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

IN RE: IMPRELIS HERBICIDE MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	Case No. 2:11-md-2284-GP MDL NO. 2284
THIS DOCUMENT APPLIES TO ALL ACTIONS	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Rules

Settlement Class Plaintiffs respectfully submit this Memorandum in Support of their Motion for Final Approval of the Settlement Agreement ("Settlement") between Plaintiffs and Defendant E.I. du Pont Nemours and Company ("DuPont"), and for final certification of the Settlement Classes pursuant to Federal Rule of Civil Procedure Rule 23(b)(3).[1] This Court preliminarily approved the Settlement by Order dated February 12, 2013 (Dkt. 160).[2]

I. INTRODUCTION

This Court is familiar with this litigation and settlement. As the Court knows, after many months of intense arm's-length negotiations, conducted with the assistance and under the direction of Hon. Diane Welsh (Ret.), Plaintiffs successfully obtained a settlement with DuPont that provides significant benefits to the Settlement Class Members beyond those provided for by DuPont's previously existing Imprelis® Claim Resolution Process for each of the three Settlement Classes. In light of the excellent and timely result obtained, and the uncertainty, complexity, and expense inherent in litigation, as detailed below, Plaintiffs respectfully submit that the Settlement is fair, reasonable and adequate, and in the best interests of the Settlement Classes, and warrants final approval.

II. STATEMENT OF THE CASE

A. Factual Background

This is a class action arising from DuPont's introduction and sale of its Imprelis® herbicide in October 2010. Plaintiffs allege that Imprelis®—a powerful selective herbicide that

[1] All exhibits to the Settlement Agreement are referred to herein by the numerical designation given in the Settlement Agreement Exs. 1-29 (Dkt. 117, Exs. 1-32). Unless otherwise noted, all capitalized terms in this motion will have the same meaning as set forth in the Settlement Agreement.

[2] On February 11, 2013, this Court appointed as Settlement Counsel Richard J. Arsenault of Neblett, Beard & Arsenault, Gregory S. Asciolla of Labaton Sucharow, LLP, Robert Kitchenoff of Weinstein Kitchenoff & Asher LLC, Adam J. Levitt of Grant & Eisenhofer P.A., and Jonathan D. Selbin of Lieff, Cabraser, Heimann & Bernstein ("Appointed Counsel"). (Dkt. 160).

was intended to kill unwanted weeds while leaving other vegetation intact—proved to kill not only weeds, but also trees and other non-target vegetation. Plaintiffs are property owners who sustained damages to their trees and other non-target vegetation caused by Imprelis® and lawn care professionals who have purchased and applied Imprelis® to their customers' properties and sustained damages. On August 4, 2011, DuPont announced that it would suspend sales of Imprelis® and conduct a product return and refund program. DuPont did not admit liability.

On September 6, 2011, DuPont initiated the Imprelis® Claim Resolution Process that was designed to compensate property owners for the damages Imprelis® has caused. Under the Imprelis® Claim Resolution Process, a DuPont representative or the lawn care operator ("LCOs") who applied Imprelis® to the landowner's property visited the property to examine the damage and assess the negative effects of Imprelis® to trees on that property. DuPont then determined the amount of compensation for Imprelis®-related damages that DuPont deemed appropriate based on its own (undisclosed) methodology.

The Imprelis® Claim Resolution Process was, in Plaintiffs' Counsel's opinion, incomplete. Among their concerns, for example, was the fact that its release barred property owners from seeking relief from DuPont in the event that environmental hazards or personal injuries manifested themselves in the future. Plaintiffs' Counsel also believed 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. Indeed, as a result of its document discovery and a sworn statement it took of a DuPont product manager, Appointed Counsel believe that the latency period of Imprelis® under certain conditions exceeded the warranty period that DuPont was offering in the

Imprelis® Claim Resolution Process. *See* Declaration of Adam J. Levitt ¶ 8, attached hereto as Exhibit A.

B. History of This Litigation and Discovery Process

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. On October 20, 2011, the Judicial Panel on Multidistrict Litigation ("JPML") transferred all pending actions to this Court.[3] Following the JPML centralization order, Plaintiffs' Counsel continued their active prosecution of these cases, and continued structuring the case for discovery and trial. The operative complaint in this action is the Corrected Amended Master Class Action Complaint ("Complaint") filed by Appointed Counsel on October 25, 2012 (Dkt. 123).

The Parties subsequently engaged in extensive discovery and motion practice.[4] Appointed Counsel sought, received, and analyzed nearly 500,000 pages of documents pertaining to the development, marketing, and sale of Imprelis®. Appointed Counsel, successfully negotiated with DuPont's counsel a Protective Order governing confidential information (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. *See* Asciolla Decl. at ¶ 36. Appointed Counsel also took the sworn statement of Jon Claus, DuPont's Global Technical Product Manager, learning key facts concerning Imprelis® and its environmental effects. Appointed Counsel vetted and retained

[3] *In re Imprelis Herbicide, Mktg., Sales Practices & Prods. Liab. Litig.*, 825 F. Supp. 2d 1357 (J.P.M.L. 2011).

[4] Further details concerning the work performed by Plaintiffs' Counsel can be found in the Declaration of Gregory Asciolla filed with Plaintiffs' Memorandum in Support of Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Settlement Class Representatives which are incorporated herein by reference.

seven leading academic and industry experts in connection with this action for its expert team, including experts in the areas of EPA regulation, herbicide product development, causation, 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.

Appointed Counsel also actively vetted the Imprelis® Claim Resolution Process. Counsel, accompanied by an independent arborist, attended a representative sample of inspections to evaluate the Imprelis® Claim Resolution Process 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. This vetting effort enabled Appointed Counsel and their experts to negotiate changes to the Imprelis® Claim Resolution Process to fairly assess and compensate plaintiffs' Imprelis®-related claims.

Appointed Counsel also drafted and filed a memorandum discussing the various state law claims alleged in the Master Class Action Complaint (Dkt. 65). Aided by extensive research on state laws and claims, the accumulated body of factual evidence, and extensive expert analysis and guidance, Appointed 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 and lawn care operators who were harmed by Imprelis®. The Master Class Action Complaint was filed on March 30, 2012. DuPont filed its Answer on August 15, 2012 (Dkt. 101).

C. The Settlement Negotiations

Following the Court's appointment of the current interim leadership structure, Appointed Counsel and DuPont began discussing the possibility of a class-wide settlement.

On January 24, 2012, the Parties began a series of informal settlement discussions to determine the likelihood of success of any settlement effort, and to formulate a plan for settlement discussions. During subsequent face-to-face meetings, the Parties decided upon mediation as the best way to achieve a settlement, and decided to engage Magistrate Judge Diane M. Welsh (Ret.) as the mediator. On April 11, 2012, the Parties began formal mediation under guidance and direction of Magistrate Judge Welsh. Over the next several months, 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 Appointed Counsel. Numerous additional meetings have taken place during this period between the Parties pertaining to the Settlement, ranging from formal teleconferences during which the Parties spent hours negotiating particular documents, to hundreds of phone calls and email exchanges aimed at resolving material issues. *See generally* Declaration of Hollis L. Salzman, attached hereto as Exhibit B. Due to the difficult and protracted nature of this extensive Settlement negotiation process, and the Parties' commitment to advocating and protecting their clients' respective interests (and, in the case of Appointed Counsel, the interests of the other members of the Settlement Classes), the Parties exchanged, edited, and revised numerous drafts of settlement documents.

On October 19, 2012, Appointed 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* Settlement Agreement and Release ("S.A.") (Dkt. 117-2). 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, Appointed Counsel carefully analyzed evidence uncovered during

discovery, the strengths of DuPont's legal defenses, and the existing Imprelis® Claim Resolution Process.

III. OVERVIEW OF THE SETTLEMENT

Under the Settlement, DuPont will provide significant benefits to the Settlement Class Members beyond those provided for by the former Imprelis® Claim Resolution Process for each of the three Settlement Classes.[5]

A. The Settlement Classes

The Settlement Agreement defines the three proposed Settlement Classes as follows:

> **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.

[5] 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. S.A. at IV.C.

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.

S.A. at I.

B. Monetary and Warranty Consideration Provided to the Classes

The Settlement provides for DuPont to pay Property Owner Class Members for the removal of damaged trees and their replacements based on tree height under a publicly-available pricing schedule, as well as the care and maintenance of trees that presently do not require replacement. S.A. at III.C.1.a.i. DuPont will also pay for the removal of trees scheduled for replacement, and provide Property Owner Class Members with additional payments in the amount of 15% of the total value of any payments and services provided to compensate them for incidental damages, including damage to shrubs and other non-target vegetation or other losses relating to their Imprelis®-affected trees. S.A. at III.C.1.a.vii.

Two additional, innovative features bear mention: 1) payments are being made on an ongoing basis so that Class Members need not wait until the Settlement becomes final to receive their damages, and 2) the Settlement is uncapped, in that DuPont will pay all qualifying damages incurred by Class Members within the definition of the Settlement. Thus, as of August 1, 2013, DuPont has already paid $361,453,352.22 to 24,524 property owners for claims of Imprelis®-related tree damage. *See* Declaration of Anthony Reid ¶ 6(a), attached hereto as Exhibit C.

Applicator Class Members are provided compensation for remediation, field work, and any other Imprelis®-related expenses incurred or paid to third parties prior to September 6, 2011 and reimbursement for purchased Imprelis®. S.A. at III.C.2.d. As of August 1, 2013, DuPont

has paid $6,639,950.00 to lawn care operators for administrative fees, $7,556,386.13 for tree removal costs, and $832,327.29 for reimbursement of expenses related to the Claim Resolution Process. *See* Reid Decl. at ¶ 6(c)-(e). Self-Applicator Class Members receive, in addition to the reimbursements provided to Applicator Class Members, additional reimbursements of up to $2,000 for out-of-pocket expenses and time spent remediating and examining Imprelis® damage on their properties. S.A. at Section III.C.3.

In addition, DuPont has agreed to extend the tree warranty provision originally provided by DuPont in its Imprelis® Claim Resolution Process. The original warranty only protected trees on a claimant's property until December 31, 2013, whereas the new warranty extension provides protection for an additional 18 months to May 31, 2015. S.A. at III.C.1.a.ix. As of August 1, 2013, DuPont has paid $1,224,336.00 to property owners for warranty claims for Imprelis®-related tree damage. *See* Reid Decl. at ¶ 6(b).

C. Release of Claims against DuPont

In exchange for the consideration provided by DuPont, Property Owner Class Members have agreed to release those claims arising from injury to trees, shrubs, and non-target vegetation. Any potential claims for environmental hazards or personal injuries are specifically excluded from the release S.A. at VI.A. Neither Applicator Class Members nor Self-Applicator Class Members will 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 properties of others. *See* S.A. at III.C.2.c. These are significant enhancements over the former Imprelis® Claim Resolution Process.

D. Relief for the Benefit of the Class and for Future Purchasers

Under the terms of the Settlement, DuPont has also agreed to change the way it conducts the claims process and the appeals process under the Imprelis® Claim Resolution Process.

Instead of having claims inspectors record only trees identified by the owner as damaged by Imprelis®, the Settlement requires claims inspectors to record *all* Imprelis®-impacted trees observed on the Class Member's property. Further, DuPont must provide an independent appeals process[6] to handle any disputes from the Settlement Claims Process, including decisions regarding initial claims or warranty issues. S.A. at III.C.1.a.xi. DuPont must also provide Appointed Counsel with quarterly reports containing summary statistics detailing the implementation of the Settlement program. The Settlement permits Appointed Counsel to seek to have DuPont bring in an independent auditor to determine the accuracy of those statistics.

IV. PRELIMINARY APPROVAL ORDER AND CLASS CERTIFICATION

In its February 12, 2013 Order, this Court preliminarily approved the Settlement, certified the Classes for settlement purposes, and authorized Appointed Counsel to disseminate Notice and Claim Forms by direct mail and publication. (Dkt. 160). A final fairness hearing is scheduled for September 27, 2013. (Dkt. 160).

V. THE NOTICE PLAN COMPORTS WITH THE REQUIREMENTS OF RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Where parties seek certification of a settlement class pursuant to Rule 23(b)(3) and approval of the settlement pursuant to Rule 23(e), "notice of the class action must meet the requirements of both Rule 23(c)(2) and Rule 23(e)." *In re CertainTeed Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 480 (E.D. Pa. 2010). The mechanics of the notice process "are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975).

[6] The independent Appeals Panel is comprised of three members: (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.

A. The Notice Program.

The Notice plan approved by the Court under Rule 23(c)(2)(B) has been carried out.[7] *See* Order dated March 11, 2013 (Dkt. 166); *see also* Declaration of Katherine Kinsella, attached hereto as Exhibit D. The parties have made available multiple channels through which class members can learn about the settlement. The notice plan provides for both individual and media notice through a combination of direct mail, internet publication, newspaper and magazine publications, television notice, a website, and a toll-free telephone number. *See generally* Kinsella Decl. at ¶¶ 4-5.

Beginning on March 22, 2013, Settlement Claims Administrator Rust Consulting mailed by First Class Mail the Long From Notices to all Settlement Class Members who were known at the time, including Class Members who have (1) filed a claim in the DuPont Imprelis Claims Process, (2) contacted DuPont or Settlement Counsel and provided a name and property address, or (3) brought suit against DuPont for damage related to Imprelis® use. The Long Form Notice was also mailed to all known LCOs who purchased Imprelis® from distributors that provided customer lists to DuPont or Rust Consulting. The Notice Administrator has mailed 66,778 Class 1, 2, and 3 Notices. *See* Declaration of Kimberly K. Ness ¶¶ 5, 9-10 attached hereto as Exhibit E. DuPont has received 37,824 claims for Imprelis®-related damage on a property. Reid Decl. at ¶ 5(a). As of July 31, 2013, the Settlement Claims Administrator has received only 580 requests for exclusion postmarked by the June 28, 2013 deadline set by the Court. *See* Ness Decl. at ¶ 11.

A nationally available website—www.TreeDamageSettlement.com—devoted to the Settlement was also established, which made available for review and downloading the Publication and Long Form Notices, as well as providing review of the Settlement Agreement,

[7] In addition, DuPont has provided the required CAFA notice under 28 U.S.C. § 1715 to the Attorney General of the United States and the appropriate state officials. Ness Declaration ¶ 4.

Preliminary Approval Order, and other relevant Court documents. The website also provides general information about Imprelis® and the Settlement, including photos and video of Imprelis®-related damage, and flowcharts illustrating the steps in the claims process, objection process, and appeals process. The Settlement website has been operational since March 22, 2013; as of July 31, 2013, the website has received 108,416 unique visitors. Ness Decl. at ¶ 8. In addition to the Settlement website, the Parties established a toll-free 24-hour telephone number on March 25, 2013 where potential Class Members could obtain information about the Settlement, including a mechanism to obtain the Notice and Claim Form. As of July 31, 2013, the toll-free number has received 12,981 calls. Ness Decl. at ¶ 9. In addition, callers requested 1,310 Inspection Request Forms, nineteen Class 2 Expense Reimbursement Forms, three Class 3 Expense Reimbursement Forms, four Former Owner Forms, and sixty-one Appeal Forms. *Id.* Such forms can also be filled out or downloaded from the settlement website.

B. The Notice Plan and Claims Procedures Meet the Requirements of Due Process.

The requirements of due process are straightforward in the settlement context: "In order to satisfy due process, notice to class members must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 119 (D.N.J. 2002) (quotation marks omitted); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). For those whose names and addresses cannot be determined by reasonable efforts, notice by publication suffices under both Rule 23(c)(2) and the due process clause. *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 325 (E.D. Pa. 1993) (*citing Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950)). Significantly, compliance with Rule 23(c)(2) itself can satisfy the Due Process Clause. *See In re Enron Corp. Secs., Derivs., & "ERISA"*

Litig., No. MDL-1446, 2008 U.S. Dist. LEXIS 84656, at *41 (S.D. Tex. Sept. 8, 2008). Here, the parties agreed upon a comprehensive, nationwide paid media effort that included publication in (1) leading national consumer magazines, (2) local newspapers, (3) local television advertising, (4) internet banner advertising, (5) a settlement website, and (6) an automated toll-free telephone line. Katherine Kinsella, a nationally known expert on class action notice programs, has opined that: "The Court-approved Notice Program, designed and implemented for this case, provided the best practicable notice of the Settlement, consistent with the requirements of Rule 23(c)(2)(B)" to members of the classes. Kinsella Decl. at ¶ 4.

VI. THE PROPOSED SETTLEMENT CLASSES SATISFY RULE 23 AND SHOULD BE CERTIFIED.

In its preliminary approval order, this Court determined that the Settlement Classes satisfied the requirements of Rule 23(a) and 23(b)(3) and certified the three Settlement Classes for the limited purpose of this Settlement. *See* Preliminary Approval Order at 1 (Dkt. 160). Nothing has changed since the Court's Orders that would make the Class uncertifiable, or that changes the bases on which it may be certified. Therefore, Plaintiffs will not repeat the discussion of the reasons making certification of the settlement classes appropriate here. *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Classes, and For Permission to Disseminate Class Notice at 26-32 (Dkt. 118).

VII. THE SETTLEMENT IS FAIR, REASONABLE, ADEQUATE, AND IN THE BEST INTEREST OF THE CLASSES.

The Supreme Court has identified the "important principle that settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 401 (1977) (quotation and alteration marks omitted). Class action settlements minimize the

litigation expenses of the parties and reduce the strain that litigation imposes upon already scarce judicial resources. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d. Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) ("[T]he extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy encouraging settlements to an overriding public interest." (quotation marks omitted)).

A. The Settlement is Entitled to an Initial Presumption of Fairness.

Under Federal Rule of Civil Procedure 23(e), a settlement must be "fair, reasonable and adequate" to be approved. Fed. R. Civ. P. 23(e); *see also In re The Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118 (3d Cir. 1990); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983). In evaluating the settlement, the court acts as a fiduciary responsible for protecting the rights of the absent class members and is required to "'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'" *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001) (quoting *General Motors*, 55 F.3d at 785).

The Third Circuit affords an initial presumption of fairness to a settlement "if the court finds that: (1) the negotiations occurred at arm's-length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; (4) only a small fraction of the class objected." *Cendant*, 264 F.3d at 233 n.17; *see also In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 249, 267 (E.D. Pa. 2012) (attaching a presumption of fairness even where there was no formal discovery because plaintiffs' counsel "investigat[ed] the merits prior

to filing the complaint . . . and exercise[ed] opportunities to review records provided by [defendant], all of which enabled counsel to have sufficient background in the facts of the case"); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.") (citing *Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). As demonstrated below, these criteria are readily satisfied here.

There can be no doubt that the negotiations that led to this Settlement were undertaken at arm's length. The extensive Settlement negotiations in this case spanned the course of several months and included numerous sessions before retired Judge Welsh in Philadelphia and in-person meetings between DuPont's counsel and Appointed Counsel. Numerous settlement offers were proposed and rejected, and only after countless proposals, counterproposals, extensive negotiations, and multiple drafts did the Parties come to a mutually agreeable resolution. The best interests of the Settlement Classes were of paramount importance throughout the negotiation process. *See* Salzman Decl. at ¶¶ 4-5; *see also* Declaration of Jonathan D. Selbin at ¶ 11, attached hereto as Exhibit F.

As described above, Appointed Counsel conducted their own extensive and in-depth investigation of the facts of this case, including examining a half million DuPont documents pertaining to Imprelis® and its observed effects on non-target vegetation and retaining a team of qualified experts, before concluding that a settlement was in the best interest of the Classes. This process included taking the sworn statement of Jon Claus, DuPont's Global Technical Product Manager, during which significant factual issues were addressed in detail. The Settlement Agreement was only entered into after the Plaintiffs' expert team extensively evaluated key issues in this case and, in conjunction with Appointed Counsel, assessed the existing Imprelis®

Claim Resolution Process to determine critical improvements to ensure the best interests of the plaintiffs.

The Parties have been represented by seasoned litigators throughout the process. Both Appointed Counsel and DuPont's counsel are well-experienced in similar class action litigation, having been involved in the litigation and resolution of several of the seminal cases in the field of consumer protection and agricultural biotechnology class actions. *See generally* Declaration of Robert S. Kitchenoff Exhibits A, B, C, and D (Dkt. 47, 48, 49). The Parties' Counsel unreservedly recommend this Settlement. *See generally* Selbin Decl. at ¶ 12; Salzman Decl. at ¶ 7-8; Levitt Decl. at ¶¶ 11, 14; and Declaration of Richard J. Arsenault ¶¶ 7-8, attached hereto as Exhibit G. Courts recognize "significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the class." *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 731 (E.D. Pa. 1995 (quotation marks omitted)); *see also Spring Garden United Neighbors, Inc. v. City of Phila.*, No. 83-3209, 1986 U.S. Dist. LEXIS 29688, at *9-10 (E.D. Pa. Feb. 4, 1986) ("[T]he professional judgment of counsel involved in the litigation is entitled to significant weight."); *In re Am. Family Enters.*, 256 B.R. 377, 421 (D.N.J. 2000) ("In determining the fairness, adequacy, and reasonableness of a proposed settlement, significant weight should also be given to the belief of experienced counsel that settlement is in the best interest of the class, so long as the Court is satisfied that the settlement is the product of good faith, arms-length negotiations." (quotation marks omitted)); *Austin*, 876 F. Supp. at 1457 ("[C]ourts have accorded significant weight to the view of experienced counsel who have engaged in arm's-length negotiations."); *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 68 (S.D.N.Y. 1993) ("Experienced counsel's opinions are entitled to substantial weight by the Court in determining whether to approve [a] Settlement.").

Direct notice of the Settlement was mailed to over 68,892 Settlement Class Members, and a comprehensive multi-media notice plan published notice in newspapers, magazines, and the internet, ran television advertisements and also established a case website and toll-free automated telephone line to assist class members in making claims determinations. *See generally* Kinsella Decl. Appointed Counsel have received only 580 opt-outs by the June 28, 2013 deadline. *See* Ness Decl. at ¶ 11.While the final deadlines do not run until August 21, 2013, to date Appointed Counsel have received only five objections, two of which were filed with the Court and sent to Appointed Counsel, and the other three were only sent to Appointed Counsel and were not filed with the Court. Settlement Class Plaintiffs will update the Court with final numbers of each with their reply papers.

This small number of opt-outs and objections qualifies for the presumption of fairness. *See McCoy v. Health Net, Inc.*, 569 F. Supp. 2d 448, 459 (D.N.J. 2008) (finding that 601 opt-outs and nine objections qualified for a presumption of fairness); *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007, 2005 U.S. Dist. LEXIS 27011, at *50 (D.N.J. Sept. 13, 2005) (finding that 70 opts outs and eight objections from a class of 850,000 qualified for a presumption of fairness). Accordingly, an initial presumption of fairness should be given to the Settlement because the Parties arrived at the Settlement only after extensive arm's length negotiations by fully informed, experienced and competent counsel—under the direction of Magistrate Judge Welsh—and only after carefully considering the strengths and weaknesses of the case based on analysis of volumes of factual evidence with the assistance of an expert team.

B. Application of the *Girsh* Factors.

District courts have broad discretion in determining whether to approve a proposed class action settlement. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004). However, in determining whether the Settlement is fair and reasonable, courts in the Third

Circuit must consider the following factors, commonly known as the *Girsh* factors, as set forth in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975):

(1) The complexity, expense, and likely duration of the litigation;

(2) The reaction of the class to the settlement;

(3) The stage of the proceedings and the amount of discovery completed;

(4) The risks of establishing liability;

(5) The risks of establishing damages;

(6) The risks of maintaining the class action through trial;

(7) The ability of the defendants to withstand a greater judgment;

(8) The range of reasonableness of the settlement in light of the best possible recovery; and

(9) The range of reasonableness of the settlement in light of all attendant risks of litigation.

As set forth below, the application of each of these factors to the Settlement demonstrates that the Settlement is fair, reasonable, and adequate.

C. The Proposed Settlement Satisfies the *Girsh* Criteria for Final Approval.

1. The Complexity, Expense, and Likely Duration of the Litigation

The first *Girsh* factor weighs heavily in favor of approving the Settlement. The factor considers the "probable costs, in both time and money of continued litigation." *Cendant*, 264 F.3d at 233 (quotation marks omitted); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 U.S. Dist. LEXIS 65037, at *45 (D.N.J. Sept. 4, 2007); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663,2007 U.S. Dist. LEXIS 11163, at *48 (D.N.J. Feb. 16, 2007), *aff'd*, 579 F.3d 241 (3d Cir. 2009). Prior to trial, the Parties would, among other things, be required to further examine the Imprelis® Claim Resolution Process' database and analyze claims data for millions of property owners. A trial on the merits of this case would entail considerable expense,

including numerous experts, further pre-trial motions, and thousands of additional hours of attorney time. *See Egg Prods.*, 284 F.R.D. at 269 (finding settlement favorable where "considerable expenditures of financial resources and hours of attorney time relating to discovery for liability and damages" would be required for trial). Moreover, even after trial is concluded, there would likely be one or more lengthy appeals. Indeed, the likelihood of appeal from any decision on the merits counsels in favor of approving the Settlement. *See, e.g.*, *In re Ikon Office Solutions, Inc., Secs. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) ("Finally, the extremely large sums of money at issue almost guarantee that any outcome, whether by summary judgment or trial, would be appealed. This factor thus weighs in favor of the proposed settlement."); *see also Remeron*, 2005 U.S. Dist. LEXIS 27011, at *49 ("Finally, trial would likely not end the litigation, given the right to appeal.").

By reaching a favorable settlement early in the litigation, Plaintiffs have avoided significant expense and delay and have ensured a recovery to the Class. The settlement benefits available for Settlement Class Members are real and substantive, enabling property owners to assess and manage the damage to trees *immediately* by seeking maintenance to existing trees or obtaining new plantings. These factors weigh in favor of the Settlement. *See Egg Prods.*, 284 F.R.D. at 268-69 ("[G]iven that the settlement agreement occurred at an early stage of this litigation, prior to the active commencement of discovery, Plaintiffs have avoided such expense and delay as may have attached to these settling Defendants."); *Warfarin Sodium*, 391 F.3d at 535-36 (acknowledging this factor because "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial"); *Linerboard*, 292 F. Supp. 2d at 642 (noting that the "protracted nature of class action antitrust litigation means that any recovery

would be delayed for several years," and the settlement's "substantial and immediate benefits" to class members favored settlement approval).

2. Class Reaction to the Proposed Settlement

The second *Girsh* factor also weighs heavily in favor of final approval. This factor "attempts to gauge whether members of the class support the settlement." *Prudential*, 148 F.3d at 318. As noted above, individual direct notice was mailed to over 68,892 Settlement Class Members and 37,824 claims have been made, but to date there have been only five objections to the Settlement, and only 580 requests for exclusion, amounting to just 1.5% of claims. *See* Reid Decl. at ¶ 5; Ness Decl. ¶ 11;. These numbers are consistent with Third Circuit precedent and the decisions of other federal courts approving settlements. *See Egg Prods.*, 284 F.R.D. at 269 (holding that 150 requests for exclusion were "virtually *di minimis* in light of the over 13,200 Notices of settlement that were sent (as well as published notices and press releases about the settlement)"); *McCoy*, 569 F. Supp. 2d at 459 (finding that 601 opt-outs and nine objections qualified for a presumption of fairness); *Stoetzner*, 897 F.2d at 118-19 (holding that only 29 objections in 281 member class – or 10% – "strongly favors settlement"); *Prudential*, 148 F.3d at 318 (affirming conclusion of district court that class reaction was favorable when 19,000 class members opted out of class of eight million and 300 objected); *Ikon*, 194 F.R.D. at 175 (settlement approved where there were 2,500 requests for exclusion from an original notice to 140,000 class members); *cf. Anderson v. Torrington Co.*, 755 F. Supp. 834, 847 (N.D. Ind. 1991), 755 F. Supp. at 844 (granting final approval over objections from one-third of class members); *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004, 1022 (E.D. Wis. 1984) (108 objectors in class of 200). The low ratio of objectors and opt-outs to claimants shows the decisively positive response to the Settlement. Further support for the Settlement can be found in the Class

Member declarations which overwhelmingly support the terms of the Settlement. *See generally* Declarations by Class Representatives, attached hereto as Exhibit H.

3. The Stage of Proceedings and Amount of Discovery Completed

The third *Girsh* factor also favors settlement. The Third Circuit has found that this factor—considering the stage of proceedings and the amount of discovery completed—is intended to ensure "that a proposed settlement is the product of informed negotiations" and that "the parties . . . have an adequate appreciation of the merits of the case before negotiating." *Prudential*, 148 F.3d at 319 (quotation marks omitted); *see Egg Prods.*, 284 F.R.D. at 271 (granting approval even where there was no formal discovery because counsel "were in such a position prior to negotiating and entering into the Moark Settlement that they had an adequate understanding and appreciation of the strengths and weaknesses of the Plaintiffs' case"). This factor "captures the degree of case development that interim counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Gen. Motors*, 55 F.3d at 813.

Plaintiffs, through Appointed Counsel, 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 governing confidential information (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. Appointed 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' Co-Lead Counsel—took the sworn statement of Jon Claus, DuPont's Global

Technical Product Manager, during which the Imprelis®'s biodegradation process—a key consideration in the negotiations concerning the extended warranty—was addressed in detail. Appointed Counsel and other Plaintiffs' counsel also vetted, organized, and retained experts in connection with this action, including experts on EPA regulation, herbicide product development, causation, latency, damage valuation, tree replacement, and soil remediation. *See generally* Declaration of Richard Arsenault (Dkt. 106, Ex. 2). "Given this vast amount of discovery obtained, and the volume of motion practice that enabled Plaintiffs' Counsel to preview some of the defenses that Defendants would advance, Plaintiffs' Counsel had a valid basis to negotiate a settlement." *McCoy*, 569 F. Supp. 2d at 461 (quotation marks omitted). Thus, the litigation has reached a stage where "the parties certainly had a clear view of the strengths and weaknesses of their case," and favors approval under this factor. *Bonett v. Educ. Debt Servs*., No. 01-6528, 2003 U.S. Dist. LEXIS 9757, at *17 (E.D. Pa. May 9, 2003) (quotation and alteration marks omitted).

4. The Risks of Establishing Liability

The fourth *Girsh* factor also weighs in favor of approval. The fourth factor "examine[s] what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them." *Gen. Motors*, 55 F.3d at 814. "The inquiry requires a balancing of the likelihood of success if 'the case were taken to trial against the benefits of immediate settlement.'" *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001) (*quoting Prudential*, 148 F.3d at 319). Here, "the Court need not delve into the intricacies of the merits of each side's arguments, but rather may 'give credence to the estimation of the probability of success proffered by [Appointed Counsel], who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *Perry*

v. FleetBoston Fin. Corp., 229 F.R.D. 105, 115 (E.D. Pa. 2004) (*quoting Lachance v. Harrington*, 965 F. Supp. 630, 638 (E.D. Pa. 1997)).

While Appointed Counsel believe that they would prevail at trial, they recognize that class action cases, like all complex litigation against large companies with highly talented defense counsel, have inherent risks. "Here, as in every case, Plaintiffs face the general risk that they may lose at trial, since no one can predict the way in which a jury will resolve disputed issues." *Lazy Oil Co. v. Witco Corp.*, 95 F. Supp. 2d 290, 337 (W.D. Pa. 1997), *aff'd*, 166 F.3d 581 (3d Cir. 1999), *see also State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."), *aff'd*, 440 F.2d 1079 (2d Cir. 1971).

5. The Risks of Establishing Damages

The fifth *Girsh* factor likewise supports approval of the Settlement. This factor, similar to the fourth, "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Cendant*, 264 F.3d at 238-39 (*quoting Gen. Motors*, 55 F.3d at 816). "Because establishing damages will be contingent on establishing liability, the same concerns animate both of these elements of the *Girsh* test." *McCoy*, 569 F. Supp. 2d at 461. Even if Plaintiffs successfully reach trial as a class and establish liability, proof of damages will be provable, but complex. *See, e.g.*, *Lazy Oil*, 95 F. Supp. 2d at 337 ("[C]ourts have recognized the need for compromise where divergent testimony would render the litigation an expensive and complicated 'battle of experts.'"). However confident Appointed Counsel may be that damages can be proven against DuPont, Counsel must also recognize the existence of a genuine risk of no recovery or only a limited recovery. Settlement, on the other hand, provides Settlement Class Members with tangible and timely benefits to deal with Imprelis®-related damage to their

property. *See, e.g.*, *Sutton v. Medical Serv. Ass'n*, No. 92-4787, 1994 U.S. Dist. LEXIS 7512, at *18 (E.D. Pa. June 8, 1994) (granting final approval, noting that "even assuming that plaintiffs ultimately would have prevailed on liability, they faced the risk that they could not establish damages or obtain the other prospective relief that is achieved by this Settlement Agreement").

6. The Risks of Maintaining a Class Action Through Trial

The sixth *Girsh* factor, which evaluates the risks of certifying and maintaining a class through a trial, also favors approval of the Settlement. "Because the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class] action, this factor measures the likelihood of obtaining and keeping a class certified if the action were to proceed to trial." *Warfarin Sodium*, 391 F.3d at 537 (quotation and alteration marks omitted). The Classes have been preliminarily certified for settlement purposes only. *See* Preliminary Approval Order at 5-6 (Dkt. 160). There is no guarantee that these classes would be certified before or during trial, and this uncertainty further supports approval of the proposed Settlement. *Prudential*, 148 F.3d at 321 (noting that "a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable"); *see Egg. Prods*., 284 F.R.D. at 273 ("The Court of Appeals for the Third Circuit has recognized: There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in favor of settlement." (quotation marks omitted)).

7. The Ability of the Defendant to Withstand a Greater Judgment

The seventh *Girsh* factor should be considered neutral here. The Third Circuit has interpreted this factor as concerning "whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *Cendant*, 264 F.3d at 240. Here, the amount of Settlement damages is not a fixed sum; indeed, the Settlement is uncapped, and DuPont will

pay all qualifying damages incurred by Class Members within the definition of the Settlement through the claims process.

Even assuming that DuPont could withstand a larger judgment, this is not an obstacle to approving the Settlement. Settlements have been approved where a settling defendant has had the ability to pay greater amounts, but the risks of litigation outweigh the potential gains from continuing on to trial. *See Lazy Oil*, 95 F. Supp. 2d at 318 ("The Court presumes that Defendants have the financial resources to pay a larger judgment. However, in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial, the Court accords this factor little weight in deciding whether to approve the proposed Settlement."); *Perry*, 229 F.R.D. at 116 ("[Defendant] could certainly withstand a much larger judgment as it has considerable assets. While that fact weighs against approving the settlement, this factor's importance is lessened by the obstacles the class would face in establishing liability and damages."); *see also Warfarin Sodium*, 391 F.3d at 538 ("[T]he fact that DuPont could afford to pay more does not mean that it is obligated to pay any more than what the . . . class members are entitled to under the theories of liability that existed at the time the settlement was reached.")

8. <u>The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and the Attendant Risks of Litigation</u>

The final two *Girsh* factors also weigh in favor of approval of the Settlement. These factors assess the reasonableness of the settlement "in light of its monetary and nonmonetary consideration." *Egg Prods.*, 284 F.R.D. at 274. Both factors "test two sides of the same coin: reasonableness in light of the best possible recovery and reasonableness in light of the risks the parties would face if the case went to trial." *Warfarin Sodium*, 391 F.3d at 538. A court evaluating a proposed class action settlement should consider "whether the settlement represents a good value for a weak case or a poor value for a strong case." *Id.*; *see also Girsh*, 521 F.2d at

157. In the process, however, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re Nat'l Student Mktg. Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974).

As courts have explained, "[w]hile the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard." *In re Aetna, Inc. Sec. Litig.*, MDL No. 1219, 2001 U.S. Dist. LEXIS 68, at *21 (E.D. Pa. Jan. 4, 2001); *see also Gen. Motors*, 55 F.3d at 806 (noting that "after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution"); *Lazy Oil*, 95 F. Supp. 2d at 338-39 (stating that a court "should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and abandoning of highest hopes" (quotation marks omitted)).

Plaintiffs are aware of the inherent risks of complex litigation, the challenge of obtaining nationwide class certification on claims, the delays that often occur, and the desirability of obtaining prompt and effective relief for the Classes. Continued discovery would be extensive and costly, and Plaintiffs have already spent significant money on expert evaluation. Litigating the case further would prove exponentially more complex and costly. Further class certification motions, potential appeals, summary judgment motions, and *Daubert* motions would be time-consuming. Especially when balanced against these risks and uncertainties, the economic relief, and other benefits afforded by the Settlements confers a significant benefit on the Classes. In short, further litigation of this case would create an unnecessary burden on the parties and the Court, but would not be likely to result in greater benefit to the Classes than the Settlement

provides. The reimbursements and payments Settlement Class Members receive, in addition to the warranty extension and restructuring of the Imprelis® Claim Resolution Process, confer immediate and concrete benefits, particularly in light of the risk plaintiffs would face if the case went to trial against DuPont. The value of these benefits is enhanced by the fact that Settlement Class Members will be permitted to use these benefits to manage the dead and dying trees on their property *now*—without the risks and delay of further litigation. It thus satisfies the eighth and ninth *Girsh* factors.

Therefore, for the reasons stated above, the Settlement satisfies the factors set forth in *Girsh*, 521 F.2d at 157, and is fair, reasonable, and adequate.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval of the Settlement pursuant to Federal Rule of Civil Procedure 23(e) and certify the requested Settlement Class for settlement purposes pursuant to Rules 23(a) and 23(b)(3). A proposed Order is attached hereto as Exhibit D.

Dated: August 7, 2013

Respectfully submitted,

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