a]ll entities in the United States and its territories that, for purposes other than resale, purchased, reimbursed and/or paid for VYTORIN or ZETIA during the period from November 1, 2002 through [September 17, 2009]. Such entities include, but are not limited to, all self-funded employer plans, private insurance providers, managed care organization, insurance companies, employee benefit plans, health and welfare funds, union plans, workers compensation entities, HMOs, PPOs, entities with self-funded plans, and any other entity who is a party to a contract, issuer of policy, or sponsor of a plan, and is at risk, under such policy, contract, or plan, to pay or reimburse all or part of the cost of prescription drugs dispensed to covered natural persons. **[*15]** [1]

Thirty percent (30%) of the total settlement or $ 12.45 million dollars has been allocated to pay consumer subclass members. The remaining seventy percent (70%) has been allocated between TPPs and IRHPs, each initially receiving $ 14.525 million. The allocation plan does not permit "spillovers." That is, amounts paid to consumers will not be used to satisfy claims of TPPs or IRHPs.

II. LEGAL STANDARD

A. SETTLEMENT PLAN AND ALLOCATION

1. Satisfaction of Rule 23 Criteria for Class Certification

The Court must certify the Master Class and Subclasses pursuant to the requirements of *Federal Rule of Civil Procedure 23(a)* and *(b)*. See *Anchem Prod., Inc. v. Windsor, 521 U.S. 591, 621-22, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. In determining whether certification is appropriate,

---

[1] A separate settlement agreement has been entered into with a group of independently represented health plans ("IRHPs"), conferring an award of $ 14.525 million on members of that subclass.

this Court may take the Settlement Agreement into consideration. See *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 308 (3d Cir. 1998)* cert denied, *525 U.S. 1114, 119 S. Ct. 890, 142 L. Ed. 2d 789 (1999)*.

i. *Rule 23(a)* Requirements

To certify a class, *Rule 23(a)* requires **[*16]** that there be numerosity, commonality, typicality and adequacy of representation. *Fed. R. Civ. P. 23(a)*. Here, the numerosity requirement is met given that the multi-district action accounts for over 140 putative class actions and includes over 100 Plaintiffs in the constituent actions. Further, at the hearing before this Court, parties projected that the prospective class of Plaintiffs could range anywhere from 10,000 members to 100,000 members. Joinder of this many Plaintiffs is clearly not feasible. See *Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001)*.

Commonality exists because there are common questions of law and fact. *Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*. Plaintiffs' claims arise from a common nucleus of operative facts, namely, Defendants' alleged deceptive business practices in marketing the drugs while allegedly suppressing the results of the ENHANCE study. Furthermore, there is commonality among the questions of law raised because the same core legal and equitable claims apply to all Plaintiffs, including claims asserted pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the New Jersey Consumer Fraud Act.

Typicality **[*17]** is satisfied so long as the interests of all plaintiffs are "aligned." *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir. 2004)*. So long as "the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is usually established regardless of factual differences." *Newton v. Merrill Lynch Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183-84 (3d Cir. 2001)*. Specifically, the claims of the Lead Plaintiffs and of the Class arise from the same alleged deceptive business practices by Defendants and therefore, their interests are properly aligned.

"The adequacy of representation inquiry has two components designed to ensure that absentees' interests are fully pursued. First, the interests of the named plaintiffs must be sufficiently aligned with those of the absentees." *Georgine v. Amchem Products, 83 F.3d 610, 630 (3d Cir. 1996)* (internal citation omitted). "This component includes an inquiry into potential conflicts among various members of the class because the named plaintiffs' interests cannot align with those of absent class members if the interests of different class members are not themselves in alignment. Second, class **[*18]** counsel must be qualified and must serve the interests of the entire class." *Id.* While Plaintiffs acknowledge a potential disparity given that some Plaintiffs are consumers and some are TTPs, Plaintiffs assert any potential conflict that may have arisen has been remedied with the implementation of separate subclasses, individually representing any unique interests of consumers and any unique interests of TTPs. Nonetheless, the overarching interests are aligned as outlined above. Further, any unnamed Plaintiffs are likely to fall under one of the subclasses and therefore, those potential Plaintiffs interests are adequately represented. The adequacy component also requires that Plaintiffs be represented by qualified counsel. The firms representing Plaintiffs are known nationally and well reputed with a focus in class action and multi-district litigation. Therefore, the requirement of adequate representation is satisfied.

For these reasons, the requirements of 23(a) for class certification are satisfied in this case.

ii. *Rule 23(b)* Requirements

Next, the Court must find that the class fits within one of the three categories of class actions set forth in *Fed. R. Civ. P. 23(b)*. In a case where **[*19]** money damages predominate, class

certification is appropriate where common questions predominate and class resolution is the superior method for the fair and efficient adjudication of the controversy. As discussed above, common questions of fact and law predominate in this case. Furthermore, for purposes of *Rule 23(b)*, these "questions of law or fact common to members of the Class predominate over any questions affecting only individual members." *Fed. R. Civ. P. 23(b)(3)*. Specifically, each Class Member's claims depend upon resolution of the same factual and legal questions regarding the Defendants' alleged deceptive business practices with respect to the efficacy and safety of a drug. See *Warfarin, 391 F.3d at 528*; *In re Cmty. Bank of N. Virginia, 418 F.3d 277, 309 (3d Cir. 2005)* (cases where Third Circuit found the predominance requirement satisfied because the claims arose from Defendants' same fraudulent scheme).

Even though the laws of various states differ as to the claims raised by these multi-district Plaintiffs, this Court still finds that there is *Rule 23(b)* predominance. The Third Circuit has noted that "the same concerns with regards to case manageability that arise with **[*20]** litigation Classes are not present with Settlement Classes, and thus these variations [in state laws] are irrelevant to certification of a settlement class." *Warfarin, 391 F.3d at 529*. Furthermore, the same common issues regarding Defendants' business practices still lie at the core of Class Members' claims.

Finally, it is clear that approving the settlement is a superior method of resolving these claims. Approving this Settlement Agreement is a more efficient and less risky means of addressing Class Members' grievances.

Based on the foregoing, the proposed Settlement Class is certified pursuant to *Rule 23(b)(3)*.

2. Satisfaction of *Rule 23(e)* Standard

Federal Rule of Civil Procedure 23(e), provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs." *Fed. R. Civ. P. 23(e)*. In determining whether to approve a class action settlement pursuant to *Rule 23(e)*, "'the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members'" *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 785 (3d Cir.1995)* **[*21]** (quoting *Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975)*, cert. denied, *423 U.S. 864, 96 S. Ct. 124, 46 L. Ed. 2d 93 (1975)* (citation omitted)).

Before giving final approval to a proposed class action settlement, the Court must determine that the settlement is "fair, adequate, and reasonable." *Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588 (3d Cir. 1999)*; *Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 965 (3d Cir.1983)*. In Girsh v. Jepson, the Third Circuit identified nine factors, so-called "Girsh factors," that a district court should consider when making this determination:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
>
> (7) the ability of the defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery;
>
> (9) the range of reasonableness of the

settlement fund to a possible recovery in light of all the attendant risks of litigation.

521 F.2d 153, 157 (3d Cir.1975). **[*22]** "These factors are a guide and the absence of one or more does not automatically render the settlement unfair." *In re American Family Enterprises, 256 B.R. 377, 418 (D.N.J. 2000)*. Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under Girsh. See *In re Orthopedic Bone Screw Prod. Liab. Litig., 176 F.R.D. 158, 184 (E.D.Pa.1997)*; see also *In re AT&T Corp. Sec. Litig., 455 F.3d 160 (3d Cir. 2006)*. [2] In sum, the Court's assessment of whether the settlement is fair, adequate and reasonable is guided by the *Girsh* factors, but the Court is in no way limited to considering only those enumerated factors and is free to consider other relevant circumstances and facts involved in this settlement.

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Karcich v. Stuart (In re Ikon Office Solutions, Inc., Sec. Litig.), 194 F.R.D. 166, 184 (E.D. Pa. 2000)* (citations and internal quotations omitted); see also *Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 964 (3d Cir. 1983)* ("The Court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.").

[2] District courts should also consider other relevant and appropriate factors. The court in Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), suggested that district courts may consider "the maturity of the underlying substantive issues . . . the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial **[*23]** on the merits of liability and individual damages . . . whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable." *148 F.3d 283, 323 (3d Cir. 1998)*.

B. JUDICIAL APPROVAL OF ATTORNEYS' FEES

The awarding of fees is within the discretion of the court, so long as the court employs the proper legal standards, follows the proper procedures, and makes findings of fact that are not clearly erroneous. **[*24]** *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 727 (3d Cir. 2001)*. Notwithstanding this deferential standard, a district court is required to clearly articulate the reasons that support its conclusion. *In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 301 (3d Cir. 2005)*. The Third Circuit Court of Appeals identified several factors--the Gunter factors--that a district court should consider. These factors include:

> (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 plaintiff's counsel; and (7) the awards in similar cases.

Rite Aid, 396 F.3d at 301 (citing *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)*). The Third Circuit identified three additional factors that apply in percentage of fee awards, including:

> (8) the value of benefits attributable to the efforts of class counsel relative to the efforts of other groups, such as government **[*25]** agencies conducting investigations, (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained, and (10) any innovative terms of settlement.

In re Diet Drugs (Phentermine/Flenfuramine/Dexflenfuramine)

Products Liab. Litig., 582 F.3d 524, 541 (3d Cir. 2009)

The Court need not apply these fee award factors in a formulaic way. Certain factors may be afforded more weight than others. *Rite Aid, 396 F.3d at 301*. The Third Circuit emphasized in Rite Aid, however, that the district court must engage in a robust assessment of these factors. *396 F.3d at 302*; see also *Gunter, 223 F.3d at 196* (vacating district court's ruling because the fee-award issue was resolved in a cursory and conclusory fashion). While the Third Circuit has not adopted a particular standard for fee awards in common fund cases, the Third Circuit acknowledges that fee awards generally range from 19% to 45%. *In re General Motors Corp. Pickup Fuel Tank Products Liability Litigation, 55 F.3d 768, 822 (3d Cir. 1995)*.

III. DISCUSSION

A. SETTLEMENT PLAN AND ALLOCATION - APPLICATION OF THE GIRSH FACTORS

The Court will consider the proposed **[*26]** settlement in light of the *Girsh* factors. The balance of factors, here, weighs in favor of approval.

1. Complexity, Expense and Likely Duration of Litigation

This factor is concerned with assessing the "probable costs, in both time and money, of continued litigation." *In re Cendant Corp. Litig., 264 F.3d 201, 234 (3d Cir. 2001)*. This litigation has been ongoing for more than two years. Undoubtedly, without settlement, the continued costs and time required to proceed through discovery, pre-trial matters, trial and post-trial matters would be great in this multi-district action.

Additionally, there will necessarily be significant delay in recovery if this case is tried. See, e.g., *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 536 (3d Cir. 2004)*; *Weiss v. Mercedes-Benz of N. Am., Inc., 899 F. Supp. 1297, 1301 (D.N.J. 1995)*. In contrast, the settlement provides immediate recovery of more than $ 40 million dollars, less attorneys' fees and expenses. The first *Girsh* factor weighs in favor of approving the settlement.

2. Reaction of Class to Settlement

This factor requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction **[*27]** of the class to the settlement is favorable. The Court also notes that the second *Girsh* factor is especially critical to its fairness analysis, as the reaction of the class "is perhaps the most significant factor to be weighed in considering its adequacy." *Sala v. National R.R. Passenger Corp., 721 F. Supp. 80, 83 (E.D. Pa. 1989)*; *Fanning v. AcroMed Corp. (In re Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 185 (E.D. Pa. 1997)* (stating that a "relatively low objection rate militates strongly in favor of approval of the settlement" (internal citations omitted)). [3]

Few objections have been raised. As stated on the record, before this Court, all objections have been resolved and withdrawn. Therefore, this factor

---

[3] Originally, Blue Cross Blue Shield of Alabama and Michigan filed objections, including a typographical error objection, an inequitable distribution of the fund objection, and overly broad language objection to Article XXII, which subsequently were resolved and withdrawn. By way of Stipulation, dated February 3, 2010, these objections were resolved. Class Members Sam A. Cannata and Dennis P. Levin originally filed objections and subsequently, withdrew those objections raised with respect to attorneys' fees., contingent upon a reduction in reimbursement costs. In withdrawing the original objections, the counsel **[*28]** for Cannata and Levin represent to the Court that the Class Counsel has agreed to "reduce its request for reimbursement of expenses by the amount of Fifty-Five thousand dollars ($ 55,000) representing a portion of the amount claimed for Internet Research and Internal Copying Expenses." The reduction was applied to an original reimbursement request of $ 196,186.00 that is now a request for $ 141,186.00. Further, it is represented that a reasonable fee is to be paid from the Class Counsel fee award to the Objectors' Counsel, consisting of a group of four law firms. Assuming, without concluding, all parties agree, the motion to withdraw the former objections is granted. Lastly, it has been represented to this Court by Class Counsel that an objection by Consumer Class Member, Ellis Eisen, Esq. has been withdrawn.

weighs strongly in favor of settlement.

3. Stage of Proceedings and Amount of Discovery Completed

Pursuant to the third *Girsh* factor, the Court must consider the "degree of case development that Class Counsel have accomplished prior **[*29]** to Settlement," including the type and amount of discovery already undertaken. *GMC Pick-Up Truck, 55 F.3d at 813*; see also *Prudential, 148 F.3d at 319*. In short, under this factor the Court considers whether the of amount of discovery completed in the case has permitted "counsel [to have] an adequate appreciation of the merits of the case before negotiating." *Prudential, 148 F.3d at 319*; See also *AT&T, 455 F.3d at 167* (noting extent of discovery).

Class counsel has reviewed in excess of 1.2 million documents pertaining to Defendants' marketing practices, Defendants' interaction with governmental agencies, circumstances surrounding the ENHANCE study as well as other clinical and regulatory documents. Additionally, Class Counsel has conducted informal discovery, obtained information from named Plaintiffs in this matter, consulted expert witnesses, retained private investigators and prepared relevant legal documents in response to a motion to dismiss filed before this Court. It is clear that Class Counsel had an adequate appreciation of the facts in this matter before proceeding with settlement negotiations. This factor weighs in favor of settlement approval.

4. Risks **[*30]** of Establishing Liability

A trial on the merits always entails considerable risk. *Weiss, 899 F. Supp. at 1301*. "By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 814 (3d Cir. 1995)*.

Risk is inherent in litigation. In this case, the risks of litigation are great because Plaintiffs' claims involve complex and contested questions of law and fact. Previously, Defendants filed a motion to dismiss the Master Complaint demonstrating that, in the absence of settlement, Defendants will continue to zealously advocate in defense of their products. Further, at the fairness hearing conducted before this Court, Defendants reasserted their belief that this motion would be otherwise meritorious in the absence of settlement, citing a number of cases in support of that motion. Although Plaintiffs assert that their claims are legally sound, indeed, they acknowledge that FDA statements in support of the efficacy of Defendants' drugs pose a level of risk. Therefore, **[*31]** this factor weighs in favor of settlement approval.

5. Risks of Establishing Damages

The fifth Girsh factor "attempts to measure the expected value of litigating the action rather than settling it at the current time." *GMC, 55 F.3d at 816*. Ultimately, a battle of experts will ensue presenting differing damages calculations and "[a] jury would therefore be faced with competing expert opinions representing very different damage estimates . . . adding further uncertainty." *In re Rent-Way Sec. Litig., 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003)*. Even if Plaintiffs successfully established causation at trial, post-trial motions and appeals present added risk. *In re Apollo Group, Inc. Sec. Litig., 2008 U.S. Dist. LEXIS 61995, at *1-4 (D. Ariz. Aug. 4, 2008)* (granting Rule 50(b) motion, following lengthy trial, notwithstanding the $ 280 million jury verdict). This uncertainty of the final damage award along with the attendant risk of successfully establishing damages weighs in favor of settlement approval.

6. Ability of Defendants to Maintain Class Certification Through Trial

The standard for certification is the same for settlement classes as it is for conventional classes. *GMC, 55 F.3d at 817*. **[*32]** "*Rule 23(b)* does not require that class members share every factual and legal predicate to meet the commonality and

typicality standards." Id. Further, certain issues such as damages can be tried on an individual basis. Id. If certification is precluded, alternatives, such as multi-district litigation, exist helping to retain some of the substantive advantages of class certification. Id.

Plaintiffs present a compelling argument that if the class is not certified here, then few if any members of the litigation will have financial incentive or actual means to proceed in individual suits. Further, Plaintiffs argue that settlement class certification eliminates some of the other hurdles present in class action litigation, including conflict or choice of law issues, manageability issues and concerns with respect to injury and causation elements of individual claimants. Given Plaintiffs' recognition of the particular issues that arise with respect to class certification for purposes of litigation, it seems that this factor weighs in favor settlement approval.

7. Ability of Defendants to Withstand a Greater Judgment

To evaluate whether the Settlement Agreement is fair to Plaintiffs, the Court **[*33]** must evaluate whether Defendants could withstand a judgment much greater than the amount of the settlement. See *Cendant, 264 F.3d at 240*; *Prudential, 148 F.3d at 321-22*; *GMC, 55 F.3d at 818*. While Plaintiffs recognize that Defendants potentially have resources to withstand a greater judgment, this factor is not dispositive. See *GMC, 55 F.3d at 818*. Given that Defendants' global sales are reported in the billions of dollars, there is strong indication that Defendants can potentially withstand a greater judgment. This factor does not weigh in favor of settlement approval.

8/9. Reasonableness of the Settlement Fund in Light of the Best Possible Recovery, and in Light of the Attendant Risks of Litigation

"According to Girsh, courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor)." *GMC, 55 F.3d at 806*. Neither party presents the Court with an estimate of prospective recovery. if the litigation concluded with a successful result for Plaintiffs. Assuming, without concluding, that Plaintiffs would prevail at trial, then it **[*34]** appears that recovery would prove substantial in light of the billions of dollars grossed from global sales. Although a concrete estimate would enable the Court to conduct a more refined analysis, the potential costs of continued litigation along with potential recovery favors settlement, especially by way of comparison to settlement recovery in the amount of $ 41.5 million dollars.

B. ATTORNEYS' FEES

1. The Gunter/Prudential Factors

Consideration of the Gunter factors weighs in favor of the reasonableness of the attorneys' fees in this common fund class action settlement. Co-Lead Class Counsel seeks 33<1/3> % of the value of the Settlement as fees, totaling $ 13,819,500.00, plus $ 141,186.00 as reimbursement for the expenses and costs actually incurred.

First, courts consider the size of the fund created and the number of persons benefitted by the settlement. "As a general rule, as the size of the fund increases, the appropriate percentage to be awarded to counsel decreases." *Chemi v. Champion Mortgage, 2009 U.S. Dist. LEXIS 44860, *31 (D.N.J. May 26, 2009)* (citing *In re Cendant Corp., 232 F. Supp. 2d 327, 337 (D.N.J. 2002)*). "This rule is based on the premise that, 'in many instances[,] **[*35]** the increase in recovery is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.'" Id. The Third Circuit appears to recognize, or at least, implicitly endorse recognition of, $ 100,000,000.00 as a benchmark of a large settlement. Id. (citing Welch *& Forbes, Inc. v. Cendant Corp., 243 F.3d 722, 736-37 n.19 (3d Cir. 2001)*).

In the instant case, the settlement value is by no means insubstantial, totaling $ 41,500,000.00. However, the benefit conferred is not so large that recovery dictates a reduction in the percentage of fee recovered in accordance with the purported Third Circuit benchmark. The number of class members is large, at least consisting of Plaintiffs IBEW Local 164 Welfare Fund, Fire & Police Retiree Health Care Fund of San Antonio, Government Employees Health Association, Inc., Pipefitters Local 537 Trust Fund, Teamsters Healthcare, Midwestern Teamsters Health & Welfare Fund, UFCW & Employers Arizona Health & Welfare Trust, County of Nassau, Louisiana Health Insurance Indemnity Company d/b/a BlueCross BlueShield of Louisiana, Helen Aronis, Kenneth Bever, Glenda Morgan, Roy Cosgrove, Charles Miller, Anna Iannuzzi, Robert Mastondrea, **[*36]** Robert Love, Donald Varino, Frances Weiland, and Daniel Tollefson, on behalf of themselves and all others similarly situated. Therefore, the size of the fund and number of persons benefitted by the fund weighs in favor of an award of attorneys' fees.

Second, the Court evaluates the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel. Substantive objections raised by class members Blue Cross Blue Shield ("BCBS") of Alabama and BCBS of Michigan, in their individual capacities and as TTP class representatives, have been resolved by way of stipulation entered into the docket on February 3, 2010. Reimbursement cost objections raised by individual consumer class members Sam A. Cannata and Dennis P. Levin were also withdrawn pursuant a reduction in reimbursement expenses as reflected in the recent motion also before this Court seeking final seeking class certification and final settlement approval. [4]

Mahzer **[*37]** Jaweed ("Dr. Jaweed"), absent from the Court hearing earlier this day, filed a request for clarification. Pursuant to that request, Dr. Jaweed documents an emergent admission to the hospital where he was informed that he was suffering from cancer and was told to stop taking Vytorin, "the offending agent" which had prompted the admission. Dr. Jaweed expresses concern that despite that grave personal injury incurred, he will not be able to demonstrate a causal connection between cancer and Vytorin in the absence of medical research supporting a linkage. Although the Settlement Agreement and Release does not release damage claims for personal injury, there is no indication that Defendants will not seek to assert a defense of statute of limitations, laches or estoppel even if a linkage is later discovered. Dr. Jaweed seeks clarification that nothing in the settlement will preclude a suit by Dr. Jaweed "should a causal connection between and Vytorin/Zetia be discovered, and that the statute of limitations clock did not begin to run at that time." Unfortunately, and with all due respect, the Court is not in a position to address or propose amendment to the settlement agreement based on the **[*38]** emergence of hypothetical research. Indeed, this concern appears to center around a personal injury claim otherwise excluded from the present settlement agreement. Therefore, settlement is not precluded on this ground. Therefore, an absence of objections favors settlement.

Third, the skill and efficiency of the attorneys involved is high. Class Counsel are highly skilled attorneys with substantial experience in class action litigation, particularly mass tort and multi-district litigation, as illustrated by firm biographies and the Declarations of Counsel accompanying their fee application. Therefore, this factor favors an award of attorneys' fees.

Fourth, multi-district class action litigation is inherently complex, involving classes of persons from multiple states and consolidation of cases from multiple districts. Beyond the obvious complexity and consequent demand of multi-

[4] Ellis Eisen, Esq., a Consumer Class Member and formerly an objector to the instant settlement agreement, through Class Counsel has represented to this Court that the previous objection filed has been resolved and withdrawn.

district suits, this litigation has been ongoing for more than two years to date. The prospective duration of this matter if the does settle accompanied with the constant attention to detail required by an inherently complex suit favors the award of attorneys' fees.

Fifth, "[c]lass Counsel accepted the responsibility **[*39]** of prosecuting this class action on a contingent fee basis and without any guarantee of success or award." *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 281 (3d Cir. 2009)*. The risk of non-payment appears substantial given expense of unreimbursable out-of-pocket costs and the 8,199.48 uncompensated hours dedicated to this matter. In the absence of a settlement, the fee awarded is contingent upon prevailing at trial. If a jury were to find in favor of Defendants that the FDA approval of these allegedly defective drugs negates the claims of alleged deceptive advertising, potentially, Co-Lead Counsel would recover nothing and lose more than $ 5 million dollars invested in this case. Further, although Plaintiffs may prevail at trial, "even a victory at trial is not a guarantee of ultimate success." *In re Warner Communications Sec. Litigation, 618 F.Supp. 735, 748 (S.D.N.Y. 1985)*. "If plaintiffs were successful at trial and obtained a judgment for substantially more than the amount of the proposed settlement, the defendants would appeal such judgment. An appeal could seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself." *Id. at 748*. "The attorneys' **[*40]** contingent fee risk is an important factor in determining the fee award." *Id. at 747*. The risk of little to no recovery weighs in favor of an award of attorneys' fees.

Sixth, the Executive Committee Members have expended 8,199.48 hours and incurred more than $ 141,186.00 in out-of-pocket expenses, including time and money expended pursuant to an initial investigation, legal research and preparation of relevant legal matters, including instituting a national class notice plan and the attendant procedures required to implement such a plan. Moreover, the time dedicated and expenditures incurred do not include costs that will arise immediately in the future, such as the settlement hearing conducted before this Court on February 8, 2010.

Seventh, awards in similar common fund cases appear analogous to the present request. *In re Remeron Direct Purchaser Antitrust Litig., No. 03-0085, 2005 U.S. Dist. LEXIS 27013, at *44 (D.N.J. Nov. 9, 2005)* (not for publication) (review of 289 settlements demonstrates "average attorney's fees percentage [of] 31.71% with a median value that turns out to be one-third") (internal citations omitted); *General Motors, 55 F.3d at 822* (in common fund cases "fee awards **[*41]** have ranged from nineteen percent to forty-five percent of the settlement fund"). Given that the award requested appears consistent with other similar cases, this factor weighs in favor of an award of attorneys' fees.

Eighth, the Court must assess "whether Class Counsel had benefitted from 'the efforts of other groups, such as government agencies conducting investigations[.]'" *In re Diet Drugs, 582 F.3d at 544* (citing *In re AT&T Corp., 455 F.3d 160 (3d Cir. 2006)*). Indeed the former FDA approval of these drugs created a hurdle in the present litigation, rather than a benefit. However, there is a corresponding case presently pending before this Court, In re Merck & Co., Inc. Vytorin ERISA Litigation 08-CV-1974, which may have afforded some collateral, but indirect benefits to the present matter. Nonetheless, this factor favors an award despite the effect of any collateral benefits arising from the co-pending case because such effects appear insubstantial by way of comparison to the efforts contributed by Co-Lead Class Counsel in the face of the obstacles presented by this multi-district litigation.

Ninth, the 33<1/3> % fee award requested reflects commonly negotiated fees in the private **[*42]** marketplace. *Remeron, 2005 U.S. Dist. LEXIS 27013, at*46* ("Attorneys regularly contract

for contingent fees between 30% and 40% with their clients in non-class, commercial litigation."); *Karcich, 194 F.R.D. at 194* ("[I]n private contingency fee cases . . . plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery"). Accordingly, this commonality favors an award of attorneys' fees.

Tenth, although the settlement may contain innovative terms, none have been underscored with respect to the instant matter. Therefore, this factor neither weighs in favor nor detracts from a decision to award attorneys' fees.

2. Lodestar Cross-check

In addition to assessing the Gunter factors, courts in this circuit confirm the reasonableness of a fee by using the lodestar calculation method when a fee award is based on percentage of recovery. See *Rite Aid, 396 F.3d at 305-306*. 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." *Id.* "The **[*43]** reasonableness of the requested fee can be assessed by calculating the lodestar multiplier, which is equal to the proposed fee award divided by the lodestar (i.e., the product of the total hours and the blended billing rate). But the lodestar 'multiplier need not fall within any pre-defined range, provided that the District Court's analysis justifies the award.'" *In re Ins. Brokerage Antitrust Litig., 579 F.3d at 280*.

"After a court determines the lodestar amount, it may increase or decrease that amount by applying a lodestar multiplier. 'The multiplier is a device that attempts to account for the contingent nature or risk involved in a particular case and the quality of the attorneys' work.'" *In re Diet Drugs, 582 F.3d at 540 n.33*. The common fund doctrine "provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees.'" *Id. at 540* (citing *In re Cendant Corp. Sec. Litig., 404 F.3d 173, 187 (3d Cir. 2005)* (internal citation omitted))."When calculating attorneys' fees in such cases, the percentage-of-recovery **[*44]** method is generally favored." Id. (citing *Prudential, 148 F.3d at 333*).

In support of the lodestar calculation, Co-Lead Class Counsel provided charts detailing the hours worked and billing rates for each attorney and paralegal or support staff who worked on this matter. Class Counsel have expended a total of 8,199.48 hours in this litigation with a total lodestar in the amount of $ 4,958,945.50 and unreimbursable expenses at a rate of $ 141,186.00.

Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., formerly Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, reports an expenditure of 2,567.10 hours with a total lodestar of $ 1,452,562.50 and $ 35,587.99 in unreimbursable expenses. The hourly attorney billing rate presented ranges from $ 500.00-$ 750.00 (non-weighted average = $ 625.00) at a total of 2,312.1 hours, representing 0.90066 or 90% of the hours expended. The hourly paralegal and/or professional support staff rate is documented as $ 105.00 at a total of 187.5 hours, representing 0.000327 or .0327% of the hours expended.

Wolf Haldenstein Adler Freeman & Herz LLC reported an expenditure of 1,583.8 hours with a total lodestar of $ 920,059.00 and $ 52,904.02 in unreimbursable **[*45]** expenses. The hourly attorney billing presented ranges from $ 320.00-$ 835.00 (non-weighted average = $ 577.50) at a total of 1,464.4 hours, representing 0.92461 or 92.46% of the hours expended. The hourly paralegal and/or professional support staff rate ranges from $ 85.00-$ 255.00 (non-weighted average = $ 170.00) at a total of 119.4 hours, representing 0.000631 or .0631% of hours expended.

Seeger Weiss LLP reports an expenditure of 1,875.3 hours with a lodestar of $ 1,308,614.00 and $ 29,767.19 in unreimbursable expenses. The

hourly attorney billing rate presented ranges from $ 345.00-$ 775.00 (non-weighted average $ 560.00) with a total of 1,840 hours, representing 0.981176 or 98.11% of hours expended. The hourly paralegal and/or professional support staff rate ranges from $ 165.00-$ 225.00 (non-weighted average = $ 195.00) at a total of 35.3 hours.

Hagan Berman Sobol Shapiro LLP reports an expenditure of 1,026.98 hours with a total lodestar of $ 354,900.50 and unreimbursable expenses in the amount of $ 28,436.09. The hourly attorney billing rate presented ranges from $ 250.00-$ 650.00 (non-weighted average $ 450.00) with a total of 551.78 hours, representing 0.537284 or 53.72% of **[*46]** hours expended. The hourly paralegal and/or professional support staff is documented as $ 150.00 at a total of 475.2 hours, representing 0.462715 or 46.27%.

Lieff, Cabraser, Heimann & Bernstein, LLP reports an expenditure of 1,174.8 hours with a lodestar of $ 748,569.00 and $ 46,247.05 in unreimbursable expenses. The hourly attorney billing rate presented ranges from $ 250.00-$ 825.00 (non-weighted average $ 537.50) with a total of 1,077 hours, representing 0.916751 or 91.67% or of hours expended. The hourly paralegal and/or professional support staff ranges from $ 175.00-$ 250.00 (non-weighted average = $ 212.50) at a total of 97.8 hours, representing 0.083248 or 8.32%.

The fee requested requires a multiplier of approximately 2.786 based on the lodestar presented to the Court by the Co-Lead Class Counsel. Generally, "multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." (internal quotation and citation omitted). *In re Diet Drugs, 582 F.3d at 545 n.41*. Upon review of the hourly wage charts submitted and the lodestar presented by Co-Lead Counsel, for purposes of a cross-check, this Court concludes that the fees requested, **[*47]** with a multiplier of 2.786 is reasonable under the circumstances and awards the fees as requested. Additionally, the Court acknowledges that the fee secured is entirely attributable to the efforts of Counsel.

3. Costs

The Court also finds that Class Counsel is entitled to receive costs, as they have been "adequately documented and reasonably and appropriately incurred in the prosecution of the case." See *In re Cendant Corp., 232 F. Supp. 2d at 343* (quoting *In re Safety Components Int'l, Inc., 166 F. Supp. 2d 72, 104 (D.N.J. 2001)*). Class Counsel has provided itemized expenditures, and has certified that full documentation of the costs have been maintained in the firms' records. Class counsel is awarded reimbursement costs in the requested amount of $ 141,186.00.

Class counsel also seeks permission to pay incentive fees to the representative Plaintiffs. It is not uncommon to award such fees. See, e.g., *Cullen v. Whitman Med. Corp., 197 F.R.D. 136, 145 (E.D. Pa. 2000)* (quoting *In re S. Ohio Corr. Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997)*) ("[C]ourts routinely approve incentive awards to compensate named plaintiffs for services they provided and the risks they incurred during the course **[*48]** of the class action litigation."). The Court grants permission to award incentive fees.

IV. Conclusion

In accordance with the foregoing, the Court certifies the Master Class and Subclasses for settlement purposes, approves the proposed Settlement Agreement and Release and awards the fees requested by Co-Lead Class Counsel.

/S/ Dennis M. Cavanaugh

Dennis M. Cavanaugh, U.S.D.J.

Dated: February 9, 2010

End of Document

Exhibit 11

Milliron v. T-Mobile USA, Inc.

United States District Court for the District of New Jersey

September 10, 2009, Decided; September 10, 2009, Filed

Civil Action No. 08-4149 (JLL)

Reporter
2009 U.S. Dist. LEXIS 101201 *; 2009 WL 3345762

DEBBIE MILLIRON, individually and on behalf of all others similarly situated, Plaintiff, v. T-MOBILE USA, INC., Defendant.

Notice: NOT FOR PUBLICATION

Subsequent History: Injunction granted at *Milliron v. T-Mobile USA, Inc., 2009 U.S. Dist. LEXIS 114106 (D.N.J., Dec. 8, 2009)*

Affirmed by *Milliron v. T-Mobile United States, 423 Fed. Appx. 131, 2011 U.S. App. LEXIS 7816 (3d Cir. N.J., Apr. 14, 2011)*

Prior History: *Milliron v. T-Mobile USA, Inc., 2009 U.S. Dist. LEXIS 143110 (D.N.J., July 24, 2009)*

Counsel: **[*1]** For BRAMSON PLUTZIK MAHLER & BIRKHAEUSER, LLP, FRANKLIN & FRANKLIN, LAW OFFICES OF ANTHONY A. FERRIGNO, REICH RADCLIFFE, LLP, CUNEO GILBERT & LaDUCA LLP, CARL HILLIARD, ESQ., LAW OFFICES OF JOSHUA DAVIS, Movants: STEVEN MARC SHERMAN, LEAD ATTORNEY, SHERMAN BUSINESS LAW, SAN FRANCISCO, CA.

For Daniel Phee, Objector: ROBERT E. MARGULIES, LEAD ATTORNEY, MARGULIES WIND, PC, HARBORSIDE FINACIAL CENTER, JERSEY CITY, NJ.

For Kimberley Lyons, AARON MILLER, Objectors: STEPHEN TSAI, LEAD ATTORNEY, STEPHEN TSAI LAW OFFICES, BRIDGEWATER, NJ.

For DEBBIE MILLIRON, individually and on behalf of all others similarly situated, Plaintiff: JAMES E. CECCHI, LEAD ATTORNEY, LINDSEY H. TAYLOR, CARELLA BYRNE BAIN GILFILLAN CECCHI STEWART & OLSTEIN, PC, ROSELAND, NJ.

For Gary Hellman, Intervenor Plaintiff: GABRIEL H. HALPERN, LEAD ATTORNEY, PINILIS HALPERN, LLP, MORRISTOWN, NJ; JENNIFER SARNELLI, JOSEPH J. DEPALMA, LEAD ATTORNEYS, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ; WILLIAM J. PINILIS, LEAD ATTORNEY, PINILIS HALPERN, MORRISTOWN, NJ.

For Tamara Ruiz, Margaret Gripaldi, Intervenor Plaintiffs: JENNIFER SARNELLI, JOSEPH J. DEPALMA, LEAD ATTORNEYS, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ; WILLIAM **[*2]** J. PINILIS, LEAD ATTORNEY, PINILIS HALPERN, MORRISTOWN, NJ.

For Margaret Schwarz, Intervenor Plaintiff: JENNIFER SARNELLI, JOSEPH J. DEPALMA, LEAD ATTORNEYS, LITE, DEPALMA, GREENBERG & RIVAS, LLC, NEWARK, NJ; STEVEN MARC SHERMAN, LEAD ATTORNEY, SHERMAN BUSINESS LAW, SAN FRANCISCO, CA; WILLIAM J. PINILIS, LEAD ATTORNEY, PINILIS HALPERN, MORRISTOWN, NJ.

For T-MOBILE USA, INC., Defendant: GAVIN J. ROONEY, LEAD ATTORNEY, LOWENSTEIN SANDLER, PC, ROSELAND, NJ; JONATHAN THOMAS GULDIN, LOWENSTEIN SANDLER, ROSELAND, NJ.

For Thomas A. Carder, Defendant: STEPHEN TSAI, LEAD ATTORNEY, STEPHEN TSAI LAW OFFICES, BRIDGEWATER, NJ.

Judges: Jose L. Linares, UNITED STATES DISTRICT JUDGE.

Opinion by: Jose L. Linares

Opinion

OPINION AND ORDER

Linares, District Judge.

This Court granted preliminary approval to the proposed settlement of this class-action lawsuit on February 19, 2009 (Docket Entry No. 17 (the "Preliminary Approval Order")), and set forth a timeline pursuant to which Class Counsel and T-Mobile (collectively, the "Settling Parties") could move for final approval of the "Settlement Agreement" (Docket Entry No. 12-2.) Pursuant to that schedule, the Court conducted a fairness hearing on July 27, 2009. Now, having considered the **[*3]** briefs and declarations filed by all parties to this matter, including objectors, the Court sets forth its findings below.

I. Background

This class action involves a claim by Plaintiff Debbie Milliron ("Plaintiff" or "Milliron") that flat-rate early-termination fees ("ETFs") charged by T-Mobile violate, inter alia, the Federal Communications Act and various state consumer protection laws. (See generally Docket Entry No. 19 ("Am. Compl.").) ETFs constitute a fee of $ 200 charged to customers for cancellation of their wireless service "at any time after a trial period but before the end of the 'service plan' term, regardless of the reason(s) for cancellation." (Id. P 3.) Milliron is a citizen of California whose subscriber agreement with T-Mobile contained an ETF provision and who was ultimately charged an ETF. (Id. P 8.)

After undergoing a day-long mediation with the Honorable Douglas Wolfson (ret.), the parties to this matter reached a settlement with the following general terms: (1) a cash common fund of $ 11.5 million allowing for $ 125 payments to Class members who paid a flat-rate ETF and $ 25 payments to Class members who were charged, but did not pay, a flat-rate ETF [1]; (2) $ 2 **[*4]** million in non-cash relief in the form of bonus minutes, free text messages, and T-Mobile "Hot Spot" access; and (3) the ability for eligible Class members to modify their contract by converting flat-rate ETFs into pro-rated ETFs. (See generally Settlement Agreement.)

On February 19, 2009, this Court preliminarily approved the settlement and preliminarily certified the settlement class ("Class"). The Class consists of two subclasses -- (1) ETF-Assessed Class: All persons in the United States who were parties to a contract for a wireless telephone personal account and were billed a Flat-Rate ETF by T-Mobile and/or its legacy companies from July 23, 1999 until February 19, 2009. The ETF-Assessed Class includes such persons whether or not they paid any portion of the ETF, whether to T-Mobile, any outside collection agency, or other third party to whom T-Mobile has assigned the rights to the ETF; and (2) Subscriber Class: All persons in the United States **[*5]** who were parties to a contract for a wireless telephone personal account with T-Mobile that included or includes a provision for a Flat-Rate ETF from July 23, 1999 until February 19, 2009, and who have not paid or been billed a Flat-Rate ETF. (Settlement Agreement, Art. II, PP 14, 42.)

---

[1] In order to claim the $ 125 payment, Class members must be able to document payment of a flat-rate ETF. Those Class members who certify under penalty of perjury that they paid the fee but cannot document it are entitled to receive $ 25.

Now, having considered the arguments and briefs in support of and in opposition to the preliminarily-approved settlement, and having conducted the fairness hearing required by *Fed. R. Civ. P. 23(e)(2)*, the Court issues this Opinion to address the issues of: (1) Class Certification; (2) reasonableness of the settlement; (3) reasonableness of the requested attorney fee award; and (4) allocation of the attorney fee award.

II. Class Certification

Prior to addressing the specifics of the settlement, the Court analyzes the class certification factors promulgated by *Fed. R. Civ. P. 23*. *Rule 23* has been held to permit classes certified only for settlement. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 777-78 (3d Cir. 1995)*. In order to be certified, the class must meet all of the requirements of *Rule 23(a)*: numerosity, commonality, typicality, and adequacy. *Fed. R. Civ. P. 23(a)(1-4)*. **[*6]** It must also meet the additional requirements of *Rule 23(b)(3)*: superiority and predominance. *Fed. R. Civ. P. 23(b)(3)*.

A. *Rule 23(a)* Factors

1. Numerosity

Fed. R. Civ. P. 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." "The Third Circuit has generally held that the numerosity requirement is met if the proposed class exceeds 100 members." *Welch v. Bd. of Dirs. of Wildwood Golf Club, 146 F.R.D. 131, 135* (W.D. Pa. 1993.) The Class includes millions of class members, dispersed nationwide. Thus, it is so numerous that joinder of all members is impracticable.

2. Commonality

All members of the Class seek to declare T-Mobile's flat-rate ETF an unenforceable penalty. "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal ex rel. Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)*. Here, the requirement is easily satisfied, as all Class members share a common question of law and seek relief on the same nucleus of operative facts.

3. Typicality

The typicality inquiry "assesses whether the named plaintiffs have incentives that align with those of **[*7]** absent class members so that the absentees' interest will be fairly represented." *Danvers Motor Co., Inc. v. Ford Motor Co., 543 F.3d 141, 149-50 (3d Cir. 2008)* (quoting *Georgine v. Amchem Products, Inc., 83 F.3d 610, 632 (3d Cir. 1996)*). Its purpose is to ensure that the interests of the class representatives do not diverge from those of the class as a whole. *Baby Neal, 43 F.3d at 57*. Here, the claims of the named plaintiff are typical of the Class claims because, like the Class, Milliron alleges that T-Mobile charged her a flat-rate ETF, which operates as an unenforceable penalty. Stated differently, her claim is based on the same legal theory and course of conduct as that of the absent members of the Class. Thus, Milliron's incentives line up with those of absent class members. This factor is accordingly satisfied.

4. Adequacy

In order to certify a class, a court must also find that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. "There are two factors: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiff must not have interests

[*8] antagonistic to those of the class." *In re Prudential Ins. Co. Sales Practice Litig., 962 F. Supp. 450, 519 (D.N.J. 1997)*. No objection has been lodged as to the qualifications and capabilities of Class Counsel, and the Court is aware of Class Counsel's expertise in handling complex civil litigation. In fact, many of the firms handling this matter on behalf of the Class have appeared before this Court on other class action-related litigation, and the Court is satisfied that they are well-equipped to handle a case of this size and complexity.

Additionally, no objections have been articulated as to the adequacy of representation of the class representative. No defenses unique to the class representative have been raised, and the class representative does not have divergent interests from the Class as a whole. Thus, Milliron is capable of fairly and adequately protecting the interests of the Class in connection with the proposed settlement.

B. *Rule 23(b)(3)* Factors

Pursuant to *Fed. R. Civ. P. 23(b)(3)*, a Court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other **[*9]** available methods for fairly and efficiently adjudicating the controversy." In examining predominance, the purpose of the inquiry is to determine whether class-wide issues outweigh individual issues. Here, the Court finds that common questions of law and fact predominate over questions affecting only individual members of the Settlement Class. T-Mobile is alleged to have charged the same flat-rate ETF to every member of the ETF-Assessed Class, and all members of the Subscriber Class signed a contract with T-Mobile that contained a flat-rate ETF provision. Nothing in the record exists to indicate that individual issues would predominate at trial.

Additionally, given that the value of an individual claim is no more than a few hundred dollars, maintaining individual actions in this case would be prohibitively expensive, and a class action is therefore the superior method of fairly and adjudicating the controversy. Thus, the Settlement Class satisfies the predominance and superiority requirements of *Rule 23(b)(3)*. Having met the requirements *Rules 23(a)* and *23(b)(3)*, the Settlement Class is granted final certification.

II. Notice

"In the class action context, the district court obtains personal **[*10]** jurisdiction over the absentee class members by providing proper notice of the impending class action and providing the absentees with the opportunity to be heard or the opportunity to exclude themselves from the class." *In re Prudential, 148 F.3d 283, 306 (3d Cir. 1998)*. Under *Federal Rule of Civil Procedure 23(c)*, notice must be disseminated by "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." See also *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175-76, 94 S. Ct. 2140, 2151-52, 40 L. Ed. 2d 732 (1974)*(finding that *Rule 23(c)* includes an "unambiguous requirement" that "individual notice must be provided to those class members who are identified through reasonable effort").

Additionally, in this case, where a settlement class has been provisionally certified and a proposed settlement preliminarily approved, proper notice must meet the requirements of *Federal Rules of Civil Procedure 23(c)(2)(B)* and *23(e)*. *Larson v. Sprint Nextel Corp., No. 07-5325, 2009 U.S. Dist. LEXIS 39298, 2009 WL 1228443, at *2 (D.N.J. April 30, 2009)*(Linares, J.). *23(c)(2)(B)*-compliant notice

must inform class members of: (1) the nature **[*11]** of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) the class member's right to retain an attorney; (5) the class member's right to exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on class members under *Rule 23(c)(3)*. Id.; *Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii)*. *Rule 23(e)* notice must contain a summary of the litigation sufficient "to apprise parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential, 177 F.R.D. 216, 231 (D.N.J. 1997)*.

Class Counsel and T-Mobile disseminated Notice as follows: (1) 1,056,653 postcard notices to individuals who paid a flat-rate ETF between January 1, 2006 and February 19, 2009; (2) postcard notice to 182,037 class members who paid an ETF in 2005; (3) over 6,570,000 bill-stuffer notices to current customers; (4) 468,522 notices to members of the Subscriber Class who were subject to a flat-rate ETF on February 19, 2009; (5) publication notice in eight newspapers for two weeks and additionally in Parade Magazine; and (6) an Internet address (*www.ETF-Settlement.com*) along with **[*12]** a toll-free phone number that had logged over 56,000 phone calls as of June 27, 2009. (See generally Docket Entry No. 50-2 (Declaration of Joel K. Botzet ("Botzet Decl.")).)

The Court finds that the parties fully complied with the stringent requirements set forth by *Rules 23(c)(2)(B)* and *23(e)*. [2] The notice plan was robust, thorough, and included all of the essential elements necessary to properly apprise absent Class members of their rights. [3] Additionally, on February 17, 2009, T-Mobile properly gave notice of the pending class settlement to the Attorney General of the United States and the attorneys general of all fifty states, as required by *28 U.S.C. § 1715*. (Docket Entry No. 84 (Decl. of Mark S. Kokanovich) P 2.)

III. Final Settlement Approval

Under *Rule 23*, a court may only approve a class settlement after it has held a hearing and determined that the settlement is "fair, reasonable, and adequate." *Fed. R. Civ. P. 23(e)(2)*. The Third Circuit has enumerated nine factors to be utilized in this determination:

> (1) the complexity, **[*14]** expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement

---

[2] This Court previously engaged in a detailed discussion of the notice requirements associated with *Rule 23(c)(2)(B)* and *23(e)*. *Larson v. Sprint Nextel Corp., No. 07-5325, 2009 U.S. Dist. LEXIS 39298, 2009 WL 1228443 (D.N.J. April 30, 2009)*. That case involved strenuous objections to the notice plan used and implemented by the parties. Contrary to the *Larson* matter, however, Class Counsel and T-Mobile have fully satisfied the requirements set forth by *Rules 23(c)(2)(B)* and *23(e)*.

[3] Objector Daniel Phee **[*13]** argues that the Notice was inadequate because it failed to include the Plan of Allocation. (Docket Entry No. 43.) This Court disagrees. As an initial matter, the Plan of Allocation was referenced in the Settlement Agreement and made easily accessible to anyone interested in viewing it on the Settlement Website. More importantly, however, *Rule 23(e)* does not require that a notice contain every specific detail related to the settlement. See, e.g., *In re Painewebber Ltd. Partnerships Litig., 171 F.R.D. 104, 124 (S.D.N.Y. 1997)* ("Nor does the adequacy of notice turn on the ability of an individual Class Member to calculate the amount of his or her actual recovery under the settlement.") Rather, "…settlement notices need only describe the terms of the settlement generally." *In re Michael Milken and Associates-Securities Litig., 150 F.R.D. 57, 60 (S.D.N.Y. 1993)* (citations omitted).

fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). Additionally, a presumption of fairness exists where a settlement has been negotiated at arm's length, discovery was sufficient, the settlement proponents are experienced in similar matters, and there are few objectors. *In re Warfarin Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004)*. The presumption of fairness attaches in this case because the Settling Parties negotiated the settlement before the Honorable Douglas Wolfson (ret.), pre-settlement discovery in this case and related cases had supplied counsel with an understanding of the factual **[*15]** and legal issues involved, the attorneys litigating this matter are experienced in similar litigation, and very few class members have objected. *Varacallo v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 207, 235 (D.N.J. Feb. 15, 2005)* (Linares, J.). Moreover, "the participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties." *Bert v. AK Steel Corp., No. 1:02-CV-467, 2008 U.S. Dist. LEXIS 111711, 2008 WL 4693747 (S.D. Ohio Oct. 23, 2008)*. Thus, the use of a mediator with respect to the present settlement is persuasive evidence that the negotiations were hard-fought, arms-length affairs.

Finally, settlement of litigation is generally favored by courts, especially in the class action setting. "The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re General Motors, 55 F.3d 768, 784 (3d Cir. 1995)*; see also *In re Warfarin, 391 F.3d at 535* (there is an "overriding public interest in settling class action litigation, and it should therefore be encouraged"). At the same time, the district **[*16]** court functions "as a fiduciary who must serve as a guardian of the rights of absent class members" by ensuring that the proposed settlement is fair, reasonable, and adequate. *In re General Motors, 55 F.3d at 785*.

Turning, therefore, to each of the *Girsh* factors, the Court finds as follows:

1. Complexity, Expense and Likely Duration of the Litigation: The expense and likely duration of litigation are factors to be considered in evaluating the reasonableness of a proposed class action settlement. In this case, the litigation has the potential to drag on for years. The issues involved are legally and factually complex, and litigation in other courts involving similar issues indicates that this type of case involves significant discovery and expert witness testimony. Importantly, continued prosecution of this case would also require Plaintiff to overcome considerable legal hurdles, including T-Mobile's belief that this matter is subject to arbitration pursuant to the customers' wireless service contracts, the notion that the ETF is preempted by the FCC, and the complexity associated with attempting to certify and maintain a nationwide class. That the parties were able to reach a settlement **[*17]** very early in the litigation weighs in favor of approval, as it saves the time associated with discovery, motions, and eventually trial. Importantly, of course, it also provides the Class with immediate, definite relief. This factor therefore weighs in favor of approval.

2. Reaction of the Class to the Settlement: This second Girsh factor gauges whether members of the class generally support or object to the settlement. In order to properly evaluate it, "the number and vociferousness of the objectors" must be examined. *In re General Motors, 55 F.3d at 812*. Generally, "silence constitutes tacit consent to the

agreement." Id. (quotation omitted). As outlined above, the notice program in place with respect to this settlement was comprehensive, detailed, and robust. Thus, the failure of Class Members to object is certainly a factor that would weigh heavily in support of approval.

Here, only 563 individuals opted out of the Class. (Docket Entry No.78 (Supp. Dec. of Joel Botzet) P 11.) Moreover, the Court has received only eight objections to the proposed settlement. [4] Thus, this settlement has strong class support. Of the eight objections, the Court finds that none are meritorious.

a. Objectors Carder, Lyons, and Miller ("Carder Objectors"), represented by Stephen Tsai, Esq., argue that they were never charged ETFs but that they were previously prevented from switching carriers because they wanted to avoid being charged an ETF. Thus, they claim that the settlement discriminates against them by not providing them any relief. This argument is factually flawed. If the Carder Objectors are current T-Mobile subscribers, then they are eligible for non-cash benefits in the form of bonus minutes, bonus text messages, or free "T-Mobile HotSpot" access. If, on the other hand, they were never assessed an ETF, never paid an ETF, and subsequently switched carriers, then they would not be members of the Class for purposes of this settlement and would not have standing to object.

b. Objector Daniel Phee, represented by Robert Margulies, objects that the settlement agreement discriminates against Class members who were **[*19]** charged an ETF prior to February 19, 2009 but paid it in full after that date. This is incorrect. All Class members who paid an ETF during the Class Period are entitled to $ 125 compensation. All Class members who were charged, but did not pay, the fee during the Class Period are entitled to $ 25 compensation. Thus, in either scenario, Objector Phee could recover under this settlement.

c. Next, Phee and the Carder Objectors lodge complaints to the claims process, finding it inadequate, time-consuming, and too detailed. Courts have frequently upheld claims forms such as the one utilized in this case, and the Court finds it perfectly appropriate to require Class members to submit certain information proving that they are entitled to collect the relief awarded in this case. See, e.g., *DeHoyos v. Allstate Corp., 240 F.R.D. 269, 314 (W.D. Tex. 2007)*. Moreover, Class Counsel notes that an incomplete claim form will still be reviewed and considered in full during the claims administration process. (Docket Entry No. 62 at 18 n. 3.) This objection is accordingly overruled.

d. Finally, the remainder of objections -- by Phee, the Carder Objectors, and various pro se objectors, do not pertain to **[*20]** the sufficiency of the settlement itself but rather address other aspects of T-Mobile's business, including its customer service and reports to credit bureaus. (Docket Entry Nos. 42 and 48.) Because these objections do not cast doubt upon the reasonableness of the settlement reached in this matter, the Court does not consider them.

3. Stage of the Proceedings and Discovery Completed: While little discovery has taken place within the confines of this particular action, the parties have each assessed the settlement value of the case and have examined the strengths and weaknesses of their relative positions. Additionally, Class Counsel has extensive experience litigating

---

[4] The following **[*18]** individuals have lodged objections to the settlement -- (1) Drew J. Anderssen; (2) Daniel Phee; (3) Michael Van Bemmelen; (4) Aaron Petrus; (5) Stacey Hayes; and (6) Thomas A. Carder, Kimberley Lyons, and Aaron Miller. (Docket Entry Nos. 42, 43, 48, 53, 54, 57.)

ETF cases, having filed similar actions against Sprint-Nextel, Verizon, and AT&T. Thus, even though the action settled at a relatively early stage in the proceedings, the Court finds that counsel on both sides of the table are experienced and able litigators, and that the parties have sufficiently apprised themselves of the relevant facts and law to make a knowledgeable decision as to settlement. This factor weighs in favor of approval.

4. Risk of Establishing Liability: The risks of proceeding to trial in any case are **[*21]** considerable. *In re Prudential, 962 F. Supp. 450, 539 (D.N.J. 1997)*. This case is no different. Class Counsel has outlined several risks to establishing liability and damages, including: (i) even if a court held T-Mobile's liquidated damages clause to be unenforceable, T-Mobile would be allowed to counter-claim for the actual amount of damages that it could prove at trial; and (ii) T-Mobile's actual damages could very well exceed the amounts recoverable by the Class. In that scenario, the Class recovery would be zero. Additionally, as indicated earlier, T-Mobile retains several potent legal defenses, including arbitration and preemption. Given the above risks, and noting the inherent difficulty associated with litigating and proving this case at trial, the Court agrees that this *Girsh* factor weighs in favor of approval.

5. Risks of Establishing Damages: This factor is intertwined with the previous one, and weighs in favor of approval.

6. Risks of Maintaining the Class Action Through Trial: Though several cases have been filed and litigated against T-Mobile, in both state and federal courts, no class has ever been certified in any T-Mobile ETF case. Certainly, this is strong evidence **[*22]** that real risks exist in obtaining and maintaining class certification through trial.

Additionally, a substantial risk exists with respect to class actions asserting state-law claims from multiple jurisdictions because under New Jersey's choice of law scheme predomination can be defeated by the finding that each state has the greatest interest in its own law being applied. *Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 351 (D.N.J. Aug. 28, 1997)* ("Viewing these variations in the context of a case involving five state-law causes of action, the laws of fifty states, and over twenty-three million plaintiffs, the court must conclude that this suit cannot be practically and efficiently tried as a class action because plaintiffs have not established a predominance of common legal issues as required by *Rule 23(b)(3)*."). Taken in concert, the fact that no class has yet to be certified in a T-Mobile ETF case coupled with the real legal risks to certification cause this factor to come down in favor of approval.

7. Ability of Defendant to Withstand A Greater Judgment: T-Mobile is a mult-billion dollar company that has given no indication of an inability to pay a greater judgment. **[*23]** Thus, this factor weighs against settlement.

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and in Light of all the Attendant Risks of Litigation: Combining the final two Girsh factors, the analysis here compares the reasonableness of the settlement against the risks of litigation and the best possible Class recovery. Class Counsel suggests that a jury would be tasked with properly ascertaining T-Mobile's actual damages in the event that the ETF is found to be an unenforceable penalty. As indicated earlier, a jury could very well find a net recovery in favor of the Class, but it also could find that T-Mobile's damages exceed those of the Class and thereby leave the Class with no recovery. At the end of the day, it is difficult to prognosticate the best possible recovery for

this Class but it is clear that $ 13.5 million along with a move to pro-rated ETFs is a reasonable recovery in light of the risks already highlighted.

Having evaluated the proposed settlement against the nine *Girsh* factors and against the dictates of *Rules 23(b)(3)*, *23(c)*, and *23(e)*, the Court finds that it warrants approval. The minuscule number of objectors combined **[*24]** with the size of the class recovery, the robust notice program, and the real risks associated with taking this matter to trial all indicate that the settlement ought to be approved. The Court therefore grants the motion for final approval of the settlement reached in this matter.

IV. Attorneys' Fees, Incentive Award, and Expenses

Next, Class Counsel also moves for an award of attorneys' fees in the amount of 33 1/3% of the Settlement and reimbursement of expenses in the amount of $ 54,530.65. Thirty-three and one-third percent of the $ 13.5 million settlement ($ 11.5 million cash and $ 2 million non-cash) is equal to $ 4.5 million. While the amount of this award has garnered few objections, its ultimate distribution remains heavily contested. The "Bursor Group" [5] and the "Plutzik Group" [6] have filed motions for their own share of the expected multi-million dollar fee. (Docket Entry Nos. 65, 66.) Additionally, the Bursor Group and the Plutzik Group have filed a joint motion for appointment of a special master. (Docket Entry No. 72.)

A. Application of *Gunter* Factors

The awarding of fees is within the district court's discretion. *In re Cendant Corp. PRIDES Litig., 243 F.3d 722, 727 (3d Cir. 2001)*. However, the court must clearly articulate the reasons supporting its conclusion. *In re Rite Aid Corp. Securities Litig., 396 F.3d 294, 301 (3d Cir. 2005)*. "In a class action settlement, the court must thoroughly analyze an application for attorneys' fees, even where the parties have consented to the fee award." *Varacallo, 226 F.R.D. at 248*. Generally, a court will use either the percentage-of-recovery method or the lodestar **[*26]** method to determine the fee award. *In re GM, 55 F.3d at 821*. The lodestar method is considered most appropriate in statutory fee-shifting cases, and has the advantage of resembling a tradition fee calculation, whereas the percentage-of-recovery method is viewed as best approximating a contingent fee award in a common fund recovery. *Cendant PRIDES, 243 F.3d at 732*. The Third Circuit has approved the use of the percentage-of-recovery method for determining attorneys' fees in common fund cases, such as this one. *In re Rite Aid, 396 F.3d at 300*.

The standard for evaluating fee awards is reasonableness. *Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)*. In common fund cases of the type presented here -- where attorneys' fees and the Class recovery come from the same source and the fees are based on a percentage of the Class settlement -- the Third Circuit has set forth a multi-factor analysis to help analyze whether or not the percentage award is reasonable. *Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir. 2000)*. These factors include:

---

[5] The Bursor Group consists of several sets of lawyers, all of whom represent Class members Gary Hellman, Tamara Ruiz, and Margaret Gripaldi. Hellman, Ruiz, **[*25]** and Gripaldi had filed a motion to intervene, which this Court denied on July 24, 2009. (Docket Entry Nos. 61, 80). The lawyers comprising the Bursor Group are: (1) Lite DePalma Greenberg & Rivas; (2) Faruqi & Faruqi; (3) Jayne E. Goldstein; (4) William Pinilis; (5) Gilman and Pastor; and (6) Scott A. Bursor.

[6] The Plutzik Group consists of: (1) Bramson, Plutzik, Mahler & Birkhaeuser, LLP; (2) Franklin & Franklin; (3) Sherman Business Law; (4) Law Offices of Anthony A. Ferrigno; (5) Reich Radcliffe & Kuttler; (6) Cuneo Gilbert & LaDuca, LLP; (7) Carl Hilliard, Esq.; and (8) Law Offices of Joshua Davis.

> (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial **[*27]** 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.

Id.; see also *In re AT&T Corp., 455 F.3d 160, 165 (3d Cir. 2006)*. These factors are not intended to be exhaustive. Among other factors that a Court may consider are:

> (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.

AT&T, 455 F.3d at 165-166 (citing *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions, 148 F.3d 283, 338-340 (3d Cir. 1998)*. The above-referenced factors should not be applied in a formulaic way; rather, the district court should "engage in robust assessments of the fee award reasonableness factors **[*28]** recognizing an especially acute need for judicial scrutiny of fee arrangements in class action settlements." *AT&T, 455 F.3d at 166* (citations and quotations omitted); see also *Gunter, 223 F.3d at 195 n.1* (finding that "factors listed need not be applied in a formulaic way" and "in certain cases, one factor may outweigh the rest"). Finally, the Third Circuit requires that a district court cross-check the percentage-of-recovery calculation against the lodestar method to ensure that the percentage-of-recovery method has yielded a reasonable number. *AT&T, 455 F.3d at 164*.

The Court first evaluates the propriety of the requested fee award through application of the Gunter factors, and then addresses the motions regarding appointment of a special master and allocation of fees. Importantly, the *Girsh* factors discussed earlier are similar to, and overlap with, several of the Gunter factors. Thus, the Court incorporates by reference the reasons already articulated for approval of the settlement, and now makes specific findings with respect to each of the *Gunter* factors.

1. Size of Fund Created and Number of Persons Benefitted

The first Gunter factor analyzes the size of the fund created and the **[*29]** number of persons benefited. *Gunter, 223 F.3d at 195. n.1*. Generally speaking, there is an inverse relationship between an increase in the size of the settlement fund and the percentage fee award. *In re Prudential, 148 F.3d at 339*. This case, however, involves only a cash fund of $ 11.5 million and non-cash benefits valued at $ 2 million. While this is a significant amount given the claims asserted and the risks of establishing liability, the net recovery is not so large as to implicate the "inverse relationship" called for by a "very large" settlement. See *In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 195 (E.D.Pa 2000)* (finding that $ 100 million is the informal marker constituting a "very large" settlement).

The size of the fund here is large and the size of the Class measures in the millions. As of June 20, 2009, 41,650 claims had been filed. (Docket Entry No. 49 at 3.) Thus, the settlement has afforded benefits to a large amount of people. Additionally, alongside these monetary benefits, T-Mobile also agreed

to switch to a pro-rated ETF system and allow any customer who is still subject to a flat-rate ETF to convert his or her contract into a prorated one. Considering **[*30]** the large number of persons benefited and the significant size of the common fund created, this factor weighs in favor of the $ 4.5 million request for fees.

2. Class Member Objections

Next, a Court must examine "the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel." *Gunter, 223 F.3d at 195 n.1*. Only five Class Members lodged objections to the amount of attorneys' fees requested, and none of those objections state a substantive ground to warrant denying the request. [7] The Court notes that the Bursor and Plutzik Groups have lodged objections to the respective percentage payouts of the total amount of fees, but these objections do not strike at the reasonableness of the fee award itself. This factor, therefore, is strong evidence that the requested fee is reasonable.

3. Skill and Efficiency of [*31] the Attorneys Involved

The Court considers the skill and efficiency of Plaintiff's counsel, "as measured by the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." *Nichols v. SmithKline Beecham Corp., No. 00-6222, 2005 U.S. Dist. LEXIS 7061, 2005 WL 950616, at *22 (E.D. Pa. April 22, 2005)* (quotation omitted). The Court has already found, in its analysis of the *Girsh* factors, that Class Counsel are experienced and skilled in prosecuting ETF cases specifically and class actions more generally. The recovery achieved here came about quickly and swiftly, and though Class Counsel faced few legal difficulties in this particular case (due to the early settlement), the fact remains that a settlement of this magnitude only occurred because both sides properly recognized the legal and factual risks of going to trial. Finally, T-Mobile was represented by highly-skilled attorneys from two very prominent law firms, both of whom have experience litigating these types of cases. *In re Warner Communications Securities Litig., 618 F. Supp. 735, 749 (S.D.N.Y. 1985)* **[*32]** ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsel's work.") Accordingly, this favor weighs in favor of approving the requested fee award.

4. Complexity, Difficulty, and Duration of the Litigation

With respect to duration, the Court has already noted that this particular matter settled early. No substantive motions were entertained by the Court, and the matter proceeded rather quickly from an initial complaint filed on August 18, 2008, to preliminary settlement approval on February 19, 2009, to a final approval fairness hearing on July 27, 2009. Thus, the litigation was not long or drawn out. The Court, however, is aware that ETF litigation against T-Mobile has been ongoing for several years now -- in state and federal court -- and the settlement in this case cannot be evaluated simply by looking at the sparse docket referenced above. As indicated with respect to the third factor, this matter reached settlement

[7] Objectors Daniel Phee, Stacey Hayes, Thomas A. Carder, Kimberley Lyons and Aaron Miller object to attorneys' fees as excessive. However, none of the objectors states a clear ground upon which to find the fees excessive, relying instead on a general proclamation to that effect. Their objections are accordingly overruled.

because both sides appreciated the difficulties with taking the case to trial.

Next, regarding difficulty and complexity, the legal issues presented were by no means easy to navigate. The Court has already discussed at length the **[*33]** potential hurdles that would have cropped up had Class Counsel elected to pursue this matter to trial. Even though this particular litigation was not lengthy, the Court finds that the duration of all of the ETF cases pending against T-Mobile (in state and federal courts) along with the complexity of the legal issues involved weighs in favor of awarding the requested amount of fees.

5. Risk of Nonpayment

Class Counsel submits that it undertook this litigation on a contingent fee basis, with the risk that it might yield little or no recovery and leave them uncompensated for their efforts. Certainly, the risk associated with taking a case on contingency is a real and important factor to consider.

> Counsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks since both trial and judicial review are unpredictable. Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution.

*In re Prudential-Bache Energy Income P'ships Litig., No. 888, 1994 U.S. Dist. LEXIS 6621, 1994 WL 202394, at *6 (E.D. La. May 18, 1994)*. Indeed, "[t]he contingent fee agreement further substantiates **[*34]** the propriety of the attorneys' fee award." *In re Genta Securities Litig., No. 04-2123, 2008 U.S. Dist. LEXIS 41658, 2008 WL 2229843, at *10 (D.N.J. May 28, 2008)*; see also *In re Pet Food Prods. Liab. Litig., No. 07-2867, 2008 U.S. Dist. LEXIS 94603, 2008 WL 4937632, at *22 (D.N.J. Nov. 18, 2008)* ("Courts have consistently recognized that the risk of receiving little or no recovery is a major factor in considering an award of attorneys' fees."). The risk of nonpayment here, as with most contingency work, was high. Given the legal defenses available to T-Mobile and the oft-noted hurdles associated with certifying a class and proving liability, this factor is solidly in favor of approval.

6. Amount of Time Devoted to Case by Plaintiffs' Counsel

Next, the sixth Gunter factor is the "amount of time devoted to the case by plaintiffs' counsel." *Gunter, 223 F.3d at 195 n.1*. Class Counsel submits a compendium of fees and expenses totaling 5,586.87 hours, equaling $ 2,889,634.50 in lodestar and $ 54,530.65 in expenses. (Docket Entry No. 64 (Decl. of James E. Cecchi ("Cecchi Decl.")), Exh. A.) The attorneys comprising this massive hourly bill break down as follows:

Go to table1

(Id.) **[*35]** Additionally, as noted earlier, two groups of attorneys -- the Plutzik Group and the Bursor Group -- have submitted their own respective motions for attorneys' fees. The Plutzik Group details the following in time, lodestar, and expenses:

Go to table2

(See generally Docket Entry No. 60 (Declarations of Counsel in support of Motion for Award of Attorneys' Fees and Expenses).) And with respect to the same three categories -- time, lodestar, and expenses -- the Bursor Group reports the following with respect to its concurrent motion for fees:

Go to table3

(See generally Docket Entry No. 65 **[*36]** ("Declarations of Counsel submitted in support of joint motion for payment of incentive awards to Hellman et al. and for award of attorney's fees and nontaxable costs to ETF counsel").)

Having evaluated the time summaries provided by the various attorneys identified above, the Court notes its concerns with at least two of Class Counsel's claimed hours, lodestar, and expenses. First, the law firm of Freed & Weiss appears to have logged 1630 hours, equating to a mind-boggling lodestar of over $ 700,000. The Declaration of Paul M. Weiss in support of this figure is chalk full of question-marks. (Cecchi Decl., Exh. C ("Weiss Decl.").) He claims to have taken primary responsibility for the uploading and reviewing of over 140,000 documents produced by T-Mobile *after* preliminary approval of the settlement. (Id. P 20.) This took place, apparently, in order to "confirm[] the adequacy of the Settlement." Additionally, Weiss claims time associated with the filing of two other federal ETF-related complaints against T-Mobile: (1) Sweetnam v. T-Mobile USA, Inc., No. 2:06-cv-01463-RSM (W.D. Wash.), filed on October 10, 2006 (hereinafter, "Sweetnam"); (2) Greener, Banducci, Shoemaker, P.A. v. T-Mobile **[*37]** USA, Inc., No. 1:06-cv-00452-EJL (D. Idaho), filed on November 10, 2006 (hereinafter, "Greener"). (Weiss Decl. PP 13-14.) However, T-Mobile successfully moved to stay both Sweetnam and Greener. (Id. P 17.) A quick peek at the Sweetnam and Greener dockets indicates that nothing has taken place -- no discovery, no depositions, no substantive motion practice. The only major event in either case involved the contested motion to stay. Finally, Weiss claims to have undertaken "more fact and legal investigation" leading up to the filing of the instant action, adding that he and his firm "spent significant resources over many months working up the case, compiling and analyzing documents, conducting legal and additional fact research." (Id. P 18.) Certainly, the Court is aware that investigation, research, and analysis goes into drafting a successful complaint. However, given the timeline of this case and the fact that the other cases mentioned by Weiss appear to have had no major activity, his claim of $ 700,000 in lodestar is facially untenable.

Additionally, Class Counsel provides the Declaration of Barry L. Kramer. (Cecchi Decl., Exh. N ("Kramer Decl.").) That Declaration simply provides **[*38]** a total of 198 hours, equaling a $ 143,550 lodestar. Mr. Kramer, however, submits that he "does not keep individual time sheet records because I find these to be highly unproductive for this type of case." (Id.) Certainly, Mr. Kramer is entitled to his own method of book-keeping, but this type of Declaration is wholly unhelpful to a Court tasked with determining a proper fee award. Given its clearly-articulated lack of detail, Kramer's Declaration is of little value in evaluating this *Gunter* factor.

Having found fault, however, with the Weiss and Kramer Declarations, this factor still supports a fee award in the amount requested. After all, even if Class Counsel's hours were equal to 50% of the amount claimed, they would support recovery of the fee award requested. Moreover, when the Court adds in the hours expended by the Bursor Group and the Plutzik Group, this factor easily moves to the plus side of the ledger. [8] Thus, the Court notes its concerns with two of Class Counsel's submitted declarations but finds this factor still to weigh in support of awarding fees.

7. Awards in Similar Cases

8 As noted in Section IV.C.3, infra, the Court approves fees to the Bursor Group and the Plutzik Group for work they performed [*39] on behalf of the California state class prior to appointment of Class Counsel in the instant matter. Thus, it is appropriate to include their hours in the overall assessment of this Gunter factor.

With respect to this final factor, the court must (1) compare the award requested with other awards in comparable settlements; and (2) ensure that the award is consistent with what the attorney would have received had the fee been negotiated on the open market. *McGee v. Continental Tire North America, Inc., No. 06-6234, 2009 U.S. Dist. LEXIS 17199, 2009 WL 539893, at *15 (D.N.J. March 4, 2009)*. As to the first inquiry, "most fees appear to fall in the range of nineteen to forty-five percent." *In re Ikon Office Solutions, Inc. Securities Litig., 194 F.R.D. 166, 194 (E.D. Pa. 2000)*. The Court is aware that 33 1/3% is a standard figure for recovery in a consumer class action of the contingent-fee variety. See, e.g., *Martin v. Foster Wheeler Energy Corp., No. 06-878, 2008 U.S. Dist. LEXIS 25712, 2008 WL 906472, at *5 (M.D. Pa. March 31, 2008)* (noting that for a settlement of $ 1.64 million "district courts have typically awarded attorneys' fees of 30% to 35% of the recovery, plus expenses…"); *In re Corel Corp. Sec. Litig., 293 F. Supp. 2d 484, 495-98 (E.D. Pa. 2003)* **[*40]** (awarding one-third of $ 7 million settlement fund). In this case, where the settlement fund is substantially larger than both $ 1.64 million and $ 7 million, the 33 1/3% number is certainly justified.

Next, the requested fee of 33 1/3% is also consistent with a privately negotiated contingent fee in the marketplace. "Attorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class commercial litigation." *2008 U.S. Dist. LEXIS 25712, [WL] at *16* (quoting *In re Remeron Direct Purchaser Antitrust Litig., No. 03-085, 2005 U.S. Dist. LEXIS 27013, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005)* (citation omitted); see also *In re Orthopedic Bone Screws Products Liability Litig., 2000 U.S. Dist. LEXIS 15980, 2000 WL 1622741, at *7 (E.D. Pa. Oct. 23, 2000)* (… the court notes that plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery.") Thus, the requested fee award is strongly supported by both subparts to this final *Gunter* factor.

8. Conclusion

Application of the *Gunter* factors confirms the reasonableness of Class Counsel's requested 33 1/3% fee award. All seven of the Gunter factors, to varying degrees, militate in favor of approving this fee. The lack of any notable **[*41]** objections along with the complexity of the case, the substantial settlement, the contingency risk associated with nonpayment, and the fact that several courts in similar matters have awarded fees in this amount all indicate that approval of a 33 1/3 % fee is warranted.

B. Lodestar Cross-Check

In common-fund cases, district courts are also advised to cross-check the percentage fee award against the lodestar method of awarding fees so as to ensure that the percentage is not unreasonable. Gunter, 223, F.3d at 199. "The lodestar cross-check, while useful, should not displace a district court's primary reliance on the percentage-of-recovery method." *AT&T, 455 F.3d at 164*. The lodestar multiplier is calculated by dividing the attorneys' fees that Class Counsel seeks by Class Counsel's associated lodestar. *Cullen v. Whitman Medical Corp., 197 F.R.D. 136 n.6 (E.D. Pa. 2000)*.

As indicated above, the total time claimed by Class Counsel is 5586.67 hours, for a lodestar of $ 2,889,634.50. [9] Using that figure, the

9 The lodestar is calculated by multiplying an attorney's reasonable rate, as measured by the prevailing market rates in the community multiplied by the reasonable hours expended. Loughner v. Univ. of Pittsburgh, 260 F.3d 173, 180 (3d Cir. 2001). In this case, twelve separate attorneys from different regions comprise Class Counsel's fee application. The Court has not conducted its [*43] own inquiry into the market rates in each of those communities but is satisfied based

lodestar multiplier would be 1.55. However, as noted above, the Court takes issue with the Weiss and Kramer Declarations and accordingly -- for purposes of the lodestar cross-check -- the **[*42]** Court deducts their corresponding lodestars from Class Counsel's final figure. Deducting Weiss's lodestar of $ 711,816 and Kramer's lodestar of $ 143,550 yields a lodestar for Class Counsel of $ 2,034,268.50 and a multiplier of 2.21. The Third Circuit has noted that "[m]ultiples ranging from one to four are frequently awarded in common fund cases where the lodestar method is applied." *In re Prudential, 148 F.3d at 341*. In fact, in Cendant PRIDES, the Third Circuit approved a lodestar multiplier of 2.99 in a case it described as "relatively simple in terms of proof" in which "discovery was virtually nonexistent." *Cendant PRIDES, 243 F.3d at 735-36*; see also *AT&T, 455 F.3d at 173* (discussing the reasonableness of the Cendant PRIDES multiplier). Thus, a 2.21 multiplier is well within the range of reasonableness.

Next, as set forth in Section IV.C.3, infra, however, the Court is awarding fees to the Bursor and Plutzik Groups for their work on behalf of the California state class of T-Mobile subscribers. Thus, is it appropriate to consider their hours in the lodestar multiplier calculation. Adding in the Bursor Group's lodestar of $ 1,348,444.65 and the Plutzik Group's lodestar of $ 1,624,290.10, the new lodestar is $ 5,007,003.25 (this does not include the Weiss and Kramer hours) and the new multiplier is .90. Thus, considering all of the pertinent hours spent litigating ETF cases against T-Mobile nationwide, this attorney fee award does not cover the entire lodestar. A multiplier of less than one is quite reasonable for a lodestar cross-check.

Finally, the Court reiterates that "this is only a cross-check and a not a full lodestar analysis." *In re Linerboard Antitrust Litig., No. MDL 1261, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *15 (E.D. Pa. June 2, 2004)*. **[*44]** To delve deeply into the thousands of hours claimed by the many attorneys involved in this matter would undermine the Court's reliance on the percentage-of-recovery method. Thus, while this Court has raised questions as to the veracity of some of the hours claimed within Class Counsel's fee petition, the fact of the matter is that the hours claimed by all parties to ETF litigation against T-Mobile more than satisfy the lodestar cross-check for percentage-of-recovery purposes. [10] Thus, though some of the hours are questionable, the cross-check fully supports a $ 4.5 million fee award. Accordingly, the Court finds that the lodestar cross-check confirms the reasonableness of a $ 4.5 million fee.

C. Allocation of $ 4.5 Million Fee

Of course, awarding a $ 4.5 million fee does not end the matter. Rather, while objections to the reasonableness of the settlement and to the reasonableness of the total fee award have been few and far between, the parties have saved their ammunition to wage this particular battle. Specifically, Class Counsel, **[*45]** the Plutzik Group, and the Bursor Group vociferously disagree on how the $ 4.5 million fee should be allocated. This Court first provides factual background to the dispute, then outlines the applicable law, finally issues its decision.

1. Facts

The Plutzik and Bursor Groups rely heavily on the work they performed in two state-court actions to substantiate their claim for attorneys'

upon the declarations received that the various rates charged are reasonable. Additionally, the Court notes that all parties have appropriately broken down their lodestar by rates charged depending on the particular position of the attorney or paralegal involved.

10 In fact, even if Class Counsel's lodestar came in at half the claimed amount ($ 1.4 million instead of $ 2.8 million) the multiplier would be an acceptable 3.2.

fees arising out of the instant settlement. Indeed, the Settlement Agreement in this matter serves to release claims that have been waged in state and federal courts by various sets of attorneys for the past several years. The Bursor and Plutzik Groups claim, however, that the specific successes achieved in their dual state-court matters were so important to the present settlement that they deserve the lion's share of fees. Before addressing this argument on the merits, the Court provides a brief overview of the two state-court actions litigated by the Bursor and Plutzik Groups. [11]

The Bursor Group and the Plutzik Group were counsel to Plaintiffs in two state cases: (1) Hellman v. T-Mobile USA, Inc., Case No. 502004CA005061MB (Circuit Ct of 15th Judicial Circ., Palm Beach Cty, FL.) (hereinafter, "Hellman"); and (2) Vaughan, et al. v. T-Mobile USA, Inc., Case No. RG03108118 (part of In re Cellphone Termination Fee Cases, JCCP 4332 (Calif. Superior Ct., Alameda Cty, CA) (hereinafter, "Vaughan"). The Vaughan action is part of a consolidated proceeding involving ETF claims against several wireless-service providers. Both Vaughan and Hellman are identified as Related Actions in Article 11.35 of the Milliron Settlement Agreement. Thus, the Settlement Agreement will settle and release the claims pending in both cases.

Within the confines of the Vaughan case, the Bursor and Plutzik Groups successfully fought off at least two T-Mobile defenses. First, T-Mobile raised the defense of federal preemption. Eventually, on March 15, 2005, the Cellular Telephone & Internet Association ("CTIA") -- a trade group that includes Verizon, Spring, AT&T, and T-Mobile, filed a "Petition for an Expedited Declaratory **[*47]** Ruling" finding that ETFs are "rates charged" within the meaning of *Section 332(c)(3)(A) of the Communications Act* and FCC precedent and that any application of state law by a court to invalidate ETFs would be preempted by *Section 332(c)(3)(A)*. (Bursor Decl. P 56.) The Bursor Group claims to have "participated extensively" in the FCC proceedings, including drafting and submitting "to the FCC of formal comments, reply comments, and numerous ex parte filings advocating against federal preemption of the claims that are the subject of this settlement." (Id. P 58.) The CTIA withdrew its petition in mid-June 2009. (Plutzik Decl. 7.)

Next, T-Mobile moved to compel arbitration. (Bursor Decl. P 19.) Judge Ronald Sabraw denied that motion at the trial court level, a decision eventually upheld by California's intermediate appellate court. T-Mobile's subsequent petitions for review in the California Supreme Court and the United States Supreme Court were denied. (Id. PP 20-22.)

Hellman, filed on May 17, 2004, also incurred some motion practice. (Id. PP 30-42.) T-Mobile removed the case to federal court and moved to compel arbitration. (Id. PP 31-32.) Plaintiffs successfully moved to remand the case **[*48]** to Palm Beach County. (Id. P 36.) With respect to the motion to compel arbitration, the parties agreed in November 2005 to defer further work on the matter pending resolution of similar issues pending in California in the Vaughan matter. (Id. P 41.)

Meanwhile, the Bursor and Plutzik Groups achieved class certification in California in similar ETF-cases against Sprint, AT&T and Cingular. (Plutzik Decl. PP 19-20.) The hearing on the class certification motion against T-Mobile was stayed once the present settlement achieved preliminary approval. (Id. P 20.) Additionally, the cases against Sprint

11 The Court's discussion of the Hellman and Vaughan cases, litigated by the Bursor and Plutzik Groups (among others) is generally drawn from the Bursor and Plutzik Declarations submitted in support of their respective motions for [*46] attorneys' fees. (Docket Nos. 60-2 ("Plutzik Decl.") and 65-8 ("Bursor Decl.").

and Verizon went to trial. (Id. P 23.) The Verizon case settled for $ 21 million. (Id. P 25.) And in the Sprint case, the plaintiffs received a ruling that flat-rate ETFs were illegal and void under California law. (Id. P 23.) The Plutzik Group takes the position that T-Mobile only settled the present matter because of several factors, all discussed above: (1) preliminary approval of the Verizon settlement; (2) the trial verdict against Sprint; (3) the filing of the class certification motions against T-Mobile; and (4) the achievement of favorable class certification rulings against other wireless **[*49]** carriers. (Id. P 27.)

Finally, the Court notes that according to both the Bursor and Plutzik Groups, T-Mobile did engage in settlement negotiations with Vaughan counsel. Plaintiffs offered to settle for $ 49 million, T-Mobile countered with $ 5 million, and Plaintiffs lowered their demand to $ 40 million. (Id. P 28.) T-Mobile never responded to the $ 40 million offer, eventually settling the matter in this Court with Class Counsel for $ 13.5 million (cash plus non-cash).

Based upon the events outlined above, the Plutzik Group asserts a lodestar of over $ 1.6 million and the Bursor Group asserts a lodestar of approximately $ 1.34 million. The Plutzik Group does not explicitly argue for a specific percentage breakdown of fees, arguing instead that the Court should either award fees on a "fairness" principle or send the entire dispute to a special master. The Bursor Group asserts a claim to 40% of the $ 4.5 million fee award. [12]

2. Law

Generally, appointed Class Counsel is tasked with the responsibility of allocating the aggregate fee award to the various non-lead counsel who played a role in producing the settlement. The "submission of a combined fee application with actual allocation to be made by lead counsel has generally been adopted by the courts." *In re Linerboard, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, at *17*. "From the standpoint of judicial economy, leaving allocation to such counsel makes sense because it relieves the Court of the 'difficult task of assessing counsel's relative contributions.'" Id. (quoting *In re Prudential, 148 F.3d at 329 n.96*.) Indeed, this general method of allocating fees is embedded in the Settlement Agreement, which provides as follows:

> Class Counsel may make a Fee and Cost Application to be heard at the Final Approval Hearing seeking an award of reasonable attorneys' fees in an amount not to exceed four million, five-hundred thousand dollars ($ 4,500,000) and reimbursement of expenses. T-Mobile will not oppose or undermine an application at or below that amount or solicit others to do so. Attorneys' fees and costs consistent with this paragraph that **[*51]** are approved by this Court shall be paid by the Settlement Administrator out of the Common Fund to Class Counsel within fifteen (15) days after the date that the Court has entered the Final Approval Order and Judgment. Class Counsel shall be solely responsible for further distributing, to ETF Counsel and otherwise, any payments made under this provision. No later than twenty-one (21) days prior to the Final Approval Hearing, ETF Counsel shall submit to Class Counsel a summary of the attorneys' fees they wish to seek as part of the Settlement. All other claims for attorneys' fees by ETF Counsel shall be deemed waived. In no event will any attorneys' fees be required to be paid other than from the Common Fund, and in no

12 The 40% figure is contained within a side agreement reached between T-Mobile and the Bursor Group ("Bursor Agreement"). In the Bursor Agreement, the Bursor Group agreed to pursue 40% of the fees awarded in this case, and T-Mobile agreed not to oppose this application. [*50] (Bursor Decl., Exh. 7 ("Bursor Agreement") P 5.)

> event will awarded attorneys' fees exceed four million, five-hundred thousand dollars ($ 4,500,000).

(Settlement Agreement, Art. VI P 3.)

However, the fees sought by the Bursor and Plutzik Groups are for work performed prior to the appointment of Class Counsel. According to the Third Circuit, "the court's involvement in the fee decision will be at its height when the fee request is for work performed before the appointment of the lead plaintiff." *In re Cendant Corp. Securities Litig., 404 F.3d 173, 195 (3d Cir. 2005)*. **[*52]** Expanding upon this idea, the Cendant Court discussed the types of work that would be compensable prior to appointment of a lead plaintiff.

> Only those attorneys who confer an independent benefit upon the class will merit compensation. To summarize, responsibility for determining fees for the work of non-lead counsel performed before the appointment of the lead plaintiff will rest, in the first instance, with the district court, though that court may ask the lead plaintiff for guidance in evaluating claims for fees. Only work that actually confers a benefit on the class will be compensable; in the ordinary case, simply filing a complaint that is substantially identical to other complaints will not by itself warrant compensation.

Id. at 197. [13] The Advisory Committee Notes to the 2003 Amendments to *Rule 23(h)* support the Cendant court's conclusions, stating as follows:

> [*Rule 23(h)*] provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the **[*53]** class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under *Rule 23(e)* or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

Fed. R. Civ. P. 23(h), Advisory Committee Notes to the 2003 Amendments.

Thus, both the Bursor and Plutzik Groups, as well as Class Counsel, are correct. Class Counsel is generally permitted to allocate a fee award to the non-lead counsel who produced work on behalf of the settlement. This procedure conserves judicial resources and leaves the allocation decision in the hands of counsel who are best-equipped to evaluate the relative contributions of various attorneys to the ultimately successful outcome. The Court, therefore, gives Class Counsel's fee determination significant deference. However, the Court is tasked with the duty of analyzing and assessing the contributions of non-Class **[*54]** Counsel that occurred prior to appointment of Class Counsel. This Court, therefore, strikes a middle ground -- it will evaluate and ultimately decide the percentage award to be given to the Bursor and Plutzik Groups for pre-appointment work while allowing Class Counsel to divide the remainder of the fee based upon the relative contribution of each attorney.

3. Application

The Court agrees that the Third Circuit's decision in Cendant authorizes an award of fees for work performed prior to the appointment of Class Counsel that conferred an independent benefit on the Class. However, the positions advanced by the Bursor and

13 The Cendant Court discussed fees in the context of the Private Securities Litigation Reform Act ("PSLRA"). Though this is not a PSLRA case, the Court finds that the analysis of pre-appointment attorneys' fees is applicable.

Plutzik Groups with respect to this issue are far too aggressive. Under their base argument, they are entitled to a significant percentage of the $ 4.5 million attorney fee because they achieved several successful results litigated the Vaughan and Hellman cases, all of which theoretically led T-Mobile to settle its claims in the instant action. The significant percentage they assert a claim to is nearly 80% of awarded fees. When asked at the fairness hearing what would constitute a "fair" allocation of fees would be, Mr. Bursor responded -- "I think it would be fair, **[*55]** your Honor, to give my group 40 [percent], the California group 40 [percent], and to give these folks [Class Counsel] 20." (Fairness Hr'g Tr. Jul 27, 2009 48:22-24). Later, Mr. Bursor suggested that even this breakdown was too generous to Class Counsel, stating:

> …you know, I am not sure that Mr. Cecchi's group actually added any value to the settlement. If we were going to do a fee paid based on the value obtained for the class, I am not sure they would get anything. So when I say I think it would be fair [to give] 40 to my group, 40 to the California folks and 20 to them, I think that actually overcompensates them in terms of value generated for the class.

(Id. at 50:10-18.) The argument advanced by the Bursor and Plutzik Groups, in favor of an 80% allocation of the $ 4.5 million fee award, is simply not supported by the law. More importantly, it would yield consequences that would wreak havoc on the practice of class action litigation.

The logical import of Bursor's and Plutzik's argument is that their victories in the Vaughan matter, coupled with the positive results achieved against *other* wireless-service providers (Sprint, Verizon, and AT&T) entitle them to a fee in any action settled **[*56]** anywhere that addresses ETF claims against T-Mobile. The settlement Class in this case is nationwide and includes the California class proposed in the Vaughan matter. But Bursor and Plutzik do not simply espouse a theory in which they are entitled to recover for ETF claims settled as to the class on whose behalf they have litigated for the past five years -- the state court class in California. Rather, if some different set of attorneys began and settled a state-court action, on behalf of a statewide class, in a state other than California, the Bursor and Plutzik Groups would claim an entitlement to fees, so long as the action addressed ETFs charged by T-Mobile. This argument is as aggressive as it is untenable -- if upheld, it would allow lawyers to successfully litigate one state-court case and thereby put a stake in the ground with respect to fees collected on similar claims in different jurisdictions. [14] The fact that they successfully defeated T-Mobile's motion to compel arbitration, successfully litigated cases against *other* wireless carriers in California, and poured many hours of work into opposing the wireless industry's claims of federal preemption does not entitle them to **[*57]** fees in all actions that settle ETF claims against T-Mobile. And if Bursor and Plutzik would not be entitled to automatically claim fees in a separate state-court action that settled after the victories described in Vaughan and Hellman, they certainly are not entitled to 80% of fees in a nationwide class such as Milliron.

In fact, adopting the Bursor and Plutzik Groups' position in this case would ostensibly allow them to prevent attorneys from filing related actions in different jurisdictions altogether. The plaintiffs in Vaughan, after successfully defeating T-Mobile's motion to compel arbitration, and after putting work into

---

14 The Court uses the term "successfully litigate" loosely, as the Bursor and Plutzik Groups rely not on a successful trial court verdict or settlement, i.e., the successful conclusion to a case, but rather on an assorted set of motion practice victories.

litigating T-Mobile's preemption defense, would assert a claim to fees in all actions filed against T-Mobile involving ETFs. If one catalyst for class action litigation is the possibility that an attorney can collect an attorney fee award that offsets the risk associated with taking a case on contingency, Bursor **[*58]** and Plutzik's claim to 80% of any fee awarded would dis-incentivize any new lawyers from bringing suit. In the end, T-Mobile would be forced to settle with the Bursor and Plutzik Groups or not settle at all.

The real disservice occurring from this chain of events is borne out by the very settlement in this case. The Bursor and Plutzik Groups, by their own declarations, advised this Court that they first offered $ 49 million and then $ 40 million to settle the Vaughan matter on a nationwide basis with T-Mobile. The matter settled for $ 13.5 million with Class Counsel in the instant case. Yet, neither Bursor nor Plutzik object to the reasonableness of the settlement reached in this matter. This is in spite of the fact that during the Fairness Hearing and on the papers, much appeared to be made of the fact that Class Counsel had settled this case "on the cheap" by swooping in and consummating a settlement at a fraction of the $ 40 million. (Fairness Hr'g Tr. July 27, 2009 49:2-5) (Bursor: "Well, they [Class Counsel] didn't actually get the case settled, your Honor. They came in and made a settlement offer that was about 25 percent of what we were demanding after we litigated the case for **[*59]** five years.") In their papers to Judge Winifred Smith, the presiding judge in the Vaughan matter, the Bursor and Plutzik Groups opposed T-Mobile's application for a stay (due to the Milliron settlement) on the ground that "the Milliron settlement is the product of a reverse-auction and not fair or adequate to the members of the class in Vaughan v. T-Mobile." (Bursor Decl., Exh. 6 at 2.) According to Judge Smith, Plaintiffs also argued to her that the lawyers in the Milliron matter had not undertaken the necessary investigation and discovery to properly settle the claims and that the settlement might well be unreasonable. (Id. at 3.) After all of this posturing, however, no member of the Plutzik or Bursor Groups objected to the settlement in this matter. In other words, forty-million dollars might have been their starting offer in the California negotiations with T-Mobile but both Plutzik and Bursor agree that $ 13.5 million is fair and reasonable. Yet under their theory of fee allocation, Defendant would never have been able to negotiate with outside counsel to get to $ 13.5 million because Bursor and Plutzik might well have prevented those additional filings in the first place. [15]

In fact, at some level, the claim asserted by the Bursor and Plutzik Groups is even more aggressive than the simple argument seeking to parlay victories against T-Mobile into fees in related litigation. Rather, part of their application is also based on the fact that they settled a similar case against Verizon, litigated to verdict a case against Sprint, and successfully certified classes in cases against other wireless-service providers. In other words, they seek to use assorted successes in separate cases *against different defendants* to stake their claim to fees in this one. Thus, the successful settlement in Verizon, if it contributed at all to T-Mobile's desire to settle **[*61]** its own suit, would entitle the Verizon lawyers to fees. No Court has held for this proposition and for good reason.

Finally, the Court takes issue with even the "simple" argument that successes in Vaughan were of such extraordinary significance that they forced T-Mobile to settle this action.

---

15 This, [*60] of course, begs the question -- if $ 13.5 million is reasonable and the Bursor and Plutzik Groups could not get a settlement done because they came in too high at $ 40 million, how does that impact this Court's evaluation of the value of their California work to the nationwide settlement reached in this matter? Beginning settlement negotiations at an astronomically high starting point does not necessarily entitle an attorney to fees if someone else puts in the time to negotiate the settlement for a reasonable number.

Certainly, this Court does not deny that the plaintiffs in Vaughan litigated their case well and won a significant victory by defeating T-Mobile's motion to compel arbitration. However, that victory does not in and of itself collaterally estop T-Mobile from moving to compel arbitration in this or other jurisdictions. See, e.g., *In re Jamster Marketing Litig., MDL No. 1751, 2008 U.S. Dist. LEXIS 91096, 2008 WL 4858506 (C.D. Cal. Nov. 10, 2008)* (disallowing collateral estoppel argument where Court had previously denied T-Mobile's motion to compel arbitration because the new motion to compel arbitration involved issues arising under the laws of states other than California); *Hall v. AT&T Mobility LLC, 608 F. Supp. 2d 592, 600 (D.N.J. 2009)* (Linares, J.) (discussing the application of non-mutual offensive collateral estoppel to defendant's motion to compel arbitration). In fact, T-Mobile brought its own motion to compel arbitration **[*62]** in this action, choosing to withdraw it only after the case had settled. (Docket Entry No. 9.) Additionally, the heavy emphasis that the Bursor and Plutzik Groups place upon their roles in opposing T-Mobile's preemption argument belies the actual timing of the FCC proceedings. Plutzik concedes that the FTIA petition was not withdrawn until mid-June 2009, well after preliminary approval of the present settlement. The fact that the issue was addressed and litigated at various FCC hearings does not mean that, at the time of the filing of the Complaint in Milliron or at the time of preliminary approval of the present settlement, the Bursor and Plutzik Groups had successfully fought off the preemption argument on behalf of all members of the nationwide class. Rather, evaluating the strength of its preemption argument along with the strength of its motion to compel arbitration, and taking into account the potential for an eventual verdict at trial, T-Mobile made the decision to settle. All in all, the work done in California certainly played a role in bringing T-Mobile to the settlement table, just as any victories against a defendant might cause it to re-think its litigation strategy with **[*63]** respect to similar claims in different jurisdictions. The current state of class action law, however, does not permit the Bursor and Plutzik Groups to recover 80% of fees based upon a successfully litigated motion to compel arbitration and hundreds of hours spent litigating an issue of preemption. Nor does it permit recovery for successes attained in other cases against other defendants.

At the end of the day, results matter. Class Counsel, having settled this case for a value that even the Bursor and Plutzik Groups concede is reasonable, is entitled to reap the benefits. Bursor and Plutzik, having achieved significant victories in California, should receive compensation for their tremendous amount of work undertaken litigating the state-court claims in Vaughan. That work entitles them to a share of fees based upon the class that they actually represented -- a class that begins and ends with California T-Mobile subscribers. Awarding a limited fee, based upon pre-appointment work performed on behalf of the state-court class that they actually represented, allows the Bursor and Plutzik Groups to protect their investment in the California state class while preserving the vitality of the **[*64]** class-action mechanism that allows other attorneys to assert and litigate similar claims on behalf of new classes in other states.

In conclusion, the Plutzik and Bursor Groups are not entitled to 80% of fees of a nationwide settlement that they agree is fair and reasonable on the simple ground that they successfully defeated multiple motions by T-Mobile in a related state-court action. Their successes in Vaughan are certainly worth compensating, however, because they directly benefited the California class of T-Mobile subscribers. Class Counsel suggested in their

papers and at oral argument that 16% of the T-Mobile nationwide class resides in California and that 16% would therefore be an appropriate number upon which to base the Bursor/Plutzik compensation request. (Class Counsel Opp. Br. to California ETF Fee Applications at 5.) The 16% number has gone unchallenged. Thus, this Court relies upon it and agrees with Class Counsel as to its significance. The attorneys who litigated the Vaughan matter are entitled to 16% of the $ 4.5 million fee awarded in this action, resulting in an award of $ 720,000.

The Court notes that the California group litigating the Vaughan matter consisted of **[*65]** the Bursor Group, Plutzik Group, and Jacqueline Mottek. Ms. Mottek has joined forced with Class Counsel in the present case and submitted her fee request as part of Class Counsel's overall fee petition. As already noted, the Bursor and Plutzik Groups submitted their applications for fees separately from Class Counsel, requesting reimbursement for value generated prior to appointment of Class Counsel. The Court has now awarded $ 720,000 to the attorneys who litigated the Vaughan matter. The total hours billed by each of the three groups is 8219.87, broken down as follows: (1) Jacqueline Mottek -- 2214.60 hours; (2) Plutzik Group -- 3,469.98 hours; (3) Bursor Group -- 2535.29 hours. Thus, the percentage of the $ 720,000 allocable to each party is 27% ($ 194,400) to Mottek, 42.2% ($ 302,400) to the Plutzik Group, and 31% ($ 223,300) to the Bursor Group. Though Ms. Mottek has put in her claim for fees alongside Class Counsel, the Court awards her the $ 194,400 identified above for her work on behalf of the California state class prior to settlement of the present matter. Class Counsel is certainly entitled to give her additional compensation for her contributions towards creating the present **[*66]** Milliron settlement.

Finally, neither the Plutzik nor Bursor Groups are entitled to any percentage of the $ 4.5 million award based upon their work in Hellman. The Bursor Declaration clearly notes that Hellman has been stayed since 2005 pending resolution of the Vaughan matter. Thus, it would be a stretch for this Court to find that the work in Hellman contributed to the settlement reached on behalf of Florida consumers. Otherwise, Plutzik and Bursor would be able to file actions in several different states, stay those actions pending the outcome of the largest one, and then claim fees on behalf of all actions no matter who settled them or how they were settled. For good reason, no case stands for this radical proposition.

At the end of the day, the California litigation significantly advanced claims on behalf of the California class. This Court, therefore, agrees that the work is compensable to the tune of $ 720,000, equal to 16% of $ 4.5 million. [16]

C. Expenses

Finally, Class Counsel requests $ 54,530.65 in out-of-pocket litigation expenses. **[*68]** Expenses are recovered if they are adequately documented and reasonable in nature. *In re Safety Components, Inc. Sec. Litig., 166 F. Supp. 2d 72, 108 (D.N.J.*

16 As noted earlier, the Bursor Group also signed a side Agreement with T-Mobile agreeing to apply for a 40% cut of the fee award. In that Agreement, the Bursor Group agreed to "continue to assist T-Mobile in reviewing the notice program [*67] for this litigation." (Bursor Agreement P 2.) The Bursor Group is not an objector to this litigation, and therefore is not covered by the general rule in which courts can award attorneys' fees to objectors for work that substantially increased the value of the settlement. In re Rent-Way Securities Litig., 305 F. Supp. 2d 491, 520 (W.D. Pa. 2003) ("Absent a showing that the objector substantially enhanced the benefits to the class under the settlement, the objector is not entitled to a fee.") In any case, even if that rule applied, no showing has been made that the Bursor Group performed any such work. Rather, because the Bursor Agreement implicated post-Settlement work, it inevitably comes within the confines of Class Counsel's decision regarding the adequate distribution of fees. Class Counsel is fully able to judge and appreciate the merits of each attorney's contribution to the settlement after the filing of the Complaint in this matter, and therefore the Court shall not award separate fees to the Bursor Group based on any supposed contributions it made to the notice program in this matter.

2001)("Counsel for a class action is entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action.") (citing Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995)). Courts have generally approved expenses arising from photocopying, use of the telephone and fax, postage, witness fees, and hiring of consultants. Abrams, 50 F.3d at 1225; Cullen, 197 F.R.D. at 151.

Having found the Weiss Declaration facially untenable, the Court strikes his associated $ 40,572.48 request for expenses. The questions arising from his Declaration call into question the veracity of the entire request and therefore the Court cannot grant his request for over $ 40,000 in expenses. The rest of Class Counsel's expenses, in the amount of $ 13,958.17, are approved. Additionally, the Bursor and Plutzik Groups shall be reimbursed for their expenses, in the amount of $ 59,741.41 for the Plutzik Group and $ 21,980.90 for the Bursor Group.

D. Incentive Awards

In accordance **[*69]** with Paragraph VI.4 of the Settlement Agreement, the Court approves a $ 1,000 incentive award for plaintiff Milliron to be paid out of the common fund.

E. Motion for Special Master

The Bursor and Plutzik Groups have also moved this Court to appoint a special master to oversee the present fee dispute. The issue of fee allocation has now been decided, and thus this request is denied as moot.

Importantly, however, the premise underlying this motion is false. The Bursor and Plutzik Groups argue for submission to a special master because they believe that someone should evaluate the hours submitted. This presumes that fees should be allocated on the basis of hours billed. As the Court has already indicated, that presumption is mistaken. The Plutzik and Bursor Groups are not entitled to recover for their full lodestar in litigating the California action, nor are they entitled to receive a percentage of the fee award based upon their lodestar as compared with that of Class Counsel. Rather, they are entitled to recover for their contributions to the present settlement on behalf of the California class of T-Mobile subscribers. Accordingly, the Court need not sift through reams of time entries, **[*70]** nor need it appoint a special master to do so. Allocating proceeds based upon the size of the California class vis-a-vis the total T-Mobile set of subscribers is a fair and reasonable way to apportion fees for value added prior to appointment of Class Counsel.

V. Conclusion

For the reasons set forth above, the Court finds that the Settlement in this matter is fair, reasonable, and adequate and provides a significant recovery to the Class. Additionally, the request for attorneys' fees in the amount of $ 4.5 million is approved, as is the request for expenses and an incentive award. Finally, the Court awards a portion of the $ 4.5 million to the Bursor and Plutzik Groups but denies their request for 80% of fees.

THEREFORE, IT IS on this 10th day of September, 2009,

ORDERED that the proposed settlement Class, consisting of the ETF-Assessed Class and the Subscriber Class, is certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3); and it is further

ORDERED that final approval is hereby granted to the Settlement Agreement that was preliminarily approved on February 19, 2009,

as the settlement is fair and reasonable and sat satisfies the multi-factor balancing test laid out by *Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)*; **[*71]** and it is further

ORDERED that the motion by Class Counsel for an award of attorneys' fees in the amount of $ 4.5 million is **GRANTED;** and it is further

ORDERED that the request for expenses in the amount of $ 13,958.17 for Class Counsel, $ 59,741.41 for the Plutzik Group, and $ 21,890.90 for the Bursor Group is **GRANTED;** and it is further

ORDERED that the the Plutzik Group's and Bursor Group's dual motions for attorneys' fees and costs (Docket Entry Nos. 65 and 66) are **GRANTED IN PART and DENIED IN PART;** and it is further

ORDERED that the Plutzik Group is awarded $ 223,300, the Bursor Group is awarded $ 302,400, and Jacqueline Mottek is awarded $ 194,400 of the $ 4.5 million fee award, for work performed on behalf of the California state class prior to appointment of Class Counsel in the present matter; and it is further

ORDERED that Class Counsel is vested with the discretion to distribute the remainder of the fee award to those attorneys who assisted in creation of the present settlement fund; and it is further

ORDERED that Plaintiff Milliron shall receive an incentive award of one-thousand dollars; and it is further

ORDERED that the motion for appointment of a special master is **DENIED** (Docket **[*72]** No. 72); and it is further

ORDERED that Class Counsel and T-Mobile shall implement the Settlement Agreement in accordance with its terms and with the holdings set forth in this Opinion and Order; and it is further

ORDERED that the file in this matter is hereby closed.

/s/ Jose L. Linares

Jose L. Linares

UNITED STATES DISTRICT JUDGE

Table1 (*Return to related document text*)

FIRM NAME	HOURS	LODESTAR ()	EXPENSES ()
Carella Byrne	772.40	493,828.50	3,873.75
Freed & Weiss	1630.30	711,816.00	40,572.48
Seeger Weiss	428.25	243,257.50	175.61
Lovell Mitchell & Barth	41.25	16,482.50	362.70
Jacqueline Mottek			
(Coughlin Stoia)	2092.75	972,282.50	9,346.11
(Positive Legal Group)	121.85	54,834.00	175.00
Strange & Carpenter	165.72	131,972.75	0
Augustine & McKenzie	28.6	7,865.00	25.00
Richard Burke	163	105,950.00	0
Eric Stoppenhagen	48.75	19,256.25	0
William Sweetnam	8.7	4,567.50	0
Banducci Woodward			
Schwartzman	54.6	21,294.00	0
Wardup & Wardrup	30.7	7,675.99	0
Barry L. Kramer	198	143,550.00	0
TOTAL	5,586.67	2,889,634.50	54,530.65

Table1 (*Return to related document text*)

Table2 (*Return to related document text*)

FIRM NAME	HOURS	LODESTAR ()	EXPENSES ()
Bramson Plutzik	1511.30	605,247.00	31,162.48
Franklin & Franklin	943.03	490,375.60	16,351.49
Anthony A. Ferrigno	522.3	300,322.50	6486.46
Reich Radcliffe & Kuttler	208	70,973.75	477.15
Carl Hilliard	108.08	70,250.00	1102.54

FIRM NAME	HOURS	LODESTAR []	EXPENSES []
Cuneo, Gilbert & LaDuca	150.99	72,670.00	4,161.29
Joshua Davis	26.275	14,451.25	0
TOTAL	3,469.975	1,624,290.10	59,741.41

Table2 (*Return to related document text*)

Table3 (*Return to related document text*)

FIRM NAME	HOURS	LODESTAR []	EXPENSES []
Lite DePalma Greenberg & Rivas	11.8	5,107.50	0
Faruqi & Faruqi	1,179.20	652,549.50	12,287.96
Jayne E. Goldstein	148	51,722.50	1511.72
William Pinilis	5.6	2,800	0
Gilman and Pastor	75.4	39,585	158.75
Scott A. Bursor	1115.29	596,680.15	7932.47
TOTAL	2535.29	1,348,444.65	21,890.90

Table3 (*Return to related document text*)

End of Document