IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| IN RE: IMPRELIS HERBICIDE MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION | 2:11-MD-02284-GP<br><br>MDL NO. 2284 |
| THIS DOCUMENT RELATES TO<br><br>ALL ACTIONS | |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, FOR CERTIFICATION OF SETTLEMENT CLASSES, AND FOR PERMISSION TO DISSEMINATE CLASS NOTICE**

Dated: October 19, 2012

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Plaintiffs, through Settlement Class Counsel,[1] respectfully submit this Memorandum of Points and Authorities in support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Classes, and for Permission to Disseminate Class Notice. For the reasons set forth below, Plaintiffs respectfully submit that this Settlement is within the "range of possible approval" under Fed. R. Civ. P. 23(e) and request that the Court preliminarily approve the Settlement, certify the Settlement Classes, and order dissemination of class notice as soon as practicable.

## I. FACTUAL BACKGROUND

### A. Facts Giving Rise To This Litigation.

On October 4, 2010, DuPont began selling Imprelis, a powerful new selective herbicide. Like all selective herbicides, Imprelis® was intended to kill unwanted weeds, while leaving other vegetation intact. But, as Plaintiffs allege, Imprelis® proved not selective enough — it killed not only weeds, but also trees and other non-target vegetation.[2]

In June 2011, the United States Environmental Protection Agency ("EPA") began investigating widespread reports of damage stemming from the use of Imprelis. On July 14, 2011, the first federal court class action lawsuit was filed against DuPont seeking damages for Imprelis-related injuries. Many similar lawsuits were filed shortly thereafter (the "Lawsuits").

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[1] On October 19, 2012, Settlement Class Counsel, on behalf of the Settlement Class Members, and DuPont reached final agreement upon a proposed class action settlement of this matter (the "Settlement"), memorializing the Settlement in the form of a written settlement agreement ("Settlement Agreement"). The Settlement Agreement is attached here as Ex. A ("Settlement Agreement"). All exhibits to the Settlement Agreement are referred to herein by the numerical designation given in the Settlement Agreement, Exs. 1-29. Unless otherwise noted, all capitalized terms in this motion will have the same meaning as set forth in the Settlement Agreement.

[2] Under the Settlement Agreement, DuPont does not admit liability. The factual recitation herein is based upon the Master Class Action Complaint filed by Settlement Class Counsel on March 30, 2012 (Dkt. 66).

On August 4, 2011, DuPont announced that it would suspend sales of Imprelis® and conduct "a product return and refund program for the product." DuPont also provided a "hotline" telephone number on its website to receive reports of problems related to Imprelis® and for homeowners and lawn care operators to call with questions or concerns.

On August 11, 2011, the EPA formally ordered DuPont "to immediately cease the distribution, sale, use or removal of Imprelis® . . . ." The EPA confirmed that "certain coniferous trees . . . are susceptible to being damaged or killed by application of Imprelis." The EPA also revealed that "[a]s of August 2011, DuPont ha[d] submitted to the Agency over 7,000 adverse incident reports involving damage (including death) to non-target trees . . . related to the application of Imprelis."

In response to damages caused by Imprelis, on September 6, 2011, DuPont initiated the Imprelis® Claim Resolution Process that was designed to compensate property owners for the damages Imprelis® has caused. The Imprelis® Claim Resolution Process, however, was incomplete. Under the Imprelis® Claim Resolution Process, a DuPont representative or the Lawn Care Operator ("LCO") that applied Imprelis® to the landowner's property visited the property to collect evidence pertaining to the negative effects of Imprelis® on that property, and DuPont then determined the amount of compensation for Imprelis-related damages that DuPont deemed appropriate based on its own (undisclosed) methodology. Landowners who accepted DuPont's offer were required to broadly release DuPont from all liability.

Settlement Class Counsel believe that while the Imprelis® Claim Resolution Process was a step in the right direction, it also could be substantially improved. Of particular concern, for example, was the fact that its release barred landowners from seeking relief from DuPont in the event that environmental hazards or personal injuries manifested themselves in the future.

Exacerbating this problem was the fact that the notice and disclosure to prospective claimants regarding the Imprelis® Claim Resolution Process was inadequate and the coverage and relief available through the Imprelis® Claim Resolution Process was deficient in several respects, including the mandatory arbitration provision and the abbreviated warranty period.

As explained more fully below, however, following months of comprehensive — and often spirited — discussions and mediation sessions, Settlement Class Counsel and DuPont have now negotiated a significantly improved Settlement Claims Process that resolves the problems inherent in DuPont's initial effort. The improved Settlement Claims Process, which forms the foundation of the Settlement, is the result of tireless negotiation by both sides and represents an outstanding achievement for the Settlement Classes because it provides materially superior class relief and claims resolution processes to those which DuPont originally offered through its Imprelis® Claim Resolution Process.

**B. Discovery Status.**

On October 20, 2011, the Judicial Panel on Multidistrict Litigation ("JPML") transferred all pending, Imprelis-related actions to this Court. *See In re Imprelis Herbicide, Mktg., Sales Prscs. & Prods. Liab. Litig.*, 825 F. Supp. 2d 1357, 1359 (J.P.M.L. 2011). Following JPML transfer of these actions and this Court's consolidation thereof, Settlement Class Counsel actively prosecuted these cases — just as they had done pre-JPML transfer in the underlying constituent actions. One aspect of Settlement Class Counsel's prosecution efforts encompassed a variety of discovery methods. Settlement Class Counsel sought, received, and analyzed nearly 500,000 pages of documents pertaining to the development, marketing, and sale of Imprelis. Settlement Class Counsel obtained, organized, and examined the documents DuPont provided to the EPA as well as all publicly available information and data about Imprelis® and its observed effects on non-target vegetation. On March 15, 2012, Adam Levitt and Richard Arsenault —

two of Plaintiffs' Settlement Class Counsel — deposed Jon Claus, DuPont's Global Technical Product Manager, during which deposition Imprelis' potential latency period and biodegradation process were addressed in detail. This discovery greatly informed Settlement Class Counsel's approach to all aspects of this litigation, including the settlement negotiations and the Settlement.

Settlement Class Counsel also vetted, organized, and retained the leading academic and industry experts in connection with this action, including experts in the areas of EPA regulation, herbicide product development, causation and latency, damage valuation, tree replacement, and soil remediation. Each of these experts has been vitally important and has added substantial value to both the discovery efforts and the settlement discussions. Settlement Class Counsel's expert team includes:

| **Name** | **Expertise** | **Qualifications** |
|---|---|---|
| Dr. Charles Benbrook | EPA Regulations | • Ph.D., Agricultural Economics - University of Wisconsin<br>• Chief Scientist, The Organic Center |
| Jeffrey Ling, RCA | Arborist | • Founder and President of Arborwise, Ltd |
| Dr. Bert Cregg | Plant Physiologist and Horticulturalist | • Ph.D. Forest Resources, University of Georgia<br>• Associate Professor Department of Horticulture and Department of Forestry, Michigan State University |
| Dr. Nick Christians | Soil Scientist | • Ph.D. Agronomy, Ohio State University<br>• Professor of Horticulture, Iowa State University |
| Dr. Douglas D. Baird | Product Development | • Monsanto (ret.) co-developer of Roundup |
| Dr. Glenn Wehjte | Soil Scientist | • Professor of Agronomy and Soil Science, Auburn University |
| Dr. Joseph W. Kloepper | Plant Pathologist | • PhD Plant Pathology, University of California Berkeley<br>• Plant Microbiologist, Department of Plant Pathology, Auburn University |

Moreover, Settlement Class Counsel actively vetted the Imprelis® Claim Resolution Process. As part of the Imprelis® Claim Resolution Process, DuPont conducts a site inspection of each property whose owner has indicated an interest in receiving a Claims Resolution

Agreement ("CRA") from DuPont. During this inspection, the property owner's lawn care operator (if it is participating in the Imprelis® Claim Resolution Process) or a DuPont team composed of an arborist and an outside administrative representative walk the property, examine trees for Imprelis® damage, photograph and measure Imprelis® damaged trees, and fill out a claim form with tree ratings from which DuPont makes a determination whether the damaged trees should be replaced or receive care (including trimming and other treatment). For each participating lawn care operator, DuPont conducts a second property inspection on certain selected properties to ensure the accuracy and consistency of the lawn care operator's performance within the guidelines of the Imprelis® Claim Resolution Process. This second property inspection is conducted on a randomly selected sample of the claims submitted by each participating lawn care operator, and is done by the DuPont team (i.e., an arborist and an outside administrative representative). Settlement Class Counsel, accompanied by an independent arborist, attended a representative sample of both types of inspections to evaluate the Imprelis® Claim Resolution Process. Two-person teams (comprised of one arborist and one lawyer) participated in the inspection of Imprelis® damaged properties located in Pennsylvania, New Jersey, Delaware, Indiana, Michigan, Minnesota, and Wisconsin in order to obtain a first-hand understanding of the inspection process and to ensure that these inspections were being performed in the best interests of the property owners.

Settlement Class Counsel also drafted and filed a memorandum discussing the various state law claims alleged in the Master Class Action Complaint (Dkt. 65). This memorandum was the product of extensive research of the laws of Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, and Wisconsin on claims including Consumer Fraud, Breach of

Express Warranty, Breach of Implied Warranty, Negligence, Strict Products Liability — Failure to Warn, Strict Products Liability — Design Defect, Nuisance, and Trespass. Aided by this accumulated body of factual evidence, legal research, and extensive expert analysis and guidance, Settlement Class Counsel drafted an 88-page, nine-count Master Class Action Complaint (Dkt. 66) on behalf of a nationwide class and state subclasses of property owners, lawn care operators, and self-applicators (such as golf courses) who were harmed by Imprelis. The Master Class Action Complaint was filed on March 30, 2012. DuPont filed its Answer on August 15, 2012.

During that same time period, Settlement Class Counsel continued structuring the case for discovery and trial, successfully negotiating with DuPont's counsel a Protective Order (Dkt. 69), which this Court entered on April 3, 2012, and an Order for Preservation of Documents, Electronically Stored Information, and Other Tangible Things (Dkt. 76), which this Court adopted, on May 9, 2012, as Case Management Order No. 2. In pertinent part, these two orders provide for:

- The preservation of all potentially discoverable records under Fed. R. Civ. P. 26(b)(1), including paper records, electronic mail, other electronic records on computer systems saved on network accessible storage devices, electronic records saved on local hard drives and tangible things;
- Notification every six (6) months to all domestic DuPont employees, and worldwide employees in its Crop Protection unit, of their preservation obligations;
- A schedule for the identification of individual and departmental custodians of potentially discoverable records, a means for identifying additional

custodians, and a methodology for exchanging information on DuPont's computer systems and other record storage systems in their possession, custody, or control that are reasonably likely to contain discoverable records; and

- A procedure for the exchange of discoverable information, including the designation of discovery material as confidential as well as a procedure for challenging the confidentiality of such materials.

Settlement Class Counsel also negotiated a schedule for DuPont's responses to the Master Class Action Complaint and the complaints filed by individual Plaintiffs, requiring DuPont to respond to each of those Complaints on a rolling basis of ten (10) complaints every fifteen (15) days, commencing on August 15, 2012. Rather than move to dismiss either the Master Class Action Complaint or any of the individual complaints, DuPont has, instead, answered or will answer each of those Complaints pursuant to the above-described, Court-approved schedule.

**C. Settlement Negotiations.**

Shortly after the Court appointed the current interim leadership structure, Settlement Class Counsel and DuPont began discussing the possibility of a class-wide settlement. The case seemed ideal for early and voluntary resolution because, while not admitting liability, DuPont had already begun implementing a comprehensive claims resolution process following the initiation of this litigation.

Shortly after their first in-person settlement discussions were held on January 24, 2012, the Parties began a series of formal settlement mediation sessions under the direction of Magistrate Judge Diane M. Welsh (Ret.), as well as numerous informal negotiations. From that time through the present, the Parties met or otherwise conferred on a regular basis, including

numerous sessions before Judge Welsh in Philadelphia and in-person meetings between DuPont's counsel and Settlement Class Counsel. Many additional meetings have taken place over the past nine months between the Parties pertaining to the Settlement, ranging from formal teleconferences during which the Parties spent hours negotiating particular documents, to literally hundreds of phone calls and email exchanges aimed at resolving material issues. Due to the difficult and protracted nature of the Settlement negotiation process, and the Parties' commitment to advocating and protecting their clients' respective interests (and, in the case of Settlement Class Counsel, the interests of the other members of the Settlement Classes), the Parties exchanged, edited, and revised at least 40 drafts of what eventually became the finalized Memorandum of Understanding ("MOU") — the document underlying the Settlement Agreement and the foundational document upon which the Settlement is based. The final MOU was signed on July 7, 2012, nearly six months after formal negotiations began.

On October 19, 2012, Settlement Class Counsel (on behalf of the Settlement Class Members) and DuPont reached final agreement upon a proposed class action settlement of this matter, memorializing the Settlement in the form of a written settlement agreement. *See* Ex. A. The Settlement is the result of nine months of hard-fought, often spirited, arm's-length negotiation and mediation among the Parties. In reaching the Settlement, Settlement Class Counsel carefully analyzed evidence uncovered during discovery, the strengths of DuPont's legal defenses and the existing Imprelis® Claim Resolution Process.

## II. MATERIAL TERMS OF THE SETTLEMENT

Plaintiffs seek preliminary approval of the Settlement on behalf of the following Settlement Classes:[3]

[3] Contemporaneous with the filing of this motion, Settlement Class Counsel are filing an Amended Master Class Action Complaint by stipulation that conforms with the Class definitions

**Property Owner Class (Class 1):**

All persons or entities who (a) own or owned property in the United States to which Imprelis® was applied from August 31, 2010 through August 21, 2011, or (b) own or owned property in the United States adjacent to property to which Imprelis® was applied from August 31, 2010 through August 21, 2011 and whose trees show damage from Imprelis® on or before the date of entry of the Preliminary Approval Order ("Adjacent Property Owner"). Excluded from Class 1 are (1) any Judges to whom this Action is assigned and any members of their immediate families and (2) any property owners whose properties were used for the testing of Imprelis® or developmental formulations containing the same active ingredient.

**Applicator Class (Class 2):**

All persons or entities that, from August 31, 2010 through August 21, 2011, purchased Imprelis® (and/or received Imprelis® directly or indirectly from a purchaser) and applied it to property in the United States as part of their normal business, other than property that they own or owned ("Applicators"). Excluded from Class 2 are any Judges to whom this Action is assigned and any members of their immediate families.

**Golf Courses and Other Self Applicators Class (Class 3):**

All persons or entities that, from August 31, 2010 through August 21, 2011, purchased Imprelis® (and/or received Imprelis® directly or indirectly from a purchaser) and applied it to properties in the United States that they own or owned ("Self Applicators"). Excluded from Class 3 are any Judges to whom this Action is assigned and any members of their immediate families.

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herein and includes an additional Class Representative who owns (or owned) property in the United States adjacent to property to which Imprelis was applied, and who has been involved in the litigation from the outset.

**A. Class Benefits.**

Under the Settlement, DuPont will provide significant benefits to the Settlement Class Members beyond those provided for by the existing Imprelis® Claim Resolution Process for each of the three Settlement Classes.[4]

**1. Property Owner Class (Class 1).**

Under the terms of the Settlement, DuPont will make the following relief available to Property Owner Class Members:

a. ***Limited Warranty***. DuPont will extend its warranty for replacement trees by 18 months — from December 31, 2013 to May 31, 2015.

b. ***Removal services***. DuPont will offer to remove Qualified Trees, subject to the ratings and terms set forth in Exhibits 19 and 20.

c. ***Payment for Trees***. DuPont agrees to value and pay for damaged trees pursuant to the schedule set forth in Exhibit 15 to the Settlement Agreement. A property owner who has a damaged tree removed that is 20 feet tall or smaller, should be able to purchase a tree of like size and species from a Qualified Tree Replacer for the payment received. A property owner who has a damaged tree removed that is greater than 20 feet tall may use all or a portion of the money received from DuPont under the Settlement to purchase one (1) or more smaller trees through Qualified Tree Providers at the prices set forth in Exhibit 15 to the Settlement Agreement.

[4] Excluded from the proposed Settlement Classes will be all persons who validly and timely request exclusion from the class in accordance with this Court's order granting preliminary approval and directing the dissemination of class notice should this petition be granted. (Settlement, ¶ 31.)

d. ***Tree Care and Maintenance Program***. For trees that require care but, presently, not replacement, DuPont will pay Property Owner Class Members certain tree care and maintenance payments pursuant to the schedule set forth in Exhibit 18 to the Settlement Agreement.

e. ***Additional Payment***. DuPont will make an additional payment to Property Owner Class Members to compensate them for incidental damages or other losses relating to their Imprelis-affected trees. The amount of the additional payment shall be 15% of the total value of any payments and services DuPont is providing.[5]

f. ***Ongoing Independent Audit Process***. Throughout the pendency of the Settlement program, Settlement Class Counsel shall receive not less than quarterly reports from DuPont containing summary statistics detailing the implementation of the Settlement program to ensure the Settlement program is being applied effectively and fairly. In addition, Settlement Class Counsel may request a Court-approved independent person or entity, to be paid for by DuPont, to audit a sampling of the claims submitted by Settlement Class members that the independent person or entity deems appropriate.

g. ***Appeal Process***. DuPont and Settlement Class Counsel shall jointly select and propose to the Court for its approval and appointment, a panel comprised of three (3) arborists (the "Imprelis® Alternative Dispute Resolution Panel" or the "Panel"). The Panel shall be comprised of the following members:

[5] By way of example, this means that if DuPont pays $2,000 for tree removal and pays a Property Owner Class Member $8,000 for replacement costs, for a total value of $10,000, DuPont would also pay that Property Owner Class Members an additional $1,500 (15%) to cover any incidental damages or other losses relating thereto.

(a) one arborist chosen by Settlement Class Counsel; (b) one arborist chosen by DuPont; and (c) one arborist chosen by the two arborists selected through the above-described process. The Panel shall be authorized to review and determine appeals from the Settlement Claims Process, including decisions from the DuPont objections process.

h. **Broad Notice**. Kinsella Media has designed a broad state-of-the-art, notice program that will ensure Settlement Class members are apprised of their rights. DuPont has agreed to fund an extensive notice program that will include direct notice of the Settlement to all those who have contacted DuPont and, more importantly, widespread notice to homeowners through an extensive television, print-media, and Internet campaign. Kinsella Media estimates the notice program will reach 75.9% of homeowners and 73.8% of adults 35 and older nationally, and 80-87% of adults 35 and older in the areas where most Settlement Class Members are likely to be located. These media target audiences were selected by Kinsella Media because they reflect the demographics of the Settlement Class and are measurable in terms of paid media delivery.

The following chart highlights the additional benefits the Settlement provides to the Property Owner Class by comparing DuPont's pre-existing Claims Process to the relief available under the Settlement:

| **PROPERTY OWNER CLASS** | | |
|---|---|---|
| **Property Owner Class Compensation** | **Under Current Claims Process** | **Under Settlement** |
| Warranty | Any Imprelis® damage; expires December 31, 2013, or two years from replanting. | Any Imprelis® damage; extended to May 31, 2015. *See* Settlement Exhibit 21. |

| PROPERTY OWNER CLASS | | |
|---|---|---|
| **Property Owner Class Compensation** | **Under Current Claims Process** | **Under Settlement** |
| Payment for replacement trees | Pricing schedule was not publicly available. | Publicly available pricing schedule based on height.<br><br>Class Members may use funds awarded as they choose including: (1) purchase a similar size tree, for trees up to 20', from any Qualified Tree Provider ("QTP"); (2) keep the money; (3) purchase any number of smaller trees at the price listed from the QTPs; or (4) a combination of 2 and 3 (i.e., keep some $ and purchase some smaller trees).<br><br>Note that for trees over 20 feet, a tree of that same size is not guaranteed to be available at the price paid to the Class Member by DuPont, but Class Members can elect choice 2, 3, or 4 above. *See* Ex. A. (III.C.1.) |
| Payment for Tree Care and Maintenance and Limited Warranty | $75 or $150 for replacement trees; failure to provide care voids warranty. | Same payment BUT class member must have failed to provide *reasonable* care to void warranty. *See* Settlement Ex. 21. |
| Claims Process | Claims inspectors **only** recorded trees that the property owner identified as injured by Imprelis.<br><br>Claims Process can be slow and have delays. | For future inspections, claims inspectors will record **all** Imprelis-impacted trees observed on the Class Member's property.<br><br>Evaluating several mechanisms to address delays. *See* Ex. A, Section III.C.1.a.x. Plaintiffs' Counsel may seek to have DuPont bring in an independent auditor to determine the accuracy of the statistics. *See id.* |
| Appeals Process | Property owner may object to DuPont's initial offer, but can only appeal to DuPont. | Access to a three-arborist panel to determine any disputes regarding initial claim and/or warranty issues. Panel to consist of one arborist selected by DuPont, one selected by Class Counsel, and one independent selected by those arborists. *See* Ex. A, Section III.C.1.a.xi. |

| PROPERTY OWNER CLASS | | |
|---|---|---|
| **Property Owner Class Compensation** | **Under Current Claims Process** | **Under Settlement** |
| Release Terms | Broad, general release of all claims and class action waiver. | Limited to claims arising from injury to trees, shrubs, and non-target vegetation. Specifically excludes from release (*i.e.* preserves) any potential claims for environmental hazards or personal injuries. *See* Ex. A, Section VI.A. |
| Notice | By participating LCOs or via DuPont's website. | Broad, due process notice designed by Kinsella Media, including extensive television and print advertising, as well as direct mail notice to all class members previously identified by DuPont. *See* Ex. B hereto. |

**2. Applicator Class (Class 2).**

Under the terms of the Settlement, DuPont will make the following relief available to Applicator Class Members:

a. ***Compensation***. Applicator Class Members will receive compensation for customer site visits, field work, and expenses incurred or paid to third parties prior to September 6, 2011. They will also receive compensation for participating (to the extent they are able to participate) during the Claims Process to likewise assist in the process at the rates and as otherwise provided for in the Claims Process.

b. ***Release***. Applicator Class Members will not release their right to recover from DuPont for claims of lost profits for business interruption and/or suits brought against them by third-party property owners arising out of their work relating to their application of Imprelis® on the property(ies) of others.

c. ***Recall Program***. Any Applicator Class Member that has not already participated in DuPont's recall program may seek reimbursement

pursuant to that program. The recall program will remain open, subject to EPA guidance.

The following chart highlights the additional benefits the Settlement provides to the Applicator Class by comparing DuPont's pre-existing Claims Process to the relief available under the Settlement:

| APPLICATOR CLASS | | |
|---|---|---|
| **Applicator Class Compensation** | **Under Current Claims Process** | **Under Settlement** |
| Enrollment for compensation via Option 1 Lawn Care Professional program (claims administration) | Closed. | Reopened. *See* Ex. A, Section III.C.2.a. |
| 100% refund on Imprelis | Available. | Available. |
| May apply to become a Qualified Tree Provider if they satisfy DuPont's qualifications | Available. | Available. *See* Ex. A, Section III.C.2.b. |
| May seek reimbursement for remediation and other Imprelis-related expenses for pre-Sept. 6, 2011 work | Available. | Available. *See* Ex. A, Section III.C.2.d. |
| Release Terms | No release of claims for lost profits or business interruption, or for cross-claims or contribution and/or indemnification if sued by property owner, but such claims must be arbitrated. | No release of claims for lost profits or business interruption, or for cross-claims or contribution and/or indemnification if sued by a property owner and no arbitration requirement. *See* Ex. A, Section III.C.2.c. |

**3. <u>Golf Course and Other Self-Applicator ("Self-Applicator") Class (Class 3).</u>**

Under the terms of the Settlement, DuPont will make available to Self-Applicator Class Members all of the relief available to the Property Owner Class Members, as well as the following relief:

a. ***Increased Reimbursement***. Self-Applicator Class Members will be entitled to receive payment for time and out-of-pocket expenses that they incurred

in connection with investigating and documenting Imprelis® damage on their properties as well as payment for the administrative expenses of assisting in site investigations and claims processing by DuPont with respect to their properties, subject to a $2,000 cap for each Self-Applicator Class Member.

The following chart demonstrates the additional benefits the Settlement provides to the Self-Applicator Class by comparing DuPont's pre-existing Claims Process to the relief available under the Settlement:

| GOLF COURSE AND OTHER SELF-APPLICATOR CLASS | | |
|---|---|---|
| **Self-Applicator Class Compensation** | **Under Current Claims Process** | **Under Settlement** |
| Reimbursements | None. | For out-of-pocket expenses and time spent remediating and examining Imprelis® damage (capped at $2,000). *See* Ex. A, Section III.C.3. |
| Claims Process | Available. | Available with increased benefits described above in Class 1. *See* Ex. A, Section III.C.1.a. |

**B. Class Notice.**

Settlement Class Counsel have retained and been working with Katherine Kinsella of Kinsella Media, LLC, one of the leading experts on class notice, to develop a notice program that satisfies all due process requirements. *See* Declaration of Katherine Kinsella ("Kinsella Decl."), attached as Ex. B. As set forth in the Kinsella Declaration, Ms. Kinsella designed a notice program to reach 75.9% of homeowners and 73.8% of adults 35 and older nationally, and 80-87% of adults 35 and older in key Designated Market Areas determined by using data from the location of claimants in the Imprelis® Claim Resolution Process. Kinsella Decl., ¶ 31. The centerpiece of the proposed notice program is a Paid Media Program which includes notice to be delivered through various media outlets. The Paid Media Program includes print media advertisements in various consumer magazines including: *Better Homes & Gardens, People, National Geographic, Reader's Digest, Time* and *Newsweek*. The Paid Media Program will also

include the publication and placement of newspaper supplement advertisements in *Parade* and *USA Weekend*. Additionally, notice advertisements will appear on numerous Internet sources and locations including Microsoft Media Networks, Specific Media, AOL, Facebook, and Yahoo! Networks for a total of 30 days. Finally, the Paid Media Program will include television advertisements broadcast on local television channels in 46 targeted Designated Market Areas. Notably, the substantial cost of the notice plan and related administration will be borne by DuPont, thus not reducing the amount of the Settlement Benefits that Settlement Class Members will receive by one cent.

Pursuant to the Settlement Agreement, Plaintiffs have selected a qualified third-party settlement administrator, Rust Consulting, Inc., to update Settlement Class Members' addresses, mail notice of the Settlement to Settlement Class Members, receive exclusion requests, oversee the processing of Settlement Class Members' notice of claims, respond to Settlement Class Members' inquiries, and conduct other activities relating to class notice and settlement administration under the Parties' supervision. *See* Ex. A, Section IV.A.

Additionally, the proposed notice program will include the dissemination of a Long-Form Notice for Classes 1 and 3 and a Long-Form Notice for Class 2, which describe, in detail, the material terms of the Settlement and the procedures for each Settlement Class Member to receive the benefits available to them under the Settlement. Settlement Exs. 5, 6. The Long Form Notice also provides a detailed description of the procedures by which Settlement Class Members may opt out of the Settlement and/or to provide comments in support of or in objection to the Settlement. *See id.* Any member of any of the Settlement Classes who wishes to be excluded from the Settlement can opt out by making a timely request. The procedures for

opting-out are those commonly used in class action settlements and are straightforward and clearly described in the class notices. *See id.*

If this Court grants Final Approval of the Settlement, after Settlement Class Members are notified and the time period for opt-out requests and objections expires, all Settlement Class Members who do not request exclusion from the Settlement Class will be deemed to have released most claims against DuPont related to any and all claims, including under federal or state law, arising from or related to the use or purchase of Imprelis® (the "Released Claims"). *See* Ex. A, Section VI.A. Excluded from this Release are the following: (1) Settlement Class Members will not release claims for personal injury, wrongful death, and/or any environmental injury claims not related to claimed injuries to Class Member's property and vegetation; and (2) Class 2 Members will not release any right to recover from DuPont for claims of lost profits for business interruption and/or suits brought against Class 2 Members arising out of their work relating to the application of Imprelis® brought by those who have opted-out of this Agreement. *See* Ex. A, Sections III.C.2.c., VI.A.

## III. ARGUMENT

### A. Preliminary Approval Of The Settlement Is Appropriate.

#### 1. Overview Of The Class Settlement Approval Process.

The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation and it should therefore be encouraged."). Where, as here, the parties propose to resolve class action litigation through a class-wide settlement, they must obtain the court's approval. *See* Fed. R. Civ. P. 23(e); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273,

295 (3d Cir. 2011) (en banc). Approval of a class action settlement involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. *See Manual for Complex Litigation,* § 21.632 (4th ed. 2004) (hereinafter "*MCL 4th*"); *see also* 4 Alba Conte &Herbert Newberg, *Newberg on Class Actions* § 11:25, at 38-39 (4th ed. 2002) (hereafter, "*Newberg on Class Actions*") (endorsing two-step process). In this preliminary evaluation of a proposed settlement, courts determine only whether:

> the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.

*Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007) (quotation marks and citation omitted); *see also MCL 4th* § 21.633. Under Rule 23, a settlement falls within the "range of possible approval" if there is a conceivable basis for presuming that the standard applied for final approval will be satisfied. A settlement merits final approval if it is fair, adequate and reasonable to the class. *Walsh v. Great Atlantic & Pacific Tea Co.,* 726 F.2d 956, 965 (3d Cir. 1983).

When deciding preliminary approval, a court does not conduct a:

> definitive proceeding on the fairness of the proposed settlement, and the judge must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable and adequate.

Order on Preliminary Approval of Settlement with Moark, LLC, Norco Ranch, Inc. and Land O'Lakes Inc. at 3 n.1, *In re Processed Egg Prod. Antitrust Litig.*, No. 08-md-02002 (E.D. Pa. July 15, 2010) (Dkt. 387) (quoting *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D.C. Md. 1983); *see also In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)). Rather, the fairness, reasonableness, and adequacy of

the settlement is assessed later at a final hearing. *See In re Diet Drugs Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 451 (E.D. Pa. 2008).[6]

Plaintiffs now respectfully request that this Court take the first step in the settlement approval process and preliminarily approve the Settlement here.

**2. A Review Of The Applicable Factors Favors Preliminary Approval.**

The preliminary approval determination requires the Court to consider whether:

> (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

*Linerboard*, 292 F. Supp. 2d at 638; see also *General Motors Corp.*, 55 F.3d at 785.[7] After considering those factors, if a court concludes that a settlement should be preliminarily approved, "an initial presumption of fairness" is established. *Linerboard*, 292 F. Supp. 2d at 638; *see also Newberg on Class Actions* § 11:41 (noting that courts usually adopt "an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval"). Here, applying those factors demonstrates that the Settlement should be preliminarily approved.

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[6] The factors considered for *final* approval of a class settlement include:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Sullivan,* 667 F.3d at 319-20 (quotation marks and citation omitted).

[7] The last factor is actually more aptly applied at final settlement approval after the time for class members to object has expired.

First, the Settlement negotiations plainly occurred at arm's-length. Over the course of several months, the parties engaged in numerous formal mediation sessions, all of which were held before Judge Welsh, in JAMS' offices. These negotiations have been comprehensive, often spirited, and always at arm's length. Moreover, and in an effort to facilitate a meaningful and comprehensive negotiation process, in addition to the production of documents and at Settlement Class Counsel's request, DuPont produced and presented the full details of its current claims process for Settlement Class Counsel's and their experts' evaluation. Thus, Settlement Class Counsel was able to review all aspects of the Imprelis® Claim Resolution Process, including each document sent to the members of the proposed Classes in conjunction with that Claims Process.

Upon gaining a full understanding of the Imprelis® Claim Resolution Process and in consultation with Judge Welsh, Settlement Class Counsel negotiated the Settlement, capitalizing on DuPont's existing structure and expenditure in crafting the materially enhanced Settlement relief proposed here. The Settlement Claims Process provides numerous additional benefits, improvements, and transparency for members of the Settlement Classes over and above the Imprelis® Claim Resolution Process.

Moreover, and as more fully described above, the parties commenced and conducted substantial initial discovery, including discovery specifically directed to issues implicated by the Imprelis® Claim Resolution Process and the terms of any settlement designed to build upon it. As discussed above, after protracted negotiation with DuPont's counsel, the Parties were able to reach agreement on a Protective Order (Dkt. 69) and an ESI Protocol and a Document Preservation Protocol (Dkt. 72) that facilitated discovery efforts and addressed the Parties' preservation obligations and protocols. Settlement Class Counsel sought, received, and analyzed nearly 500,000 pages of documents pertaining to the development, marketing and sale of

Imprelis. On March 15 2012, Adam Levitt and Richard Arsenault — two of Plaintiffs' Settlement Class Counsel — deposed Jon Claus, DuPont's Global Technical Product Manager, during which deposition the potential latency period and Imprelis' biodegradation process — key considerations in the negotiations concerning the extended warranty — were addressed in detail. Settlement Class Counsel and other Plaintiffs' counsel also vetted, organized, and retained several of experts in connection with this action, including experts on EPA regulation, herbicide product development, causation and latency, damage valuation, tree replacement, and soil remediation. This discovery greatly informed Settlement Class Counsel's approach to settlement negotiations and enabled them to seek and obtain the above-described settlement benefits that demonstrably surpass the benefits DuPont offered under its current Claim Resolution Process.

Concerning the third factor, Settlement Class Counsel and DuPont's counsel are among the most experienced and well-respected attorneys in the United States in, among other fields, consumer protection and agricultural biotechnology class action litigation, having been involved in the litigation and resolution of several of the seminal cases in these fields. *See generally* Declaration of Robert S. Kitchenoff Exhibits A, B, C, and D (Dkt. 47, 48, 49). The terms of the Settlement were thus reached only after extensive arm's-length negotiations between attorneys who are familiar with the legal and factual issues of the case and well-versed in litigating similar types of claims. The Parties naturally dispute the strength of Plaintiffs' case and the Settlement reflects the Parties' compromise, following their respective assessments of the worst-case and best-case scenarios of this litigation, weighing the likelihood of various potential outcomes under the guidance of a neutral party.

**3. Courts Regularly Approve Settlements Such As This One.**

This Settlement offers substantial benefits to the Settlement Classes materially superior, and not available through, the Imprelis® Claim Resolution Process. For example, as explained

above, the Settlement extends the tree warranty provision originally provided by DuPont in its Claims Process from December 31, 2013, to May 31, 2015 — thus providing the Property Owner Class with an additional 18 months of warranty coverage. Ex. 21. Further, the Settlement provides for the implementation of a state-of-the-art notice program that broadly publicizes and will increase the awareness of the available remedies to Settlement Class Members who have not already filed a claim in the Imprelis® Claim Resolution Process. Additionally, the Settlement will make available to Settlement Class Members the entire pricing schedule for replacement trees, which was not available to claimants in the Imprelis® Claims Resolution Process, thereby ensuring that the Settlement provides Class 1 and Class 3 Members with sufficient information to understand the Settlement Claims Process and to make informed decisions regarding their tree replacement options. Ex. 15. The Settlement also keeps open or reopens a number of processes in the Claims Process, Ex. A, Section III.C.2., including enrollment for compensation as an Option 1 Lawn Care Professional (claims administration), becoming a Qualified Tree Provider if they fulfill DuPont's qualifications, and seeking reimbursement for remediation and other Imprelis-related expenses for work completed prior to September 6, 2011.

Another important facet of the Settlement that is a substantial improvement over the Imprelis® Claim Resolution Process is that Settlement Class Members will not release future claims for personal injury or environmental claims other than for injury to non-target vegetation.

Moreover, the Imprelis® Claim Resolution Process bears a direct connection to this action. The first lawsuits seeking damages as a result of the use of Imprelis® were brought in July 2011. On September 6, 2011, DuPont disclosed the specific terms of its Claim Resolution Process. DuPont, realizing the amount of damage caused by Imprelis® as set forth in the lawsuits that had been filed, and further recognizing that a lengthy litigation process in the face

of a product failure was not in DuPont's interests and could potentially conclude with a Court-ordered resolution process unfavorable to DuPont, decided to establish its own voluntary Claim Resolution Process. However, it is virtually certain that the Imprelis® Claim Resolution Process — not to mention the materially expanded Claims Process encompassed in the Settlement — would not have existed were it not for this litigation.

Other courts have held that enhancing an existing resolution process by adding additional benefits, negotiated at an arm's-length by experienced counsel, constitutes a fair, reasonable, and adequate settlement, particularly when the existence of the litigation may have had a role in the "voluntary" resolution process developed by the defendants. In *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), the Second Circuit considered the adequacy of a settlement in an antitrust case that added key terms and provisions to a previously-reached voluntary agreement among the defendants. The court in *Malchman* held that such a settlement was adequate, fair, and reasonable because, among other things, "the experience of counsel and the vigor with which the case was in fact prosecuted indicate that the negotiation process was in general was aboveboard, at arm's length, and noncollusive." *Id*. at 903. The court also considered the fact that the voluntary agreement was "caused in substantial part by the suit(s)," stating as follows:

> The likelihood that the voluntary agreement might have followed logically, if not chronologically, from litigation directed toward a judicially imposed resolution of the dispute cannot be overlooked, since it is clear that [the defendants] desired to forestall further unfavorable publicity by 'voluntary' agreement.

*Id.* Like the defendants in *Malchman*, DuPont sought to prospectively limit its exposure to Plaintiffs and the other members of the Settlement Classes by launching its Claims Process — which has been substantially and crucially improved by Settlement Class Counsel in the form of the Settlement. Further, like the settlement in *Malchman*, this Settlement was negotiated at an arm's-length by skilled and experienced attorneys.

Another prominent (and recent) example of a court approving a proposed settlement that seeks to provide benefits in addition the relief available under an existing resolution program is *In re Oil Spill by the Oil Rig "Deepwater Horizon" in Gulf of Mexico on April 20, 2010*, MDL No. 2179 (the "*BP Litigation*"). In the *BP Litigation*, the court, on May 2, 2012, preliminarily approved the settlement classes for both a "Economic and Property Damages Settlement Class" and a "Medical Benefits Settlement Class," which provide the class members with additional benefits over those which BP had initially made available through its private resolution program known as the Gulf Coast Claims Facility. *See BP Litigation*, No. 2:10-md-02179-CJB-SS (Dkt. 6418), Preliminary Approval Order As to the Proposed Economic and Property Damages Class Action Settlement (E.D. La. May 2, 2012); *BP Litigation*, No. 2:10-md-02179-CJB-SS (Dkt. 6419), Preliminary Approval Order As to the Proposed Medical Benefits Class Action Settlement (E.D. La. May 2, 2012). Here, as in the *BP Litigation*, the Settlement takes an existing resolution program — unilaterally created by a defendant — and modifies the program in a number of critical ways that provide significant improvements and benefits to the Settlement Class Members.

Similarly, in the *Carrier, et al. Condensing Furnace Consumer Class Actions*,[8] the court granted final approval to a nationwide settlement in a class action lawsuit brought by current and past owners of high-efficiency furnaces manufactured and sold by Carrier Corporation. In

[8] "*Carrier, et al. Condensing Furnace Consumer Class Actions*" was the name applied to a series of class action lawsuits, pending in several different states, as well as in Canada, alleging defects in high-efficiency furnaces manufactured by Carrier Corporation, and which were ultimately collectively resolved through a consolidated class action settlement in the United States District Court for the Western District of Washington. The constituent cases comprising that settlement were: (a) *Grays Harbor Adventist Christian School, et al. v. Carrier Corp.*, Cause No. CV05-5437-RBL (W.D. Wash.); (b) *Neuser, et al. v. Carrier Corp.*, Case No. 06-C-645-S (D. Wisc.); (c) *Dougherty, et al. v. Carrier Corp.*, Civil Action No. 06-CV-15659 (E.D. Mich.); (d) *Nogosek v. Carrier Corp.*, Cause No. 07-CV-2262 JRT/FLN (D. Minn.); (e) *Donnelly, et al. v. Carrier Corp.*, Court File No. 06-CV-320045 CP (Ontario Superior Court of Justice).

*Carrier*, the company had an existing warranty program that provided some relief to class members. However, the court approved the nationwide settlement because, among other reasons, the settlement increased the relief available under the warranty offered by Carrier and provided "cash reimbursement for Class members who incurred out of pocket expenses . . . as well as a 20-year enhanced warranty." *Grays Harbor Adventist Christian Sch. v. Carrier Corp.*, No. 05-05437-RBL, (Dkt. 273), Order Granting Final Approval of Class Action Settlement, at 2 (W.D. Wash. April 22, 2008). Here, similar to *Carrier*, the Settlement has materially enhanced the relief available under the Imprelis® Claim Resolution Process and will provide cash reimbursement for out-of-pocket costs to Class 2 and Class 3 Members, as well as an enhanced warranty, as explained above.[9]

Finally, to the extent that the Settlement provides nonmonetary benefits to Settlement Class Members in the form of additional components to the Claims Process, such benefits are regularly approved by courts as being fair, reasonable, and adequate. *See, e.g.*, *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 116 (E.D. Pa. 2005) (granting final approval of proposed settlement and noting that "[a]lthough the settlement does not provide individual class members with a monetary recovery (aside from the incentive awards provided to the named Plaintiffs), the settlement nonetheless provides them with a substantial benefit"); *see also In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748-49 (7th Cir. 2001) (Easterbrook, J.) (affirming adequacy of settlement where class members received no cash benefits but, provided, among

[9] *See also Milligan v. Toyota Motor Sales, U.S.A., Inc.*, No. C 09-05418 RS, (Dkt. 80), Order Granting Final Approval of Class Action Settlement and Granting Award of Attorneys' Fees, Costs, and Incentive Payments to Class Representatives, at 11 (N.D. Cal. Jan. 6, 2012) (granting final approval of settlement where "Toyota reimbursed more than 3,600 of roughly 4,600 total claims *before* the class notice in this case was even sent out" under a prior settlement agreement with a government agency).

other things, cy pres relief to organizations that assist Mexican–American community). For these reasons, the Settlement should be preliminarily approved.

## IV. THE SETTLEMENT CLASSES SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

### A. The Settlement Classes Meet The Requirements Under Rule 23 For Certifying A Settlement Class.

Courts may certify class actions for the purposes of settlement only. *See, e.g.*, *Sullivan*, 667 F.3d at 311; *In re Processed Egg Prods. Antitrust Litig.* ("*Eggs*"), MDL No. 2002, 2012 U.S. Dist. LEXIS 98301, at *101-02 (E.D. Pa. July 16, 2012). Plaintiffs respectfully submit that this Court should preliminarily certify the Settlement Classes under Rules 23(a) and 23(b)(3).

Before preliminarily approving a settlement in a case where a class has not yet been certified, the court should determine whether the class proposed for settlement purposes is appropriate under Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *Sullivan*, 667 F.3d at 296; *Eggs*, 2012 U.S. Dist. LEXIS 98301 at *101-02 The *MCL 4th* advises:

> If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).

*MCL 4th*, § 21.632. However, when a court is "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." *Eggs*, 2012 U.S. Dist. LEXIS 98301 at *47 (quotation marks and citation omitted); *see also Sullivan*, 667 F.3d at 322 n.56. Further, the practical purpose of provisional class certification is to facilitate dissemination of notice to the class of the terms of the proposed settlement and the date and time of the final settlement approval hearing. *See MCL 4th*, § 21.633.

In this case, all of the requirements of Rule 23(a) and Rule 23(b)(3) are readily met. Rule 23(a) requires that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defense of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

**1. Numerosity.**

Rule 23(a)(1) requires that a class be "so numerous that their joinder before the Court would be impracticable." *Eggs*, 2012 U.S. Dist. LEXIS 98301 at *31; *see also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 594 (3d Cir. 2012). Dozens of plaintiffs have filed suit against DuPont alleging damages sustained as a result of DuPont's manufacture, marketing, sale and distribution of Imprelis® and the classes those plaintiffs seek to represent number, in the aggregate, not less than tens of thousands of class members. Indeed, to date, at least several thousand class members have already begun participating in the Claims Process — and all of those class members are eligible to enjoy the benefits and enhancements of the Settlement. The numerosity requirement of Rule 23(a) is easily met here. *See Eggs*, 2012 U.S. Dist. LEXIS 98301 at *47 (quoting *Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (noting that there is no minimum number to satisfy numerosity and observing that generally the requirement is met if the potential number of plaintiffs exceeds 40).

**2. Commonality.**

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." Importantly, "Rule 23(a)(2)'s commonality requirement does not require identical

claims or facts among class member[s]." *Marcus*, 687 F.3d at 597 (citation and internal quotation marks omitted). Indeed, "'[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.'" *Eggs*, 2012 U.S. Dist. LEXIS 98301 at *32 (quoting *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994)); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (explaining that, for commonality to be satisfied, the answer to the common question must help "drive the resolution" of the litigation (citation and quotation marks omitted)).

Applying these principles, it is evident that the commonality requirement of Rule 23(a)(2) is easily met here. Questions surrounding the effect of Imprelis® on Settlement Class Members' property and the damages caused by Imprelis® are issues common to all Plaintiffs and the other members of the Settlement Classes, thereby satisfying Rule 23(a)(2)'s commonality requirement.

**3. Typicality.**

Rule 23(a)(3) requires that the class representatives' claims be "typical of the claims . . . of the class." As the Third Circuit explained:

> The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented.

*Baby Neal*, 43 F.3d at 57-58; *see also Marcus,* 687 F.3d at 598 ("If a plaintiff's claim arises from the same event, practice or course of conduct that gives rises to the claims of the class members, factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class." (citation and quotation marks omitted)).

Here, individual variations that may exist among Settlement Class members do not render the named representative Plaintiffs' claims atypical of the other members of the Settlement Classes they respectively seek to represent. Each of the Plaintiffs in this action is representative

of at least one of the three subclasses, either seeking relief from DuPont for damages caused by Imprelis-related harm to their trees and other non-target vegetation or relating to their application of Imprelis® on their own or others' property. "The typicality criterion focuses on whether there exists a relationship between the plaintiff's claims and the claims alleged on behalf of the class." *Newberg on Class Actions*§ 3:13. All of the Settlement Class Representatives seek to hold DuPont liable for damages resulting from the use of Imprelis and all of the Settlement Class representatives are Property Owners, Applicators, or Self-Applicators with claims that are typical of the other Settlement Class Members in their respective Settlement Class(es).

**4. Adequacy of Representation**

Rule 23(a)(4) requires two things. First, it requires that the named class representatives "not possess interests which are antagonistic to the interests of the class." *Newberg on Class Actions* § 3:21. Second, the named class representatives' counsel "must be qualified, experienced, and generally able to conduct the litigation." *Id.* As this Court has explained:

> Essentially, the inquiry into the adequacy of the representative parties examines whether "the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class."

*Eggs*, 2012 U.S. Dist. LEXIS 98301 at *37. At this preliminary stage of the approval process, there is nothing to suggest that any such antagonistic interests on the part of the class representatives exist. The named representatives are members of the Settlement Classes they respectively seek to represent and they do not possess any interests antagonistic to the other members of those respective Settlement Classes. Moreover, Settlement Class Counsel were originally appointed by this Court as Plaintiffs' Interim Co-Lead and Liaison Counsel, following contested Rule 23(g) motion practice, based on those attorneys' vast experience in class actions

and multidistrict litigation. Settlement Class Counsel actively litigated this action, conducted settlement negotiations with DuPont at arm's-length, and have (and will) fairly and adequately represent the members of the Settlement Classes.

**5. Common Questions of Law and Fact Predominate.**

In order to satisfy Rule 23(b)(3)'s requirement that common questions of law and fact predominate, "the predominance tests asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit." *Newberg on Class Actions* § 4:25; *see also Amchem*, 521 U.S. at 623; *Marcus*, 687 F.3d at 600; *Sullivan*, 667 F.3d at 297.

In this case, the class action vehicle is best suited for the resolution of Plaintiffs' and the other Settlement Class Members' claims. Plaintiffs allege common issues of fact and law that predominate over any individual issues that may arise. Plaintiffs' claims for compensatory relief are founded upon a common legal theory related to the singular issue of DuPont's designing, creating, manufacturing, testing, marketing, distributing and/or selling Imprelis, a product that caused damages to thousands of trees and other non-target vegetation. Thus, one single issue of fact and law dominates this litigation: DuPont's liability for the manufacture of Imprelis. A class settlement will insure that a fully developed, well-designed claims process exists to remediate Plaintiffs' and other Settlement Class Members' damages.

Further, a class action suit is superior to any other form of adjudication because it provides the best way of managing and resolving the claims at issue here. "The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Eggs*, 2012 U.S. Dist. LEXIS 98301 at *48 (quoting *Prudential,* 148 F.3d at 316). Consideration of judicial economy and prompt resolution of claims underscore the superiority of the class action in this case. By

contrast, compensation resulting from litigation is highly uncertain and may not be received before lengthy, and costly, trial and appellate proceedings are complete. In addition, the Settlement obviously removes the overwhelming and redundant costs of individual trials. *See Sullivan*, 667 F.3d at 310-12; *see also* Interim Co-Lead and Liaison Counsel's Opposition to Certain Plaintiffs' Motion for Leadership Structure in Individual Cases and Motion for Hearing, at 3, *In re Imprelis Herbicide Marketing and Sales Practices Litig.*, No. 11-md-02284 (E.D. Pa. Sept. 8, 2012) (Dkt. 106).

In sum, the requirements of Rule 23 are readily satisfied at this preliminary stage and certification of the Settlement Classes is appropriate.

## V. THE PROPOSED FORM AND METHOD OF CLASS NOTICE

### A. The Proposed Class Notice Provides For The Best Notice Practicable Under The Circumstances.

Under Rule 23(e), this Court must direct notice in a reasonable manner to class members who would be bound by the proposed class settlement. "There is no one 'right way' to provide notice as contemplated under Rule 23(e)." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. MDL 1559, 2004 U.S. Dist. LEXIS 23342, at *26 (W.D. Mo. Apr. 20, 2004). It should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Lachance v. Harrington*, 965 F. Supp. 630, 636 (E.D. Pa. 1997) (quoting *Mullane v. Central Hanover Bank &Trust Co.*, 339 U.S. 306, 314 (1950)).

Here, the Parties propose a notice program designed by one of the country's leading notice experts, Katherine Kinsella, that provides notice of the Settlement mailed directly to all Settlement Class Members who have submitted their information to the Imprelis® Claims Resolution Process and publicized, as set forth above, in various consumer magazines, on the

Internet through Microsoft Media Networks, Specific Media, AOL, Facebook, and Yahoo! Networks, and on television through the placement of local advertisements broadcast in 46 targeted Designated Markets Areas across the United States. *See* Fed. R. Civ. P. 23(c)(2) (explaining that the best notice practicable under the circumstances should include individual notice to all members who can be identified through reasonable effort). Kinsella Decl. ¶¶ 11-12, 40.

### B. The Proposed Form Of Class Notice Adequately Informs Class Members Of Their Rights In This Litigation.

Any notice provided to class members should "clearly and concisely state in plain, easily understood language" the nature of the action; the class definition; the class claims, issues, or defenses; that the class member may appear through counsel; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on class members. *See* Fed. R. Civ. P. 23(c)(2).

The form of class notice proposed here complies with those requirements. *See* Settlement Exs 5, 6. The notice informs Settlement Class Members of the material terms of the Settlement; the relief the Settlement will provide; the date, time, and place of the final-approval hearing; the procedures and deadlines for opting out of the Settlement or submitting comments or objections; and that, if they do not opt out, they will be bound by any final judgment in this case, including a release of claims. The proposed notice also advises Settlement Class Members that Settlement Class Counsel have pursued the lawsuit on a contingent basis and have not received any payment of fees or any reimbursement of their out-of-pocket expenses. The proposed notice further advises that Settlement Class Counsel will apply to the Court for, and DuPont has agreed not to oppose, an award of up to $6,500,000 in fees and $500,000 in costs, which DuPont has agreed to pay in addition to — not out of — the Settlement Class Members' recoveries. *See id*.

Thus, the notice is accurate and informs Settlement Class Members of the material terms of the Settlement and their rights pertaining to it. The Court should thus approve the proposed forms of notice and direct that they be disseminated as the Parties have proposed.

## VI. PROPOSED SCHEDULE OF EVENTS

The next steps in the settlement approval process are to notify the Settlement Classes of the Settlement, allow Settlement Class Members an opportunity to opt-out of the Settlement or file any objections thereto, and hold a final approval hearing. Toward those ends, the Parties propose the following schedule, which is incorporated in the accompanying proposed Preliminary Approval Order:

| **Timeframe** | **Action** |
|---|---|
| 10 days after Agreement Submitted to Court for Preliminary Approval Order | CAFA Notice Deadline (Ex. A., Section III.K) |
| 40 days after Preliminary Approval | First Issuance of Direct Notice |
| 95 days after First Issuance of Notice | Opt-Out Deadline (Ex. A., Section IV.C)<br>Notice Completion Date (Ex. A., Section IV.B.5)<br>Claims Deadline (Ex. A., Section II.E), (III.D.5)<br>Request to Appear Deadline (Ex. A., Section IV.E) |
| 5 days after Opt-Out Deadline | Claims Administrator To Provide Opt-Out List to DuPont (Ex. A., Section IV.C) |
| 21 days after receipt of Opt-Out List | DuPont Termination Deadline (Ex. A., Section IX.A) |
| 14 days after DuPont Termination Deadline | Motion for Final Approval Deadline (Ex. A., Section III.M)<br>Fee and Expense Application Deadline (Ex. A., Sections III.M, VII.B) |
| 14 days after Motion for Final Approval Deadline | Objection Filing Deadline (Ex. A., Section IV.D) |

| | |
|---|---|
| 14 days after Objection Filing Deadline | Objection Response Deadline (Ex. A., Section IV.D) |
| 30 days after Receipt of Notice Becoming Final or 30 days after Receipt of CRA, whichever is later | Deadline for Filing a Notice of Intent to Appeal (Ex. A., Section III.C.1.a.xii) |

## VII. CONCLUSION

For the reasons stated above, Plaintiffs' Interim Co-Lead Counsel respectfully request that the Court:

1. preliminarily approve the Parties' Settlement Agreement.

2. certify the following Rule 23(b)(3) Settlement Subclasses, for purposes of settlement only:

> **Property Owner Class (Class 1)**
>
> All persons or entities who (a) own or owned property in the United States to which Imprelis® was applied from August 31, 2010 through August 21, 2011, or (b) own or owned property in the United States adjacent to property to which Imprelis® was applied from August 31, 2010 through August 21, 2011 and whose trees show damage from Imprelis® on or before the date of entry of the Preliminary Approval Order ("Adjacent Property Owner"). Excluded from Class 1 are (1) any Judges to whom this Action is assigned and any members of their immediate families, and (2) any property owners whose properties were used for the testing of Imprelis® or developmental formulations containing the same active ingredient.
>
> **Applicator Class (Class 2)**
>
> All persons or entities that, from August 31, 2010 through August 21, 2011, purchased Imprelis® (and/or received Imprelis® directly or indirectly from a purchaser) and applied it to property in the United States as part of their normal business, other than property that they own or owned ("Applicators"). Excluded from Class 2 are any Judges to whom this Action is assigned and any members of their immediate families.

**Golf Courses or Other Self Applicators Class (Class 3)**

All persons or entities that, from August 31, 2010 through August 21, 2011, purchased Imprelis® (and/or received Imprelis® directly or indirectly from a purchaser) and applied it to properties in the United States that they own or owned ("Self Applicators"). Excluded from Class 3 are any Judges to whom this Action is assigned and any members of their immediate families.

3. appoint Plaintiffs' Co-Lead Counsel as Settlement Class Counsel;

4. appoint Rust Consulting, Inc. as the class action settlement administrator;

5. order notice of the Settlement to members of the Settlement Classes; and

6. enter the schedule set forth above, or another schedule at the convenience of the Court for notice, opt-out deadlines, objection deadlines and setting a final approval briefing and hearing dates.

Dated: October 19, 2012

Respectfully submitted,

/s/ Robert S. Kitchenoff

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on this date, via the CM/ECF system, on all counsel of record.

Date: October 19, 2012

/s/ *Robert S. Kitchenoff*
Robert S. Kitchenoff