IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

IN RE BEHR DAYTON THERMAL PRODUCTS, LLC	:	**CASE NO. 3:08-cv-00326-WHR**
	:	**(Judge Walter H. Rice)**
	:	

CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS

Pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), the Court's Order Preliminarily Approving Class Action Settlement Agreement (Doc. 480), and section VI. of the Parties' Settlement Agreement (Doc. 477-2), Class Counsel respectfully move that this court approve litigation expenses incurred by Class Counsel to date in the amount of $2,136,552.07 and approve an attorney's fee on a percentage of the fund basis, in the amount of one-third (33.33%) of the $9 million gross settlement agreed to in this matter.

Class Counsel intend to file an Amended Motion for An Award of Attorney's Fees and Costs closer to the time of the fairness hearing in January 2024, to reflect any additional expenses and hours expended on the case, and any additional updates in the case.

This Motion is based on the attached Memorandum of Law and exhibits, and the files, records, and pleadings herein.

Respectfully submitted,

October 16, 2023
Date:

/s/ Patrick Thronson

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Settlement Class Counsel

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MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS

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MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS

Pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), the Court's Order Preliminarily Approving Class Action Settlement Agreement (Doc. 480), and section VI. of the Parties' Settlement Agreement (Doc. 477-2), Class Counsel[1] respectfully move this Court for an Order approving the following payments in connection with the Settlement: (1) attorneys' fees to Class Counsel in the amount of $3,000,000.00, representing one-third of the gross settlement of $9 million; (2) reimburse Class Counsel's expenses incurred in the prosecution of this action, which to date total $2,136,552.07.

This motion is being filed pursuant to the timeline set forth in the Settlement Agreement, which contemplates that a petition for costs and fees be filed 14 days after the order granting preliminary approval was filed. This permits the members of the Class to have notice of the amount of fees and approximate amount of costs Class Counsel will seek in connection with this settlement. Class Counsel expects that additional costs will be incurred between now and final approval, and reserve the right to petition for recovery of permissible costs. Class Counsel intend to submit an amended/supplemental motion for fees and costs that sets forth any additional costs incurred and hours spent on this case up until the time the settlement is fully approved.

Plaintiffs and Class Counsel have litigated this action since 2008. They engaged in full class discovery and successfully moved to certify an issues class. They successfully opposed an interlocutory appeal of class certification and a petition for a writ of certiorari following affirmance of the Court's class certification decision. Upon remand, Class Counsel engaged in full merits discovery, obtained favorable rulings on their own motion for partial summary judgment and on most issues raised within Defendants' motions for summary judgment, and engaged in extensive

[1] Capitalized terms not defined herein are as stated in the Class Action Settlement Agreement and Release, filed with the Court on September 15, 2023.

mediation discussions, encompassing a two-day mediation session in August 2019 and ongoing discussions from March 2022 through May of 2023, resulting in a near-eight figure settlement.

Under the Settlement, Class Members will receive high four-figure compensation for their property damage claims and have not waived any claims for personal or bodily injury or medical monitoring. This outcome did not come easily. Rather, it took considerable time, effort, and skill from Class Counsel, over the course of fifteen-and-a-half years.

BACKGROUND

I. Brief factual background

This consolidated class action, filed by the Plaintiffs on behalf of themselves and other similarly situated persons, alleges that residential, commercial, and tax-exempt properties in the McCook Field neighborhood of Dayton, Ohio have been contaminated because of exposure to trichloroethylene (TCE) and perchloroethylene (PCE). Plaintiffs allege that, as a result of negligence by the Defendants, TCE and PCE contamination has migrated through groundwater from two facilities in the McCook Field Neighborhood in Dayton, Ohio: (1) an automotive parts manufacturing facility located at 1600 Webster Street in Dayton that was operated by Daimler Chrysler and Chrysler, LLC (predecessors in interest to nominal defendant Old Carco, LLC) from 1937–2002, and then from 2002 to the present by MAHLE Behr Defendants (the "Chrysler-Behr Facility"); and (2) a commercial laundry facility located at 1200 Webster Street in Dayton, owned and operated by Aramark or its predecessors in interest (the "Aramark Facility") (collectively, "the Facilities"). Plaintiffs further allege that, due to tortious conduct by the Defendants, PCE and TCE originating from the Facilities has intruded into hundreds of homes and other buildings atop the overlapping plumes in the McCook Field Neighborhood, also known as the Behr Dayton Thermal VOC Plume Site ("the Site"), through vapor intrusion, thereby causing extensive property damage. Plaintiffs further allege they are entitled to damages for lost property value, loss of the use and

enjoyment of their properties, and damage to their community. (Doc. 242, Page ID # 7083.) Defendants deny all liability and deny Plaintiffs are entitled to any damages.

II. Procedural Background

Prior to initiating this litigation, Class Counsel and their scientific consultants investigated and reviewed voluminous (i) documents discussing the historic and present conditions at the Site; (ii) documents made public by USEPA and Ohio EPA; (iii) peer-reviewed and scientific literature concerning contaminants at the Site; (iv) studies and reports concerning screening for contaminants at the site; (v) case law concerning class certification; and (vi) extensive meetings with class members and residents. (Thronson Decl ¶ 6.) Counsel relied on that work during the litigation. (*Id.*)

On August 11, 2008, thirty named Plaintiffs owning property in the McCook Field neighborhood filed suit against Defendants or their predecessors in interest in the Montgomery County Court of Common Pleas. (Doc. 2, Ex. 2.)[2] Defendants removed the action from Ohio's Montgomery County Court of Common Pleas to this Court. (Doc. 1.) Two other class action lawsuits with similar allegations were filed contemporaneously.[3]

Defendants Behr Dayton Thermal Products, LLC and Chrysler Motors, LLC quickly filed a motion to dismiss. (Doc No. 17.) Plaintiffs filed an opposition. (Doc. 25.) Plaintiffs also filed, with Court permission, an amended class action complaint (Doc. 51), in response to which Defendants

[2] The Complaint initially included Gem City Chemicals, Inc., DAP Inc., and Gayton Corporation as Defendants. As discovery progressed, Class Counsel determined that further litigation against these entities would not be productive, and that the three current Defendants in the case were the responsible parties. Hence, Plaintiffs moved to dismiss these parties without prejudice, along with personal injury claims in the case. (*See* Doc. 116.) Behr and Aramark opposed this motion. (Doc No. 120, 121.) The Court sustained Plaintiffs' motion. (Doc. 127.)

[3] These actions were *First Property Group, Ltd.,* et al. *v. Behr Dayton Thermal Products, LLC,* et al., No. 3:08-CV-00329 (S.D. Ohio filed Sept. 17, 2008); and *Kimberly Spears,* et al. *v. Chrysler LLC,* et al., No. 3:08-CV-00331 (S.D. Ohio filed Sept. 18, 2008).

Behr and Chrysler filed a second motion to dismiss or, in the alternative to stay. (Doc. 52), which Plaintiffs opposed (Doc. 61.)

Ultimately, Plaintiffs were almost entirely successful on the motion to dismiss: the magistrate judge recommended the Court grant the motion only as to Counts V and VI of the Amended Complaint and dismissed those without prejudice to Plaintiffs ability to pursue medical monitoring relief and punitive damages as remedies. (Doc. 70.) Behr filed an objection to the magistrate's recommendation (Doc. 76), which was overruled (Doc. 106.)

The parties began extensive efforts to develop complex protocols on class discovery (see, e.g., Doc No. 59, 65), and the cases were consolidated for class certification discovery in February 2009. (Doc. 60.) Chrysler, however, filed a suggestion of bankruptcy on May 1, 2009. (Doc No. 71.) On May 7, 2009, the Court administratively stayed the case on account of Chrysler's bankruptcy. The case was essentially stayed until April 14, 2011, when the stay was lifted except as to Chrysler. (Doc. 92.) Behr answered the amended complaint on September 27, 2011. (Doc. 109.)

The three cases were formally consolidated in this Court for all remaining proceedings with the filing of Plaintiffs' Master Amended Class Action Complaint on January 3, 2012. (Doc. 118.) Plaintiffs also filed a preliminary motion for class certification on that date. (Doc. 117.) Defendants moved to strike this Complaint (Doc. 120), which was denied (Doc. 127). Plaintiffs then moved to file a second amended master class action complaint, on an unopposed basis, which the Court permitted. (Docs. 147, 149.) The Court also directed notice to the putative class regarding dismissal of their personal injury claims. (Doc. 144.)

Plaintiffs, alone or jointly with Defendants, proposed numerous case management orders, discovery protocols, and pretrial orders. (*See, e.g.*, Doc. Nos. 135, 137, 190, 202.) The parties also wrangled extensively over a document production and preservation protocol for class discovery. (*See* Docs. 139–142, 145, 150, 154, 155, 159, 160.) There were also extensive discovery disputes

regarding document production and protective orders regarding testimony. (*See, e.g.*, Docs. 183, 184, 187, 192, 194, 197, 198, 203–208, 210, 215.)

The parties underwent years of extensive fact and expert discovery, both for class certification and, later, on the merits during the issues phase. The parties deposed approximately twenty witnesses, propounded and responded to extensive interrogatories, requests for production of documents, and third-party subpoenas. They exchanged approximately 135,000 documents in discovery or obtained through publicly available sources, amassing at least 538 gigabytes; approximately 15 expert reports and supplementations, some with attachments and exhibits exceeding thousands of pages were prepared and exchanged.

Plaintiffs disclosed three expert witnesses at the class certification stage: Dr. Nicholas Cheremisinoff, on standard of care; Dr. Nicole Sweetland, on hydrogeology/causation; and Dr. Steven Sheppard, on economic loss and property valuation. (Doc. 213.) Dr. Cheremisinoff's opinion was withdrawn for purposes of class certification (Doc. 213), as Defendants deemed it irrelevant to class certification.[4] (Declaration of Patrick A. Thronson ¶ 7, attached as **Exhibit 1** (hereinafter "Thronson Decl.".)

During class discovery, Plaintiffs disclosed two lengthy reports each from Dr. Sweetland and Dr. Sheppard (initial and rebuttal). (Thronson Decl. ¶ 9.) Dr. Shepard's initial report was 61 pp., and his rebuttal report was 36 pp. (*Id.*) Dr. Sweetland's initial report was 448 pp., and her rebuttal report was 42 pp. (*Id.*) Both were also deposed at length at the class certification phase. (*Id.*)

Lengthy reports from multiple defense experts were disclosed at the class certification phase, as follows:

[4] Dr. Cheremisinoff unfortunately passed away during the pendency of this litigation. His in-depth report and the hundreds of sources gathered therein was reviewed and extensively utilized by Plaintiffs' liability expert in the course of his work in the merits phase, Matthew Hagemann. (Thronson Decl. ¶ 8.)

- Richard J. Roddewig (Aramark and Old Carco – appraisal – 113 pp. Vol. I, 181 pp. Vol. II)
- Rebel A. Cole, Ph.D. (Aramark and Old Carco – economic valuation – 74 pp.)
- David Hagen (Aramark – hydrogeology – 155 pp. report)
- David Folkes, Ph.D. (Behr – hydrogeology – 52 pp. report, 66 pp. exhibits)

. (Thronson Decl. 10.) Plaintiffs' experts replied to these reports. (Thronson Decl. ¶ 11.) In the interest of efficiency, Class Counsel elected not to depose Defendants' class certification experts, because they had produced detailed written reports. (*Id.*)

Plaintiffs moved to file a third amended complaint in 2014 (Doc. 218) and filed a renewed motion to certify the class (Doc. Nos. 219, 220, 221.) Defendants opposed both motions (Doc. Nos. 225, 226, 228, 229, and filed a *Daubert* motion to exclude Plaintiffs' expert Dr. Sheppard (Doc. 227.)

Plaintiffs filed a Third Amended Complaint on March 4, 2015—the operative complaint in the case. (Doc. 242.) Considering Defendants' briefing, and to maximize their chances of class certification, Plaintiffs withdrew Dr. Sheppard as an expert without prejudice at the class certification stage (Doc. 252) and filed an amended renewed motion to certify the class on June 12, 2015, which narrowed the scope of certification sought to liability and issue-class certification. (Doc. 254.)

Plaintiffs sought class certification on the issue of liability pursuant to Rule 23(b)(3) as to a subset of their causes of action, as well as for issue-class certification on seven key issues pertaining to liability and causation. (Doc. 254-1.) Defendants opposed the motion (Doc. 258), and Plaintiffs filed a reply (Doc. 263), and Defendants filed a surreply (Doc. 265). Notices of supplemental authority and responses were also filed. (Doc. 268–270.)

In its March 20, 2017 class certification decision (Doc. 274), the Court found the proposed class certification satisfied the requirements of Rule 23(a) but did not meet the predominance

requirement of Rule 23(b)(3). (Doc. 274, Page ID # 9738– 41.) The Court did, however, sustain Plaintiffs' alternative request for certification under Rule 23(c)(4) and certify two classes pursuant to Rule 23(c)(4) to consider seven certified class issues. The two classes certified were: (1) the Chrysler-Behr Class, consisting of "all persons who on or after April 1, 2006 owned property located within the Chrysler- Behr Class Area, which is geographically depicted by the yellow shaded area on [the map of the area]" (*see* Doc. 242-1); and (2) the Chrysler-Behr-Aramark Class, consisting of "all persons who on or after April 1, 2006 owned property located within the Chrysler-Behr-Aramark Class Area, which is geographically depicted by the red shaded area on [the map of the area]" (*see* Doc. 242-1). These class definitions were based on the plume areas articulated by Plaintiffs' environmental contamination expert, Dr. Nicole Sweetland. (*See* Doc. 254-26, Page ID # 7726; Sweetland Report, Doc. 263-3, Page ID ## 9171–78.)

The seven issues on which the Court granted certification were:

1. Each Defendant's role in creating the contamination within their respective Plumes, including their historical operations, disposal practices, and chemical usage;

2. Whether or not it was foreseeable to Chrysler and Aramark that their improper handling and disposal of TCE and/or PCE could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries;

3. Whether Chrysler, Behr, and/or Aramark engaged in abnormally dangerous activities for which they are strictly liable;

4. Whether contamination from the Chrysler-Behr Facility underlies the Chrysler-Behr and Chrysler-Behr-Aramark Class Areas;

5. Whether contamination from the Aramark Facility underlies the Chrysler-Behr-Aramark Class Area;

6. Whether Chrysler and/or Aramark's contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion; and

7. Whether Defendants negligently failed to investigate and remediate the contamination at and flowing from their respective Facilities.

Defendants filed a notice of appeal as to the class certification order on April 3, 2017. (*See* minute entry dated April 19, 2017.) After full merits briefing by all parties, including a lengthy response brief authored by Class Counsel, and oral argument, the United States Court of Appeals for the Sixth Circuit affirmed certification on July 16, 2017. *Martin v. Behr Dayton Thermal Prod. LLC*, 896 F.3d 405 (6th Cir. 2018).

Defendants then submitted a petition for a writ of certiorari to the Supreme Court of the United States. The Court requested a brief in opposition from Plaintiffs. Class Counsel secured, without cost, the expertise and work of eminent Supreme Court and appellate litigator, Scott Nelson, who co-wrote (with Ned Miltenberg and Patrick Thronson) and signed the brief in opposition to certiorari. (Thronson Decl. ¶ 12.) The Supreme Court ultimately denied Defendants' petition for a writ of certiorari on March 18, 2019. *Behr Dayton Thermal Prod. LLC v. Martin*, 139 S. Ct. 1319 (2019).

Shortly after the case was remanded, the parties engaged in a voluntary in-person two-day mediation conducted by John Barkett, a noted environmental litigator and neutral, in August 2019. (Thronson Decl. ¶ 13.) The mediation was ultimately not productive. (*Id.*)

Full merits discovery on the issue-class phase of the case commenced. During this process, the parties submitted a joint Rule 26(f) report on October 25, 2019. (Doc. 296.) Per the Court's request, the parties submitted briefing on the course the remaining litigation should take. (Doc. 302.) Defendants and Plaintiffs served on each other additional requests for production of documents and interrogatories, which were responded to. (*See* Doc. Nos. 329, 348.) The Court directed the parties to formulate special interrogatories to define the issues to be decided by a jury during the issues phase. (Doc. 311.) The parties submitted competing versions of these special interrogatories, supplemental briefing in support thereof, as well as a joint proposed class notice. (Doc. 319, 326–329.)

Plaintiffs then disclosed merits-phase experts, as follows:

- Nicole Sweetland, Ph.D. (hydrogeology) – 2021 updated report 1043 pp., rebuttal expert report 56 pp.
- Matthew Hagemann (standard of care) - 2021 expert report 58 pp.

(Thronson Decl. ¶ 14.) Defendants also conducted a two-day deposition of approximately 10 hours for each of Plaintiffs' experts, Nicole Sweetland and Matthew Hagemann. (Thronson Decl. 14.)

Defendants then disclosed merits-phase experts, as follows:

- Jon Rohrer (Aramark hydrogeology – 12,946 pp. report)
- Martin Hamper (Aramark standard of care – 32 pp. report)
- Lee Otte (Old Carco standard of care – 95 pp. report)
- Helen Dawson (Old Carco standard of care – 17 pp. report)
- Peter Mesard (Old Carco hydrogeology – 86 pp. report)
- David Folkes (Behr standard of care and hydrogeology – 71 pp. report)

(Thronson Decl. ¶ 15.) Class counsel elected not to depose Defendants' experts, because they had produced detailed written reports, and to control costs. (*Id.*)

The Court directed that notice be provided to the class of the issue-class certification and an issues trial. (Doc. 332.) Assisted by a class administrator, SSI Claims, which used property records to compile a complete list of property owners during the class ownership period, Class Counsel effectuated class notice to the members of the class through direct mail, publication notice, and through a website (www.mccookfieldclassaction.com). (Thronson Decl. ¶ 16.) Plaintiffs received only two timely opt-out requests. (*See* Doc. 348 at 2.)

Discovery closed in March 2022 (Doc. 354). On March 11, 2022, all parties filed motions for summary judgment and *Daubert* motions. Each Defendant sought summary judgment on all certified

issues. (Docs. 357, 360, 362, 365) sought to strike the entire testimony of Plaintiffs' standard of care expert, Matthew Hagemann (Doc. 361). Plaintiffs sought summary judgment on Issues 4 and 5 (Doc. 359) and moved to limit the testimony of two of Defendants' experts, Jon Rohrer and Peter Mesard, on reliability grounds (Doc. 360). Plaintiff secured additional analysis and a declaration from Dr. Sweetland in bringing this motion. (Doc. 360; Thronson Decl. ¶ 17.) Following thousands of pages of briefing, responsive briefing (see Docs. 371–379), reply briefing (see Docs. 382–388), and over three hours of oral argument at a hearing on May 16, 2022 (Thronson Decl. ¶ 18), the Court entered an order that sustained Plaintiffs' Motion for Partial Summary Judgment in its entirety; and sustained Defendants' dispositive motions only in part (as to Issue 3 and, as to Aramark, Issue 2). (Doc. 393.) The Court also denied all the Parties' *Daubert* motions to limit expert testimony. (Doc. 394.) Trial was set for October 31, 2022.

Beginning in March 2022, the parties also resumed settlement discussions with mediator John Barkett.

In the ensuing months, Class Counsel then engaged in intense pretrial briefing and motion and practice above and beyond the normal case, including the following:

- Special briefing and argument on Seventh Amendment issues, at which Plaintiffs secured the assistance and expertise of renowned constitutional litigator Robert Peck (Doc. 409; Thronson Decl. ¶ 19);
- Filing and briefing 19 motions in limine (Doc. 406) and responding to 32 defense motions in limine (11 filed jointly by Defendants (Doc. 404); 17 additional for Old Carco (Docs. 399–403); 2 additional for Aramark (Doc. 405); and 2 additional for Behr (Doc. 407)). (Class Counsel's responses to motions in limine can be found at Docs. 420–422, 425, and 427.);
- A detailed and extensive joint Proposed Pretrial Order (Doc. 428);

- Trial brief (Doc. 434);
- Deposition designations and transcripts (Doc. 417, 464);
- Proposed voir dire (Doc. 415);
- Amended proposed jury interrogatories/instructions (Doc. 412);

The voluminous pretrial filings in this case span from Docket Nos. 399 to 472.

The Court held a pretrial conference on September 29, 2022 (see 09/22/2022 minute entry) and a special evidentiary hearing on Seventh Amendment issues on October 3, 2022 (Doc. 466).

The next day Defendants filed a motion to continue the trial date (Doc. 467) and a separate motion to decertify the class (Doc. 468). Class Counsel opposed and briefed responses to both motions. (Docs. 469, 470, 472.) On October 18, 2022—less than two weeks before trial was set to begin—the parties engaged in a remote videoconferencing mediation session with mediator John Barkett. (Thronson Decl. ¶ 20.) Following that mediation session, confident they would be able to imminently agree on non-monetary terms, the parties jointly approached the Court and requested that the Court hold the trial date in abeyance. (*Id.*) The Court obliged the parties. (*See* Minute Entry October 20, 2022).

Over the ensuing months, the parties were able to relatively quickly confirm their agreement on monetary terms of the settlement. (Thronson Decl. ¶ 21.) Nonmonetary terms required significant additional negotiation by Class Counsel, through the mediator, Mr. Barkett. (*Id.*) It was not until June 14, 2023, that the parties were able to inform the Court that they had reached agreement on all monetary and non-monetary terms. (*Id.*)

Class Counsel drafted all documents necessary to consummate the settlement: the Settlement Agreement, Joint Motion for Preliminary Approval, Memorandum in Support of Joint Motion for Preliminary Approval; Escrow Agreement; Class Notice; Proposed Publication Notice; and Proposed Order. (Thronson Decl. ¶ 22.) Final versions of these documents were filed with the

Court on September 15, 2023. (Doc. 477.) The Court preliminarily approved the settlement on October 2, 2023. (Doc. 480.)

According to the docket, the Court or the assigned magistrate judge has conducted 57 telephone conferences or hearings in this matter.[5] There were 480 numbered docket entries prior to the filing of this motion and associated briefing.

If the case had gone to trial and Plaintiffs had prevailed on enough of the certified issues, each class member would still have needed to prove all the other elements of the claim, including specific causation and damages. Under the circumstances, these individual claims may have had little, if any recovery, owing to the need for expert testimony on specific causation and damages and potentially applicable Ohio caps on the recovery of non-economic and punitive damages. *See* R.C. §§ 2315.8, 2315.21.

Class Counsel have engaged, and the Court has preliminarily approved, RG2 Claims Administration LLC as class administrator. The most recent estimate by RG2 (September 28, 2023) indicates that notice and administration costs in this matter will total approximately $44,795. (Thronson Decl. ¶ 23.)

LEGAL STANDARD

"This is what is frequently referred to as a common fund case, *i.e.*, a case where named Plaintiffs have created a common fund by securing a recovery for themselves and the class they

[5] *See* Minute Entries dated 10/20/2008; 12/01/2008; 02/11/2009; 02/26/2009; 09/07/2011; 11/01/2011; 02/06/2012; 03/06/2012; 04/18/2012; 09/28/2012; 12/06/2012; 12/20/2012 (pertaining to three conferences); 02/07/2013; 02/26/2013; 03/15/2013; 03/28/2013; 04/05/2013; 04/15/2013; 06/17/2013; 06/21/2013; 07/16/2013; 10/04/2013; 10/22/2013; 12/11/2013; 01/24/2014; 03/05/2015; 03/13/2015; 05/01/2015; 12/03/2015; 03/31/2017; 04/19/2017; 11/20/2019; 11/26/2019; 01/14/2020; 11/10/2020; 11/23/2020; 12/03/2020; 04/21/2021; 12/28/2021; 01/06/2022; 05/11/2022; 05/16/2022; 08/31/2022; 09/29/2022; 10/03/2022; 10/07/2022; 11/10/2022; 12/02/2022; 01/09/2023; 03/09/2023; 04/10/2023; 05/08/2023; 06/14/2023; 08/15/2023; and 09/20/2023.

represent. As an initial matter, it bears emphasis that the award of attorneys' fees in a common fund case such as this litigation is the norm." *In re DPL Inc., Sec. Litig.*, 307 F. Supp. 2d 947, 949 (S.D. Ohio 2004) (citing *Wyser-Pratte v. Van Dorn Co.*, 49 F.3d 213, 217 (6th Cir.1995)). "Consequently, it is not questioned that the Court will award attorneys' fees to Plaintiffs' counsel, leaving only the question of the amount of that award to be resolved." *Id.*

As to the amount to be awarded, "[i]n this circuit, we require only that awards of attorney's fees by federal courts in common fund cases be reasonable under the circumstances." *Rawlings v. Prudential–Bache Properties, Inc.*, 9 F.3d 513, 515-17 (6th Cir.1993) (citing *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir.1983)). There are, in general, two methods used to determine a reasonable fee, and which method is used will depend on the relevant case. Those two methods are the "lodestar" method, in which counsel tabulates hours worked, and the rates, and the Court assesses the reasonability of that work, and possibly applies a "multiplier" to reward outstanding work or to otherwise incentivize good practices. *Rawlings*, 9 F.3d at 516.

The alternative method is to award, as is common in non-class civil cases, a percentage of the recovery to class counsel. *Id.* In this circuit, the Court "ha[s] a choice between the two methods." *Id.* at 517. The only real constraint is that the fee be "reasonable." In this case, the question is academic: whether under the lodestar method or the percentage of recovery, Class Counsel's efforts merit their requested fee and costs.

ARGUMENT

Rule 23(h) of the Federal Rules of Civil Procedure expressly authorizes a court to award "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Here, the parties have agreed that any fee will come from the $9,000,000.00 overall settlement amount afforded under the Settlement Agreement. "When awarding attorney's fees in a class action, a court must make sure that counsel is fairly compensated for the amount of work done

as well as for the results achieved." *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).

I. The lodestar analysis confirms the reasonableness of the requested award.

Plaintiffs' fee request is fully supported by the lodestar method of calculating attorneys' fees. The lodestar method accounts for the hours of work performed by counsel and ensures that counsel is fairly compensated for the results achieved. *See Rawlings*, 9 F.3d at 515–16. In determining an appropriate "lodestar" figure, a court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The court may then adjust the "lodestar" to reflect relevant considerations peculiar to the subject litigation. *Adcock–Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000).

"In this circuit, we require only that awards of attorney's fees by federal courts in common fund cases be reasonable under the circumstances." *Rawlings*, 9 F.3d at 515-17 (citing *Smillie*, 710 F.2d at 275). Determining if a fee is reasonable, however, does not involve a mechanical application of factors, but does require an explanation on the record of why the Court believes it to be so. "Often, but by no means invariably, the explanation will address these factors: '(1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides.' " *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir. 2009) (quoting *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir.1996)). These are sometimes referred to as the "Ramey factors." *See Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1194 (6th Cir. 1974). All these factors weigh in favor of approving the requested fee.

A. Class Counsel has obtained a substantial benefit for the class.

" 'The most critical factor' " when it comes to the reasonableness of a fees award " 'is the degree of success obtained,' " which is measured here by the size of the benefit to the Class, in light of the uncertainty of any recovery. *Linneman v. Vita-Mix Corp.*, 970 F.3d 621, 633 (6th Cir. 2020) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

Class Counsel has managed to turn contamination Defendants have vigorously maintained is not even compensable under Ohio law, whether for substantive or limitations reasons, into approximately $7,500 per affected property. The simple monetary value of this settlement is $9,000,000. In addition to this, prosecution of the suit has brought attention to the McCook Field neighborhood's challenges, spurring pressure toward substantial remediation efforts, under the watchful eyes of the Ohio and Federal Environmental Protection Agencies, to reduce the VOC contamination escaping Defendants' facilities and contaminating the Class's properties.

Additionally, as the settlement is structured, there is no danger that class counsel's $3,000,000 requested fee can exceed the funds to be distributed to the property owners. Pursuant to the Settlement Agreement, any funds which cannot be otherwise allocated, and any funds from checks not cashed within 60 days will return to the Settlement Fund, to be distributed as Unclaimed Funds. Settlement Agreement, § IV.5.b. Any Unclaimed Funds will be distributed amongst the Class Members until the Claims Administrator determines that the cost of a distribution will exceed the remaining amount of Unclaimed Funds. Settlement Agreement, § IV.5.c. At that point, any Remaining Funds shall be used as a donation for community purposes, the details of which will be applied for in advance of final approval. Settlement Agreement, § IV.5.c.

Of equally lasting significance, Class Counsel has secured a substantial advancement of the law in the 6th Circuit on behalf of plaintiffs who, like the Class, seek compensation through the class device. The Sixth Circuit's affirmance of this Court's class certification decision established the

"broad view" of issue-class certification in the Sixth Circuit. It has been cited favorably over 60 times in 21 different jurisdictions, including in the Flint water cases. (Thronson Decl. ¶ 33.) This will be a lasting legacy to future class action litigants and will assist courts, plaintiffs, and defendants to decide threshold and central issues in class actions and materially and efficiently advance the resolution of claims.

Class Counsel's vigorous, tireless prosecution of these claims on behalf of the class members over the past fifteen years can be seen through the *quantity* of the work required—from the filing of the claim through motions on the pleadings, class discovery, class certification, interlocutory appeal, petition for certiorari, merits discovery, dispositive motions, all pretrial filings, and settling less than two weeks before trial was to begin. It can also be seen in the *quality* of the work. Class Counsel could not have achieved this result, with a case contested at every turn by scores of highly experienced attorneys retained by three large corporate defendants, without the highest quality work product and tenacious commitment.

B. Class Counsel's hourly rates are reasonable, and Class Counsel has provided a great value to the Class on an hourly basis.

Class Counsel's requested rates are reasonable. In determining a reasonable hourly rate, courts may look at "national markets, an area of specialization, or any other market they believe is appropriate to fairly compensate attorneys." *McHugh v. Olympia Ent., Inc.*, 37 F. App'x 730, 740 (6th Cir. 2002) (citing *Louisville Black Police Officers Org. v. City of Louisville*, 700 F.2d 268, 278 (6th Cir. 1983)). Class Counsel's rates — ranging from $200.34 to $616.16— reflect the rates recommended by the Rubin Committee, with the recommended cost of living adjustment. (A table showing Class Counsel's calculation of these rates is attached as **Exhibit 2**.) These are generally accepted in this District. *See, e.g.*, *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, 995 F. Supp. 2d 835, 844 (S.D. Ohio 2014). These rates are substantially less than others approved in this District. *See Gilbert v. Abercrombie & Fitch, Co.*, No. 2:15-cv-2854, 2016 WL 4159682, at *16-18 (S.D. Ohio Aug. 5, 2016)

(report and recommendation approving hourly rates up to $850 per hour for counsel experienced in class action litigation), adopted and affirmed *Gilbert v. Abercrombie & Fitch, Co.*, No. 2:15-cv-2854, 2016 WL 4449709 (S.D. Ohio Aug. 24, 2016); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 793-94 (N.D. Ohio 2010) (approving hourly rates up to $825 as reasonable "based on this Court's knowledge of attorneys' fees in complex civil litigation and multi-district litigation").

This was a complex, 15-year case. Dividing the $3,000,000 by the 16,046.9 hours spent to date on the case results in an average fee of $186.95—slightly more than the Rubin *paralegal* rate of $182.01, and less than any attorney rate. (*See* Ex. 2.) This represents a more than fair fee for the work performed. In 2016, the Sixth Circuit approved a fee amounting to an "average at $275.20 per hour after subtracting for costs." *Gascho v. Glob. Fitness Holdings*, LLC, 822 F.3d 269, 280 (6th Cir. 2016). And the Sixth Circuit has, even a dozen years ago, approved rates "ranging from $250 per hour to $450 per hour." *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 499 (6th Cir. 2011).[6] Class Counsel's requested fee, therefore, is eminently reasonable.

C. Class Counsel's services were undertaken on a contingency basis, with absolutely no certainty of success (or even a payment of fee if successful at the issues-class phase).

Fifteen years ago, Class Counsel entered this litigation without any guarantees of a return (or even of a return of costs). Because of the strong possibility that no recovery would have been obtained, this factor weighs in favor of the requested attorney's fee.

"Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004)). Class Counsel undertook this case on a contingent fee basis, assuming a substantial risk that the litigation would yield no or potentially little recovery and leave them

[6] And, in *Van Horn*, the Court applied a lodestar multiplier of 1.2 (instead of the requested 1.78). 436 F. App'x at 499. Class Counsel here is not requesting a multiplier, further reinforcing the reasonableness of this request.

uncompensated for our significant investment of time, as well as substantial expenses. Courts have consistently recognized that this risk is an important factor favoring an award of attorney's fees. *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 155 (D.N.J. 2013) ("Courts recognize the risk of non-payment as a major factor in considering an award of attorney fees.")[7]

Given the highly technical nature of these claims, Plaintiffs' proofs were both expensive and complex. Reaching a settlement was difficult; indeed, the case reached a settlement in principle very close to the courthouse steps, after over 14 years of litigation. Settlement discussions at a two-day mediation in August 2019 were unproductive, and settlement discussions undertaken in March 2022 took over 6 months to bear fruit, even with the assistance of John Barkett, a highly experienced and skilled mediator. (Thronson Decl. ¶ 34.)

D. Society's stake in successful litigation against pollution warrants the requested fee.

The homes of the McCook Field neighborhood were polluted by Defendants' carelessness (and, in some cases, intentional dumping). Despite this, it is exceedingly difficult to produce a meaningful recovery for indirect contamination as was present here. Plaintiffs and Class Counsel

[7] *See also In re Schering-Plough Corp. Enhance ERISA Litig.*, No. CIV.A. 08-1432 DMC, 2012 WL 1964451, at *7 (D.N.J. May 31, 2012) ("Courts routinely recognize that the risk created by undertaking an action on a contingency fee basis militates in favor of approval."). An attorney is entitled to a larger fee when the compensation is contingent rather than being fixed on a time or contractual basis. *Pro v. Hertz Equip. Rental Corp.*, No. CIV.A. 06-3830 DMC, 2013 WL 3167736, at *6 (D.N.J. June 20, 2013) ("Courts have recognized that where counsel's compensation is contingent on recovery, a premium above counsel's hourly rate may be appropriate."); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (citation omitted) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases . . . as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."); *see also, e.g., In re Ins. Brokerage*, 297 F.R.D. at 155; *In re Rite Aid*, 396 F.3d at 304 (considering "risks of establishing liability" in deciding fee award).

stuck with this case for fifteen years and have secured at least high four-figure awards for the properties at issue.

E. This complex litigation necessitated Class Counsel's expenditure of over fifteen thousand hours.

Class Counsel dedicated at least 16,046.9 hours to date to prosecuting the Classes' claims (excluding hours spent on this fee petition). These hours were spent on tasks that included, but certainly were not limited to, extensive factual investigations; client communications and legal research even before filing this lawsuit; litigating motions to dismiss; amending the complaint multiple times; working with scientific consultants and experts, both before filing the case, during discovery and in preparing expert reports; class certification briefing and *Daubert* briefing; class-phase and merits-phase fact discovery, including managing, reviewing, and analyzing documents from plaintiffs, defendants, and non-parties; attending property inspections; defending, taking or otherwise participating in depositions, and litigating discovery motions; issuing and litigating non-party subpoenas; attending court conferences and hearings; client communications and updates; legal research; appellate briefing in the Sixth Circuit and Supreme Court; class notice for the issue-class trial; filing and responding to dispositive motions; making all required pretrial filings; engaging in extensive mediation and settlement efforts, including the preparation of settlement materials and our work with defendants, G2 Claims, and Class Members to facilitate a smooth claims administration process. (Thronson Decl. ¶ 35.) Our commitment continues. Accordingly, the amount of time devoted to the case heavily favors approval of the requested fee.

This litigation has been handled in as efficient and streamlined a manner as possible by all involved on Plaintiffs' side. During the fifteen (15) year course of the litigation, Class Counsel maintained detailed time records, which describe the nature of the work performed. (Thronson Decl. ¶ 36.)

Based on itemized, contemporaneous computation of time, Class Counsel's *attorney* hours total as follows:

Name	Firm	Years out of law school[8]	Time	Rate[9]	Lodestar
Leah Barron[10]	JJS	6	1,212.6	$325.14	$394,264.76
Lauren Bell[11]	JJS	4	546.5	$271.75	$148,511.37
Reza Davani[12]	JJS	2	112.3	$208.36	$23,398.83
Robert K. Jenner[13]	JJS	33	2.4	$506.44	$1,215.45
Jessica Meeder[14]	JJS	11	1,696.4	$413.84	$702,038.17
Bradford Morse[15]	JJS	1	265.5	$200.34	$53,190.27
Jackson Petito[16]	JJS	3	1,183.6	$251.25	$297,379.50
Stephen Rigg	JJS	8	275.4	$462.77	$127,466.85
Nicole Steers[17]	JJS	2	1,041.4	$241.58	$251,581.42
Patrick Thronson	JJS	10	1,374.3	$462.77	$635,984.81
Ned Miltenberg	NLS	39	885.4	$616.16	$545,548.06
Anthony Roisman	NLS	60	756.5	$616.16	$466,125.04

[8] These are calculated with reference to the latest date on which the attorney had any responsibility for the case. For example, if an attorney became licensed in 2011 and worked on the case until 2015, the 2015 fee for an attorney with 4 years of experience is used.

[9] All rates are calculated conservatively, in accordance with those in the Rubin Committee report, which is customarily relied on in the Southern District of Ohio. *See, e.g.*, *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, 995 F. Supp. 2d 835, 844 (S.D. Ohio 2014). Prevailing rates where JJS, NLS, and GR practice are higher. *See, e.g.*, Laffey Matrix, http://www.laffeymatrix.com/see.html.

[10] Ms. Barron graduated in 2008 and left JJS in 2014.

[11] Ms. Bell graduated from law school in 2013 and left JJS in 2017.

[12] Mr. Davani graduated in 2012 and left JJS in 2014.

[13] Mr. Jenner graduated from law school in 1985 and left JJS in 2018.

[14] Ms. Meeder graduated in 2005 and left JJS in 2016.

[15] Mr. Morse graduated in 2012 and left JJS in 2013.

[16] Mr. Petito graduated in 2012 and left JJS in 2015.

[17] Ms. Steers graduated in 2012 and left JJS in 2014.

Steven German	GR	23	2431.7	$616.16	$1,498,347.08
Joel Rubenstein	GR	22	352.1	$616.16	$216,949.94
Carin Bigley[18]	BA	6	691.3	$395.58	$273,464.45
Kevin Bowman	BA	26	354.2	$616.16	$218,243.872
David Brannon[19]	BA	15	112.5	$503.49	$56,642.62
Douglas Brannon	BA	19	2017.7	$544.58	$1,098,799.06
Dwight Brannon	BA	49	310.6	$616.16	$191,379.29
Joseph Paley[20]	BA	2	62.4	$253.50	$15,818.40
Matthew Schultz[21]	BA	15	362.1	$484.13	$175,303.47
LODESTAR TOTAL			**16,046.9**[22]		**$7,390,652.70**

(Thronson Decl. ¶ 37.)

The lodestar cross check results in a negative multiplier (0.41), *i.e.*, the lodestar calculated through the *Rubin* rates is more than twice the amount requested by class counsel. Again, these hours include only attorney hours. They do not include unrecorded hours contributed by counsel whose appearance was entered and who made crucial contributions to the litigation, including Howard A. Janet, managing partner of Janet, Janet & Suggs, and Kenneth M. Suggs, another named

[18] Ms. Bigley graduated in 2013 and left BA in 2019.
[19] David Brannon graduated in 2006 and left BA in 2021.
[20] Mr. Paley graduated in 2017 and left BA in 2019.
[21] Mr. Schultz graduated in 2005 and left BA in 2020.
[22] Each individual law firm was responsible for keeping its own hours and costs. Class Counsel have not independently verified one another's hours and costs. Class Counsel are prepared to make time records available to the Court if requested. Full hours and expenses from Public Citizen, which assisted in preparation of the brief in opposition to a writ of certiorari, will be included in the amended version of this motion to be submitted closer to final approval.

partner of Janet, Janet & Suggs, who would have been lead counsel and tried the case with Patrick Thronson, and was heavily involved in settlement negotiations. (Thronson Decl. ¶ 38.) They also do not include countless staff and administrative hours. Class Counsel are able to distribute fees amongst themselves pursuant to private agreement, without the need for Court intervention. (Thronson Decl. ¶ 54.)

Class Counsel's work is ongoing. In addition to the work already performed, Class Counsel will conduct additional work following this filing. In addition to responding to possible objectors and preparing for and presenting at the fairness hearing and addressing any appeals, Class Counsel will expend time and effort assisting with the administration of the Settlement. These hours and the costs associated with them are not included in this petition. (Thronson Decl. ¶ 39.) Neither are any hours associated with authoring and compiling this fee petition. (Thronson Decl. ¶ 40.) The 16,046.9 hours worked, for a lodestar value of $7,390,652.70, indicates a one-third fee is reasonable.

F. <u>This case necessitated skilled counsel on both sides. Class Counsel faced formidable opposing counsel.</u>

"Environmental litigation is an identifiable practice specialty that requires distinctive knowledge." *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991). In addition to the skills and ability required in smaller cases, the complexity and demands of class actions, as well as environmental claims, often require unique legal skills and abilities from class counsel. Those skills are called upon to litigate and successfully resolve a complex class action, such as this one. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 303 (3d Cir. 2011).

As detailed above, this case presented numerous, scientifically challenging issues, requiring testing, analysis, modeling, site visits, and review and interpretation of millions of pages of discovery. Class Counsel conducted numerous highly technical depositions and were required to familiarize themselves with many new scientific areas, in addition to the legal ones upon which their expertise was sought.

The Court has already determined that Class Counsel's expertise satisfies the standard for class certification. (*See* Class Certification Decision, Page ID ## 9732–35.) Class Counsel's skill and experience have proven to be particularly important here because of the quality, skill, and experience of defendants' counsel. *See In re Ins. Brokerage*, 297 F.R.D. at 154 (considering defendants' attorneys high level of experience, prominent firms, and background in the relevant matters); *Hall v. AT & T Mobility LLC*, 2010 WL 4053547, at *19 (D.N.J. Oct. 13, 2010) ("The quality of opposing counsel is also important in evaluating the quality of counsel's work."); *In re Datatec Sys., Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 WL 4225828, at *7 (D.N.J. Nov. 28, 2007) (taking into account that "Defendants were represented by highly skilled attorneys from a prominent firm with experience in these matters").

Class Counsel faced formidable opposition from numerous highly skilled attorneys at six defense firms. Those designated on the pretrial order as counsel to try the case (see Doc. 428), who were also heavily involved in the litigation, included the following:

- Honigman LLP (Behr): Over 300 attorneys in 9 offices:[23]
    - Khalilah Spencer: Partner in litigation department focused on complex commercial and environmental tort matters, among others, with over 20 years of litigation experience[24]
    - Raechel Conyers: Partner in litigation department focused on complex commercial litigation with approximately ten years of experience[25]
    - Huntley Chamberlain: Former litigation associate who spent 1 year and 9 months at Honigman[26]

[23] https://www.honigman.com/firm-offices
[24] https://www.honigman.com/professionals-khalilah-v-spencer
[25] https://www.honigman.com/professionals-raechel-tx-conyers
[26] https://www.linkedin.com/in/huntley-chamberlain-6401a111a

- Porter Wright (Behr): Over 180 attorneys[27] in 9 offices[28]
    - James A. King: Chair of Litigation Department with 35 years of experience.[29]
- Thompson Coburn (Old Carco): Over 400 attorneys in seven offices[30]
    - Edward Cohen: Partner and longtime co-chair of the environmental practice group at Thompson Coburn, with over 40 years of experience[31]
    - David Duffy: partner at Thompson Coburn with over 30 years of experience
- Faruki LLP (Old Carco): Prominent Dayton-area law firm with approximately 20 attorneys[32]
    - Erin Rhinehart: Co-managing partner focused on class action defense with decades of experience.[33]
    - Morgan Napier:[34] Practice focused on complex commercial litigation.
- Lowenstein Sadler (Aramark): Law firm of over 350 attorneys with offices in New York, Palo Alton, New Jersey, Utah, and Washington, D.C.[35]
    - Michael Lichtenstein: Partner and Chair of Environmental Law and Litigation with over 25 years of experience.[36]
    - Michael Kaplan: Partner specializing in business litigation and specialty torts with 12 years of experience.[37]

[27] https://www.law.com/law-firm-profile/?id=244&name=Porter-Wright-Morris-%26-Arthur-LLP
[28] https://www.porterwright.com/contact-us/
[29] https://www.porterwright.com/james-a-king/
[30] https://www.thompsoncoburn.com/firm
[31] https://www.thompsoncoburn.com/people/ed-cohen
[32] https://www.ficlaw.com/attorneys
[33] https://www.ficlaw.com/team/erin-rhinehart
[34] https://www.ficlaw.com/team/morgan-k-napier
[35] https://www.lowenstein.com/about-us
[36] https://www.lowenstein.com/people/attorneys/michael-lichtenstein
[37] https://www.lowenstein.com/people/attorneys/michael-kaplan

- Mark Heinzelmann: Counsel specializing in environmental law and litigation with 11 years of experience.[38]
- C. Patrick Thomas: Litigation associate with five years of experience.[39]

- Ulmer and Berne (Aramark): Seven offices[40] and over 170 attorneys[41]:
  - John Alten: Counsel focusing on complex business litigation with over 23 years of experience.[42]

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

Class Counsel took care to divide work in such a way that focused on each attorney's strengths, skills, and experience, to complete tasks efficiently and reduce duplication of effort. Indeed, for the merits phase of the case, most of the work on behalf of the Classes was undertaken and accomplished by a single attorney, Patrick Thronson of Janet, Janet & Suggs. (Thronson Decl. ¶ 41.) Thronson also took the lead for the Plaintiffs at all merits-phase court appearances. (*Id.*)

II. One-third of the overall recovery represents a reasonable fee.

To ensure that the fee request is appropriate, the Court may, but need not, perform a "percentage of the fund cross-check." *Gascho v. Glob. Fitness Holdings*, LLC, 822 F.3d 269, 281 (6th Cir. 2016). This "cross-check [is] optional." *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 501 (6th Cir. 2011). This Court has previously deemed a one-third fee reasonable in a

[38] https://www.lowenstein.com/people/attorneys/mark-heinzelmann
[39] https://www.lowenstein.com/people/attorneys/c-patrick-thomas
[40] https://www.ulmer.com/locations/
[41] https://www.ulmer.com/find-an-attorney/
[42] https://www.ulmer.com/attorneys/Alten-John-M/honigma

class action. *See Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-CV-516, 2019 WL 6310376, at *5 (S.D. Ohio Nov. 25, 2019) (Rice, J.).

Here, fees of one third are reasonable. "Awards utilizing the percentage-of-recovery method can reasonably range from nineteen percent to forty-five percent of a settlement fund." *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 129 (D.N.J. 2002); *see also In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 886 F. Supp. 445, 461 (E.D. Pa. 1995) (same) (citations omitted).

After determining the lodestar, the Court divides the total fees sought by the lodestar to arrive at a multiplier, which is used to account for the risk Class Counsel assumes when they take on contingent-fee cases. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005), *as amended* (Feb. 25, 2005); *see also Vizcaino v. Microsoft Corp.*, 142 F.Supp.2d 1299, 1305 (W.D. Wash. 2001) ("*Vizcaino* II") ("To restrict Class Counsel to the hourly rates they customarily charge for non-contingent work-where payment is assured-would deprive them of any financial incentive to accept contingent-fee cases which may produce nothing. Courts have therefore held that counsel are entitled to a multiplier for risk."). If the multiplier is too high, that is cause for the court to reconsider the reasonableness of the award, if necessary. *Id.* at 306; *In re Ins. Brokerage*, 297 F.R.D. at 156. On the other hand, if the multiplier is low, this may confirm the reasonableness of the award. *In re Schering-Plough Corp.*, 2013 U.S. Dist. LEXIS 147981, 96-97 (D.N.J. Aug. 27, 2013).

Here, the lodestar cross check results in a multiplier of less than 0.5. This confirms the reasonableness of the fee award.

Class counsel filed this case over 15 years ago, in 2008, on a contingent fee basis. Class Counsel neither applied for nor received any interim fee awards or expenses. At no time was there any guarantee that the case would ever produce a recovery for the Class (or for Class Counsel). Indeed, even where "Plaintiff's counsel devoted a relatively small amount of time" to the litigation, a

fee of 20% was appropriate. *In re DPL Inc., Sec. Litig.*, 307 F. Supp. 2d 947, 954 (S.D. Ohio 2004). In *DPL*, counsel received $22,000,000 for a very large result obtained very quickly. *Id.*

Here, Class Counsel devoted 15 years and 16,046.9 hours to this litigation and are seeking a fee of $3,000,000. This fee represents just one-third of the monetary benefits secured for the class.

III. The associated costs are reasonable.

"Generally, class counsel are entitled to reimbursement of all reasonable and necessary expenses, including class-notice costs, incurred in the prosecution and settlement of the claims." *McKnight v. Erico Int'l Corp.*, No. 1:21-CV-01826, 2023 WL 2003276, at *14 (N.D. Ohio Feb. 8, 2023). Class Counsel have audited and attached their case costs as **Exhibits 3–5**. (Thronson Decl. ¶ 42.) These exhibits have been filed under seal to avoid waiver of work-product protection and to not give opposing counsel in other cases insight into Class Counsel's methods and strategy. Exhibit 3 represents the audited case costs of Janet, Janet & Suggs; Exhibit 4 represents the audited case costs of Brannon and Associates; and Exhibit 5 represents the audited case costs of National Legal Scholars.

According to itemized costs compiled by Class Counsel (with each firm being responsible for tracking, itemizing, and auditing its own expenses), case costs incurred by Class Counsel related to this litigation that benefited the class were as follows:

a. Brannon & Associates expenses:
Research (including Internet and legal research): $2,872.22
Court costs (including filing fees): $1,297.94
Deposition transcripts: $1,898.50
Travel: $562.50
Miscellaneous (office expenses): $6,067.44
Expert fees: $19,351.04
EPA: $467.25
Total: $32,516.89

National Legal Scholars expenses:
Expert meeting and deposition: $998.78
Co-counsel meetings: $2,211.27
Co-counsel/client meetings: $1,817.90

Legal research: $128.37
Total: $5,156.32

Janet, Janet & Suggs expenses:
Experts (review, consultation, reports, and depositions) - $1,706,366.96
Courts (filing fees, transcripts, and deposition transcripts/video) - $87,356.47
Miscellaneous (mediation, data hosting, mailing, printing, doc. requests) - $223,421.48
Travel (to depositions, co-counsel meetings, mediation): $81,733.95
Total: $2,098,878.86

GRAND TOTAL: $2,136,552.07

Fed. R. Civ. P. 23(h) authorizes the award of nontaxable costs in class action litigation. Counsel in common fund cases is "entitled to reimbursement of expenses that were adequately documented and reasonably and appropriately incurred in the prosecution of the class action." *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 343 (D.N.J. 2002); *In re Ins. Brokerage*, 297 F.R.D. at 157 (citing *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 108 (D.N.J. 2001)). Courts have approved litigation costs expended for experts and witness fees; Westlaw and legal research; service of process; consultants and investigators; document imaging, scanning, and coding; photocopying; postage; transportation, hotel, and travel expenses; deposition services and transcripts; discovery databases, and telephone costs. *E.g., Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995); *In re Ins. Brokerage.*, 297 F.R.D. at 158; *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005); *Demmick v. Cellco P'ship*, No. 06-CV-2163 (JLL) (D.N.J. May 1, 2015) (citing *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 611-12 (D.N.J. 2010)).

These expenses were advanced by Class Counsel with no guarantee of reimbursement and were necessary to develop and prosecute these claims for the benefit of the Class. Cost summaries are provided to the Court for *in camera* review and itemized invoices will be furnished upon the Court's request. *See Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 501 (3d Cir. 2017) (*in camera* review permitted).

The expenses incurred were permissible litigation expenses incurred in the prosecution of the action, which directly benefited the class. These include, most notably, fees for liability,

hydrogeology, and economic damages experts; fees for document requests; expenses for travel to deposition; court costs; and court reporter fees. As a gesture of good will, Class Counsel are not seeking to recover any expenses for meals, medical records, books, or for late cancellation fees for lodging for trial. (Thronson Decl. ¶ 43.)

As a further gesture of good will, Class Counsel are subtracting all expenses associated with the economic damages reports of Stephen Shepard: although these reports benefited the class by informing settlement negotiations,[43] they were not relied on in Plaintiffs' final motion for class certification, and Dr. Sheppard did not serve as an expert during the merits phase. (Thronson Decl. *Id.* at ¶ 44.) The total amount Class Counsel are writing off and not petitioning for recovery of is at least $82,991.59. (*Id.* at ¶ 45.)

The $2,136,552.57 in claimed costs— $2,098,878.86 of which were advanced by Janet, Janet & Suggs (formerly known as Janet, Jenner & Suggs); $32,516.89 of which were advanced by Brannon and Associates; and $5,156.32 were advanced by National Legal Scholars—represents a reasonable figure for a large class action conducted over 15 years by counsel specifically selected for their experience in class actions, including those involving toxic chemicals. Class Counsel have navigated a bankruptcy and an interlocutory appeal. Class Counsel have deposed dozens of witnesses, many over several sessions. Class Counsel secured an issue-class certification of central issues of liability and causation, and successfully defended that ruling on interlocutory appeal and in a denial of certiorari. Class Counsel have navigated expert motions, pre-discovery motions practice, and summary judgment proceedings. The requested litigation expenses represent a substantially reasonable figure.

[43] Indeed, the final settlement of $9 million approaches to the $11,081,938 figure that Dr. Sheppard estimated as the total loss for residential, commercial, and tax-exempt properties above the Behr plume. (Thronson Decl. ¶ 47.)

For example, in a case spanning only 2008 to 2010 (with a subsequent appeal that stretched into 2011), this Court's sister district approved, without significant comment, $226,283.98 in costs. *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-CV-605, 2010 WL 1751995, at *8 (N.D. Ohio Apr. 30, 2010). In *Moulton*, a case which lasted about a quarter as long as this case, the fees were $622,279.86. *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 351 (6th Cir. 2009). These benchmarks further indicate the total claimed costs are reasonable.

IV. The requested fees and costs are reasonable even though, put together, they exceed the recovery to the class.

Class Counsel are certainly cognizant that the costs and expenses, when added together, exceed the amount to be distributed to class members. Under the circumstances of this case—a hard-fought litigation against three large, transnational corporate defendants,[44] highly contested in the trial court and on interlocutory appeal, where Class Counsel carried over $2 million in costs over fifteen years, without any guarantee of success—they are nonetheless reasonable. Courts have blessed attorney fee awards that, by themselves (*i.e.*, without including costs) exceed the recovery to the class. *See, e.g.*, *In re Sears, Roebuck and Co. Front-Loading Washer Prods. Liab. Litig*, 867 F.3d 791, 793 (7th Cir. 2017) ("[I]n this case the extensive time and effort that class counsel had devoted to a difficult case against a powerful corporation entitled them to a fee in excess of the benefits to the class.") (citations omitted); *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015) (holding that attorney's fee being three times higher than the amount paid to the class, inter alia, "does not mean the settlement cannot still be fair, reasonable, or adequate"); *Harris v. Vector Marketing Corp.*, 2011

[44] Although Chrysler LLC declared bankruptcy early in the case, its interests were represented after the bankruptcy stay by its insurer, AIG, one of the world's largest insurance companies by net nonbanking assets. *See* Best's Review, *World's Largest Insurance Companies – 2022 Edition* (Dec. 31, 2021), *available at* https://bestsreview.ambest.com/displaychart.aspx?Record_Code=316740&src=43.

WL 4831157, at *4 (N.D. Cal. 2011) ("This is not to suggest that fees which exceed actual class recovery are necessarily disproportionate or reflect a conflict of interest.").

Here, the attorney's fee does not exceed the expected recovery to the class. Class Counsel, of course, makes no profit if reimbursed litigation expenses. In fact, repayment on the terms requested represents a loss: inflation has increased substantially over the pendency of this litigation, yet costs are being paid back in nominal, not inflation-adjusted terms.

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests the Court award fees and costs requested herein. Class Counsel intends to file an amended motion at the appropriate time in advance of the fairness hearing, to account for any additional costs incurred during the intervening time as well as any further case developments.

Respectfully submitted,

October 16, 2023
Date:

/s/ Patrick A. Thronson

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Settlement Class Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

IN RE BEHR DAYTON THERMAL PRODUCTS, LLC	:	**CASE NO. 3:08-cv-00326-WHR**
	:	**(Judge Walter H. Rice)**
	:	

DECLARATION OF PATRICK A. THRONSON IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS

1. My name is Patrick A. Thronson.

2. I am an attorney duly licensed and in good standing in the states of Maryland, Minnesota, and Illinois. I am also admitted to the U.S. District Court for the Districts of Minnesota, Maryland, and Illinois; the United States Courts of Appeals for the Third, Fourth, and Sixth Circuits; and the United States Supreme Court.

3. I am a partner of the law firm of Janet, Janet & Suggs and am one of the counsel for the Settlement Class in this case. I previously served as one of the counsel for the issue classes certified in this case. have personal knowledge of the facts set forth in this Declaration and can and would testify competently thereto.

4. I am admitted to practice in this District on a *pro hac vice* basis in connection with this case.

5. This Declaration is made in support of Class Counsel's Motion Seeking an Award of Attorney's Fees and Costs.

<u>The Settlement</u>

6. Prior to initiating this litigation, Class Counsel and their scientific consultants investigated and reviewed voluminous (i) documents discussing the historic and present conditions at the Site; (ii) documents made public by USEPA and Ohio EPA; (iii) peer-reviewed and scientific

EXHIBIT 1

literature concerning contaminants at the Site; (iv) studies and reports concerning screening for contaminants at the site; (v) case law concerning class certification; and (vi) extensive meetings with class members and residents. Counsel relied on this work during the litigation.

7. One of the experts Class Counsel retained on standard of care issues was Nicholas Cheremisinoff. Dr. Cheremisinoff produced a report in this matter, which Class Counsel disclosed to defense counsel. After negotiations with counsel for Defendants, Class Counsel withdrew the report without prejudice, as Defendants deemed it irrelevant to class certification. Class Counsel intended to redisclose the report at the merits phase; unfortunately, however, Dr. Cheremisinoff died during the pendency of the litigation, on August 9, 2020 before the time for disclosure of merits experts.

8. Dr. Cheremisinoff's report, including the research undertaken and documents isolated as significant, was extensively reviewed by Plaintiffs' subsequent standard of care expert, Matt Hagemann, and saved time and expense associated with Mr. Hagemann's review.

9. During class discovery, Plaintiffs disclosed two lengthy reports each from Dr. Sweetland and Dr. Sheppard (initial and rebuttal). Dr. Shepard's initial report was 61 pp., and his rebuttal report was 36 pp. Dr. Sweetland's initial report was 448 pp., and her rebuttal report was 42 pp. Both were also deposed at length at the class certification phase.

10. Lengthy reports from multiple defense experts were disclosed at the class certification phase, as follows: (1) Richard J. Roddewig (Aramark and Old Carco – appraisal – 113 pp. Vol. I, 181 pp. Vol. II); (2) Rebel A. Cole, Ph.D. (Aramark and Old Carco – economic valuation – 74 pp.); (3) David Hagen (Aramark – hydrogeology – 155 pp. report); (4) David Folkes, Ph.D. (Behr – hydrogeology – 52 pp. report, 66 pp. exhibits).

11. Plaintiffs' experts Sweetland and Sheppard issued supplemental reports that replied to Defendants' expert reports. In the interest of efficiency, Class Counsel elected not to depose Defendants' class certification experts, because they had produced detailed written reports.

12. After the Sixth Circuit affirmed this Court's class certification, Defendants submitted a petition for a writ of certiorari to the Supreme Court of the United States. The Court requested a brief in opposition from Plaintiffs. Class Counsel secured, without cost, the expertise and work of eminent Supreme Court and appellate litigator, Scott Nelson, who co-wrote (with Ned Miltenberg and Patrick Thronson) and signed the brief in opposition to certiorari.

13. Shortly after the case was remanded, the parties engaged in a voluntary in-person two-day mediation conducted by John Barkett, a noted environmental litigator and neutral, in August 2019. The mediation was ultimately not productive.

14. Plaintiffs began full merits discovery and eventually disclosed merits-phase experts, as follows: (1) Nicole Sweetland, Ph.D. (hydrogeology) – 2021 updated report 1043 pp., rebuttal expert report 56 pp.; and (2) Matthew Hagemann (standard of care) - 2021 expert report 58 pp.

15. Defendants then disclosed merits-phase experts, as follows: (1) Jon Rohrer (Aramark hydrogeology – 12,946 pp. report); (2) Martin Hamper (Aramark standard of care – 32 pp. report); (3) Lee Otte (Old Carco standard of care – 95 pp. report); (4) Helen Dawson (Old Carco standard of care – 17 pp. report); (5) Peter Mesard (Old Carco hydrogeology – 86 pp. report); and (6) David Folkes (Behr standard of care and hydrogeology – 71 pp. report). Class counsel elected not to depose Defendants' experts, because they had produced detailed written reports, and to control costs.

16. The Court directed that notice be provided to the class of the issue-class certification and an issues trial. (Doc. 332.) Assisted by a class administrator, SSI Claims, which used property records to compile a complete list of property owners during the class ownership period, Class

Counsel effectuated class notice to the members of the class through direct mail, publication notice, and through a website (www.mccookfieldclassaction.com). Plaintiffs received only two timely opt-out requests. (*See* Doc. No. 348 at 2.)

17. On March 11, 2022, all parties filed motions for summary judgment and *Daubert* motions. Each Defendant sought summary judgment on all certified issues. (Docs. 357, 360, 362, 365) sought to strike the entire testimony of Plaintiffs' standard of care expert, Matthew Hagemann (Doc. 361). Plaintiffs sought summary judgment on Issues 4 and 5 (Doc. 359) and moved to limit the testimony of two of Defendants' experts, Jon Rohrer and Peter Mesard, on reliability grounds (Doc. 360). Plaintiff secured additional analysis and a declaration from Dr. Sweetland in bringing this motion.

18. Following thousands of pages of briefing, responsive briefing (see Docs. 371–379), reply briefing (see Docs. 382–388), and over three hours of oral argument at a hearing on May 16, 2022, the Court entered an order that sustained Plaintiffs' Motion for Partial Summary Judgment in its entirety; and sustained Defendants' dispositive motions only in part (as to Issue 3 and, as to Aramark, Issue 2). (Doc. 393.

19. In the ensuing months, Class Counsel then engaged in intense pretrial briefing and motion and practice above and beyond the normal case, including the following:

- Special briefing and argument on Seventh Amendment issues, at which Plaintiffs secured the assistance and expertise of renowned constitutional litigator Robert Peck (Doc. 409);
- Filing and briefing 19 motions in limine (Doc. 406) and responding to 32 defense motions in limine (11 filed jointly by Defendants (Doc. 404); 17 additional for Old Carco (Docs. 399–403); 2 additional for Aramark (Doc. 405); and 2 additional for

Behr (Doc. 407)). (Class Counsel's responses to motions in limine can be found at Docs. 420–422, 425, and 427.);

- A detailed and extensive joint Proposed Pretrial Order (Doc. 428);
- Trial brief (Doc. 434);
- Deposition designations and transcripts (Doc. 417, 464);
- Proposed voir dire (Doc. 415);
- Amended proposed jury interrogatories/instructions (Doc. 412);

The voluminous pretrial filings in this case span from Docket Nos. 399 to 472.

20. On October 18, 2022—less than two weeks before trial was set to begin—the parties engaged in a remote videoconferencing mediation session with mediator John Barkett. Following that mediation session, confident they would be able to imminently agree on non-monetary terms, the parties jointly approached the Court and requested that the Court hold the trial date in abeyance.

21. Over the ensuing months, the parties were able to relatively quickly confirm their agreement on monetary terms of the settlement. Nonmonetary terms required significant additional negotiation by Class Counsel, through the mediator, Mr. Barkett. It was not until June 14, 2023, that the parties were able to inform the Court that they had reached agreement on all monetary and non-monetary terms.

22. Class Counsel drafted all documents necessary to consummate the settlement: the Settlement Agreement, Joint Motion for Preliminary Approval, Memorandum in Support of Joint Motion for Preliminary Approval; Escrow Agreement; Class Notice; Proposed Publication Notice; and Proposed Order.

23. Class Counsel have engaged, and the Court has preliminarily approved, RG2 Claims Administration LLC as class administrator. The most recent estimate by RG2 (September 28, 2023) indicates that notice and administration costs in this matter will total approximately $44,795.

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

25. The Settlement Agreement was negotiated in good faith, by experienced counsel who vigorously advocated for their respective clients. (Doc. 477-2, § I.6.)

26. The proposed settlement will provide monetary relief to the named plaintiffs and unnamed class members that is particularly favorable, especially given the uncertainties of litigation, including the issues trial, merits trials on individual claims, and additional appeals. (*Id.* at § I.8.)

27. Per the proposed settlement, Defendants will fund a qualified Settlement Fund in the amount of nine million dollars ($9,000,000.00), which will represent the limit and extent of Defendants' monetary obligations under the Settlement Agreement. (*Id.* at §§ II.43, IV.2.) A proposed third-party Claims Administrator (RG/2 Claims Administration LLC)[1] will administer the Settlement Funds in accordance with the provisions of the Settlement Agreement.

28. This Settlement Fund will cover all costs, fees, and payments associated with the Settlement Agreement, including the following payments in order of priority: (i) approved attorneys' costs and expenses; (ii) approved fee award to Class Counsel; (iii) approved Claims Administration Expenses; (iv) incentive awards or other compensation to the Settlement Class Representatives; (v) payments to eligible Class Members; and (vi) any Remaining Funds which will be used as a donation for the community. (*Id.* at § IV.5.)

29. The parties propose to notify the class members with a physical, mailed notice, as well as a Class Website, www.mccookfieldclassaction.com. (*Id.* at § IV.3.) This website was used to

[1] A summary of RG/2 Claims Administration, LLC's qualifications and experience is attached as **Exhibit 4.**

notify the class members of the existence of the issues classes previously approved by this Court and is still an active website. (*Id.* at § IV.3.) Notice will also be provided by publication in the *Dayton Daily News*, a newspaper of general circulation in Dayton, Ohio, once a week for three consecutive weeks commencing on the Notice Date. (*Id.* at § IV.3.) Said publication notice will be in the form of Exhibit 2D to the Settlement Agreement, or other such form as the Court may order.

30. The Settlement Agreement permits any class member to opt out of the settlement class by mail. (*Id.* at § VIII.1.) The Settlement Classes will not include any individuals who opt out, and any individuals who opt out will not receive any monetary award under the Settlement Agreement. (*Id.* at § VIII.1.)

31. Further, any member of a Settlement Class who wishes to object may do so by mailing that objection to the Court, Class Counsel, and counsel for all Defendants, at addresses listed in the Notice. (*Id.* at § VIII.2.) Any timely objectors will have the right to be heard at the Final Approval Hearing, should they timely request it. (*Id.* at § VIII.2.)

32. Any Class Member who does not opt out or object shall be deemed to have waived any objections. (*Id.* at § VIII.3.) No party or anyone acting on their behalf, including counsel, shall solicit or encourage objections or opt-outs. (*Id.* at § VIII.4.)

33. The Sixth Circuit's affirmance of this Court's class certification decision established the "broad view" of issue-class certification in the Sixth Circuit. It has been cited favorably over 60 times in 21 different jurisdictions, including in the Flint water cases.

34. Settlement discussions at a two-day mediation in August 2019 were unproductive, and settlement discussions undertaken in March 2022 took over 6 months to bear fruit, even with the assistance of John Barkett, a highly experienced and skilled mediator.

35. Class Counsel dedicated at least 16,046.9 hours to date to prosecuting the Classes' claims (excluding hours spent on this fee petition). These hours were spent on tasks that included,

but certainly were not limited to, extensive factual investigations; client communications and legal research even before filing this lawsuit; litigating motions to dismiss; amending the complaint multiple times; working with scientific consultants and experts, both before filing the case, during discovery and in preparing expert reports; class certification briefing and *Daubert* briefing; class-phase and merits-phase fact discovery, including managing, reviewing, and analyzing documents from plaintiffs, defendants, and non-parties; attending property inspections; defending, taking or otherwise participating in depositions, and litigating discovery motions; issuing and litigating non-party subpoenas; attending court conferences and hearings; client communications and updates; legal research; appellate briefing in the Sixth Circuit and Supreme Court; class notice for the issue-class trial; filing and responding to dispositive motions; making all required pretrial filings; engaging in extensive mediation and settlement efforts, including the preparation of settlement materials and our work with defendants, G2 Claims, and Class Members to facilitate a smooth claims administration process.

36. This litigation has been handled in as efficient and streamlined a manner as possible by all involved on Plaintiffs' side. During the fifteen (15) year course of the litigation, Class Counsel maintained detailed time records, which describe the nature of the work performed.

37. Based on the attached sworn declaration and itemized, contemporaneous computation of time, Class Counsel's *attorney* hours total as follows:

Name	**Firm**	**Years out of law school**[2]	**Time**	**Rate**[3]	**Lodestar**

[2] These are calculated with reference to the latest date on which the attorney had any responsibility for the case. For example, if an attorney became licensed in 2011 and worked on the case until 2015, the 2015 fee for an attorney with 4 years of experience is used.

[3] All rates are calculated conservatively, in accordance with those in the Rubin Committee report, which is customarily relied on in the Southern District of Ohio. *See, e.g.*, *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, 995 F. Supp. 2d 835, 844 (S.D. Ohio 2014). Prevailing rates where JJS, NLS, and GR practice are higher. *See, e.g.*, Laffey Matrix, http://www.laffeymatrix.com/see.html.

Leah Barron[4]	JJS	6	1,212.6	$325.14	$394,264.76
Lauren Bell[5]	JJS	4	546.5	$271.75	$148,511.37
Reza Davani[6]	JJS	2	112.3	$208.36	$23,398.83
Robert K. Jenner[7]	JJS	33	2.4	$506.44	$1,215.45
Jessica Meeder[8]	JJS	11	1,696.4	$413.84	$702,038.17
Bradford Morse[9]	JJS	1	265.5	$200.34	$53,190.27
Jackson Petito[10]	JJS	3	1,183.6	$251.25	$297,379.50
Stephen Rigg	JJS	8	275.4	$462.77	$127,466.85
Nicole Steers[11]	JJS	2	1,041.4	$241.58	$251,581.42
Patrick Thronson	JJS	10	1,374.3	$462.77	$635,984.81
Ned Miltenberg	NLS	39	885.4	$616.16	$545,548.06
Anthony Roisman	NLS	60	756.5	$616.16	$466,125.04
Steven German	GR	23	2431.7	$616.16	$1,498,347.08
Joel Rubenstein	GR	22	352.1	$616.16	$216,949.94
Carin Bigley[12]	BA	6	691.3	$395.58	$273,464.45
Kevin Bowman	BA	26	354.2	$616.16	$218,243.872
David Brannon[13]	BA	15	112.5	$503.49	$56,642.62
Douglas Brannon	BA	19	2017.7	$544.58	$1,098,799.06
Dwight Brannon	BA	49	310.6	$616.16	$191,379.29
Joseph Paley[14]	BA	2	62.4	$253.50	$15,818.40

[4] Ms. Barron graduated in 2008 and left JJS in 2014.
[5] Ms. Bell graduated from law school in 2013 and left JJS in 2017.
[6] Mr. Davani graduated in 2012 and left JJS in 2014.
[7] Mr. Jenner graduated from law school in 1985 and left JJS in 2018.
[8] Ms. Meeder graduated in 2005 and left JJS in 2016.
[9] Mr. Morse graduated in 2012 and left JJS in 2013.
[10] Mr. Petito graduated in 2012 and left JJS in 2015.
[11] Ms. Steers graduated in 2012 and left JJS in 2014.
[12] Ms. Bigley graduated in 2013 and left BA in 2019.
[13] David Brannon graduated in 2006 and left BA in 2021.
[14] Mr. Paley graduated in 2017 and left BA in 2019.

Matthew Schultz[15]	BA	15	362.1	$484.13	$175,303.47
LODESTAR TOTAL			**16,046.9**[16]		**$7,390,652.70**

38. Again, these hours include only attorney hours. They do not include unrecorded hours contributed by counsel whose appearance was entered and who made crucial contributions to the litigation, including Howard A. Janet, managing partner of Janet, Janet & Suggs, and Kenneth M. Suggs, another named partner of Janet, Janet & Suggs, who would have been lead counsel and tried the case with Patrick Thronson, and was heavily involved in settlement negotiations. They also do not include countless starr and administrative hours.

39. Class Counsel's work is ongoing. In addition to the work already performed, Class Counsel will conduct additional work following this filing. In addition to responding to possible objectors and preparing for and presenting at the fairness hearing and addressing any appeals, Class Counsel will expend time and effort assisting with the administration of the Settlement. These hours and the costs associated with them are not being included in this petition. Class Counsel intends to file an amended petition to include those, at an appropriate time before the final approval hearing.

40. No hours associated with authoring and compiling this fee petition are being included in the lodestar calculation.

41. Class Counsel took care to divide work in such a way that focused on each attorney's strengths, skills, and experience, to complete tasks efficiently and reduce duplication of effort.

[15] Mr. Schultz graduated in 2005 and left BA in 2020.

[16] Each individual law firm was responsible for keeping its own hours and costs. Class Counsel have not independently verified one another's hours and costs. Class Counsel are prepared to make time records available to the Court if requested. Full hours and expenses from Public Citizen, which assisted in preparation of the brief in opposition to a writ of certiorari, will be included in the amended version of this motion to be submitted closer to final approval.

Indeed, for the merits phase of the case, most of the work on behalf of the Classes was undertaken and accomplished by a single attorney, Patrick Thronson of Janet, Janet & Suggs.

42. Class Counsel have audited and attached their case costs as Exhibits 3–5 to Class Counsel's Memorandum of Law in Support of Motion for Award of Attorney's Fees and Costs.

43. As a gesture of good will, Class Counsel are not seeking to recover any expenses for meals, medical records, books, or for late cancellation fees for lodging for trial.

44. As a further gesture of good will, Class Counsel are subtracting all expenses associated with the economic damages reports of Stephen Shepard. Although these reports benefited the class by informing settlement negotiations, they were not relied on in Plaintiffs' final motion for class certification, and Dr. Sheppard did not serve as an expert during the merits phase.

45. The total amount Class Counsel are writing off and not petitioning for recovery of is at least $82,991.59.

46. According to itemized costs submitted by Class Counsel, case costs incurred by Class Counsel were as follows:

a. <u>Brannon & Associates expenses:</u>
Research (including Internet and legal research): $2,872.22
Court costs (including filing fees): $1,297.94
Deposition transcripts: $1,898.50
Travel: $562.50
Miscellaneous (office expenses): $6,067.44
Expert fees: $19,351.04
EPA: $467.25
Total: $32,516.89

<u>National Legal Scholars expenses:</u>
Expert meeting and deposition: $998.78
Co-counsel meetings: $2,211.27
Co-counsel/client meetings: $1,817.90
Legal research: $128.37
Total: $5,156.32

<u>Janet, Janet & Suggs expenses:</u>
Experts (review, consultation, reports, and depositions) - $1,706,366.96
Courts (filing fees, transcripts, and deposition transcripts/video) - $87,356.47

Miscellaneous (mediation, data hosting, mailing, printing, doc. requests) - $223,421.48
Travel (to depositions, co-counsel meetings, mediation): $81,733.95
Total: $2,098,878.86

GRAND TOTAL: $2,136,552.07

47. The final settlement of $9 million is close to the $11,081,938 figure that Dr. Sheppard estimated as the total loss for residential, commercial, and tax-exempt properties above the Behr plume.

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

49. Class Counsel's focus in approaching settlement was on balancing the strength of a claim against the payment offered to resolve it, which is a key factor in assessing the adequacy of the proposed settlement (*e.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Circ. 1999)), but does not require the fact-finding of trial.[17] One purpose of a settlement is to avoid having to reach the merits of a case. Definitive statements on the merits should be avoided as a settlement may fail and the case may come to trial. *Managing Class Action Litigation: A Pocket Guide for Judges* (2d ed.) Federal Judicial Center (2009), at 11.

50. Class Counsel believes that this Settlement is in the best interest of the Class based on the negotiations and a detailed knowledge of the issues in this action. Specifically, Class Counsel

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

balanced the terms of the proposed Settlement against the possible outcomes if the case proceeded through trial and appeals.

51. This action was filed in 2008. To properly handle and prosecute active class-action litigation such as this case, Class Counsel was often precluded from accepting or working on both other potential contingency fee cases and hourly fee-producing cases. This case was taken on a purely contingent basis, with Class Counsel advancing all costs at considerable risk with the ultimate result unknown. Practicing in this area of law involves a great deal of risk as these cases may fail at the pleading stage, on class certification, on *Daubert* challenges, motions for summary judgment, at trial, or on appeal. Routinely, defendants are represented by highly skilled and experienced local and national defense firms, as was the case here.

52. These cases require the constant engagement of Class Counsel. Extensive work is required to obtain and distill data and documents associated with the environmental operations at issue, the progress of administrative action, to support liability, to develop appropriate scientific evidence, to maintain contact with Class Representatives, other Class Members, and regulators, and to effectively defend against defendants' efforts to minimize these claims. Substantial written and oral discovery and motion practice is also required, as well as the research, technical knowledge, and drafting requisite to obtain class certification and then to prepare for trial.

53. The risks of taking on a class-action are enormous. Litigating a class action against three large multinational corporations, like defendant here, through class certification and trial often takes years and requires a large investment with no guarantee of recovery.

54. Class Counsel are able to distribute attorney's fees amongst themselves through private agreements.

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

Conclusion

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 16, 2023,

Respectfully submitted,

/s/ Patrick A. Thronson

Patrick A. Thronson
Janet, Janet & Suggs

Settlement Class Counsel

RUBIN RATES

Year	Paralegals	Law Clerks	Young Associates (2 or less)	Intermediate Associates (2 to 4 years	Senior Associates (4 to 5 years)	Young Partners (6 to 10 years)	Intermediate Partners (11 to 20 years)	Senior Partners (21 or more years)
1983	$37.91	$23.96	$61.77	$71.62	$82.81	$96.39	$113.43	$128.34
1984	$39.43	$24.92	$64.24	$74.48	$86.12	$100.25	$117.97	$133.47
1985	$41.00	$25.92	$66.81	$77.46	$89.57	$104.26	$122.69	$138.81
1986	$42.64	$26.95	$69.48	$80.56	$93.15	$108.43	$127.59	$144.37
1987	$44.35	$28.03	$72.26	$83.79	$96.88	$112.76	$132.70	$150.14
1988	$46.12	$29.15	$75.15	$87.14	$100.75	$117.27	$138.00	$156.15
1989	$47.97	$30.32	$78.16	$90.62	$104.78	$121.96	$143.53	$162.39
1990	$49.89	$31.53	$81.29	$94.25	$108.97	$126.84	$149.27	$168.89
1991	$51.88	$32.79	$84.54	$98.02	$113.33	$131.92	$155.24	$175.64
1992	$53.96	$34.10	$87.92	$101.94	$117.86	$137.19	$161.45	$182.67
1993	$56.12	$35.47	$91.43	$106.02	$122.58	$142.68	$167.90	$189.97
1994	$58.36	$36.89	$95.09	$110.26	$127.48	$148.39	$174.62	$197.57
1995	$60.70	$38.36	$98.90	$114.67	$132.58	$154.32	$181.61	$205.48
1996	$63.12	$39.90	$102.85	$119.25	$137.88	$160.50	$188.87	$213.70
1997	$65.65	$41.49	$106.97	$124.02	$143.40	$166.92	$196.42	$222.24
1998	$68.27	$43.15	$111.24	$128.98	$149.14	$173.59	$204.28	$231.13
1999	$71.00	$44.88	$115.69	$134.14	$155.10	$180.54	$212.45	$240.38
2000	$73.84	$46.67	$120.32	$139.51	$161.31	$187.76	$220.95	$249.99
2001	$76.80	$48.54	$125.13	$145.09	$167.76	$195.27	$229.79	$259.99
2002	$79.87	$50.48	$130.14	$150.89	$174.47	$203.08	$238.98	$270.39
2003	$83.07	$52.50	$135.35	$156.93	$181.45	$211.20	$248.54	$281.21
2004	$86.39	$54.60	$140.76	$163.21	$188.70	$219.65	$258.48	$292.46
2005	$89.84	$56.78	$146.39	$169.73	$196.25	$228.44	$268.82	$304.16
2006	$93.44	$59.05	$152.25	$176.52	$204.10	$237.57	$279.57	$316.32
2007	$97.17	$61.42	$158.34	$183.58	$212.27	$247.08	$290.76	$328.97
2008	$101.06	$63.87	$164.67	$190.93	$220.76	$256.96	$302.39	$342.13
2009	$105.10	$66.43	$171.26	$198.56	$229.59	$267.24	$314.48	$355.82
2010	$109.31	$69.09	$178.11	$206.51	$238.77	$277.93	$327.06	$370.05
2011	$113.68	$71.85	$185.23	$214.77	$248.32	$289.05	$340.14	$384.85
2012	$118.23	$74.72	$192.64	$223.36	$258.26	$300.61	$353.75	$400.25

EXHIBIT 2

2013	$122.96	$77.71	$200.34	$232.29	$268.59	$312.63	$367.90	$416.26
2014	$127.88	$80.82	$208.36	$241.58	$279.33	$325.14	$382.61	$432.91
2015	$132.99	$84.05	$216.69	$251.25	$290.50	$338.14	$397.92	$450.22
2016	$138.31	$87.42	$225.36	$261.30	$302.12	$351.67	$413.84	$468.23
2017	$143.84	$90.91	$234.37	$271.75	$314.21	$365.73	$430.39	$486.96
2018	$149.60	$94.55	$243.75	$282.62	$326.78	$380.36	$447.60	$506.44
2019	$155.58	$98.33	$253.50	$293.92	$339.85	$395.58	$465.51	$526.70
2020	$161.80	$102.26	$263.64	$305.68	$353.44	$411.40	$484.13	$547.77
2021	$168.28	$106.35	$274.19	$317.91	$367.58	$427.86	$503.49	$569.68
2022	$175.01	$110.61	$285.15	$330.62	$382.28	$444.97	$523.63	$592.46
2023	$182.01	$115.03	$296.56	$343.85	$397.57	$462.77	$544.58	$616.16

PLACEHOLDER FOR EXHIBITS 3-5, CONTAINING ITEMIZED CASE COSTS OF CLASS COUNSEL

FILED UNDER SEAL