

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

IN RE: IMPRELIS HERBICIDE  
MARKETING, SALES PRACTICES AND  
PRODUCTS LIABILITY LITIGATION

2:11-MD-02284-GP  
MDL NO. 2284

THIS DOCUMENT RELATES TO  
ALL ACTIONS

**DECLARATION OF  
GREGORY S. ASCIOLLA IN  
SUPPORT OF MOTION FOR AN  
AWARD OF ATTORNEYS' FEES,  
REIMBURSEMENT OF EXPENSES,  
AND INCENTIVE AWARD FOR  
CLASS REPRESENTATIVES**

I, GREGORY S. ASCIOLLA, declare as follows:

1. I am a partner in the law firm of Labaton Sucharow LLP. Together with Adam J. Levitt of Grant & Eisenhofer P.A., Richard J. Arsenault of Neblett, Beard & Arsenault, Jonathan D. Selbin of Lieff, Cabraser, Heimann & Bernstein, and Robert Kitchenoff of Weinstein, Kitchenoff & Asher, we were appointed Settlement Counsel in the above-captioned case (“Appointed Counsel”).<sup>1</sup> We were also appointed Interim Co-Lead and Liaison Counsel in this Action.<sup>2</sup>

2. I submit this declaration in support of the Motion for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Incentive Award for Class Representatives.<sup>3</sup> The matters stated herein are true to the best of my personal knowledge and, if called upon to testify thereto, I would competently do so.

3. The purpose of this declaration is to summarize (1) the factual and procedural history of this litigation; (2) the work performed by Appointed Counsel and the group of law firms that performed work at the direction of Appointed Counsel (together, “Plaintiffs’ Counsel”); and (3) total hours and lodestar, as well as litigation costs and expenses, incurred by Plaintiffs’ Counsel through June 30, 2013.

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<sup>1</sup> As used herein, the term “Appointed Counsel” refers to Labaton Sucharow LLP, Grant & Eisenhofer P.A., Neblett, Beard & Arsenault, Lieff, Cabraser, Heimann & Bernstein, and Weinstein, Kitchenoff & Asher. See Order Granting Preliminary Approval of Proposed Settlements (“Preliminary Approval Order”), at 2 [Dkt. 160].

<sup>2</sup> *In re: Imprelis Herbicide Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2284, C.A. No. 11-md-02284 [Dkt. 56] (appointing Adam J. Levitt of Wolf, Haldenstein, Adler, Freeman & Herz; Richard J. Arsenault of Neblett, Beard & Arsenault; Hollis L. Salzman of Labaton Sucharow; and Jonathan D. Selbin of Lieff, Cabraser, Heimann & Bernstein as Plaintiffs’ Interim Co-Lead Counsel for the proposed class); *id.* at [Dkt. 40] (appointing Robert Kitchenoff of Weinstein, Kitchenoff & Asher as Liaison Counsel; *id.* at [Dkt. 160] (appointing Gregory S. Ascioffa of Labaton Sucharow LLP as Interim Co-Lead Counsel to replace Hollis L. Salzman).

<sup>3</sup> All defined terms herein have the same meaning as in the Settlement Agreement unless otherwise noted.

4. Appointed Counsel has led, managed, supervised and been intimately involved in every aspect of this litigation from the outset to the present.

## **I. INTRODUCTION**

5. This case involves allegations arising from DuPont's introduction and sale of its Imprelis® Herbicide ("Imprelis"), and was brought on behalf of (a) property owners who have sustained damages from the use of Imprelis on their property and trees (the "Property Owner Class"); (b) lawn care professionals who purchased and applied Imprelis to their customers' properties and sustained damages ("Applicator Class"); (c) golf-courses and others who purchased and applied Imprelis to their own property and sustained damages ("Golf Courses and Other Self-Applicators Class"). Am. Compl. ¶ 1.<sup>4</sup>

6. As a result of actions taken by Defendant E.I. du Pont de Nemours & Company ("DuPont"), the Property Owner Class (including Plaintiffs Mark Wilson, Harlene Clark, Charles Huffman, Jeff and Kathy Bailey, Sammy Cope, Donna Cozad, James Heinsimler, John and Margo Wilhelmsen, Fred and Ranelle Brandt, Thor Larson, Peter and Kathleen Malone, David H. Kinsey, Sam Gallo, Carole Meader, Gregg Westover, H. David Lunger, Richard Shlansky-Goldberg and Patty Goldberg, Marsha Shomo, Jean Vorchak, and Jan and Christopher Meier), the Applicator Class (including Plaintiffs Town & Country Landscape Management, LLC, Perennial Services, LLC, Rossi Landscaping, Inc., and Capital Turf Management, Inc.), and the Golf Courses and Other Self-Applicators Class (including Plaintiffs BW Real Estate, LLC, BW Golf Management, LLC, Winding Ridge Golf Course, The Standard Country Club, Fox Hills Golf & Banquet Center, Polo Fields Golf & Country Club, Washtenaw Acquisition, LLC, and Colonial Pines Management, LLC), all suffered Imprelis-related injuries and alleged against

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<sup>4</sup> The Master Class Action Complaint was filed by Appointed Counsel on March 30, 2012 [Dkt. 66] and later amended on October 25, 2012 [Dkt. 123].

DuPont consumer fraud and consumer protection act violations, breach of express and/or implied warranties, negligence, strict products liability, nuisance, and trespass claims based on the laws of several states. *Id.* ¶¶ 16-55, 213-299.

7. Since the inception of this litigation more than two years ago, Plaintiffs' Counsel have dedicated (and continue to dedicate) substantial time and resources to vigorously litigating this complex class action on behalf of Class Members. Among other tasks described more fully below, Appointed Counsel, and Plaintiffs' Counsel under their direction, conducted a considerable amount of discovery, including the review of some 500,000 pages of documents DuPont previously submitted to the United States Environmental Protection Agency ("EPA") in conjunction with its original approval of Imprelis, the hiring and consultation of several experts, and a deposition of a DuPont product manager.

8. Settlement negotiations were also an arduous, lengthy process. Beginning 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 over a long period of time.

9. As a result of their skill, expertise and hard work, Appointed Counsel secured from DuPont a significantly improved Settlement Claims Process (designed to compensate property owners for Imprelis damage), which was improved from the initial claims program DuPont had initiated on its own on September 6, 2011.

10. The terms of the proposed settlement was submitted to the Court as part of Appointed Counsel's Motion For Preliminary Approval Of Class Settlement, For Certification Of Settlement Classes, And For Permission To Disseminate Class Notice [Dkt. 117, 118]. The

Court preliminarily approved the Proposed Settlements by Order dated February 12, 2013. [Dkt. 160].

11. The work performed by Plaintiffs' Counsel in obtaining this excellent result was substantial, including conducting an extensive investigation, conducting substantial discovery, working with numerous experts, engaging in vigorous, arm's-length settlement negotiations over an extended period of time, seeking preliminary approval of the settlements and managing the notice and claims administration program.

12. For their significant efforts, Appointed Counsel seek an award of attorneys' fees in the amount of \$6.5 million plus \$500,000.00 in costs, which will not be deducted from any funds earmarked for class members. Appointed Counsel also seeks incentive award payments for class representatives for service to the class (\$1,500.00 for individual property owners, and \$2,500.00 for commercial entities), and these amounts likewise will not detract from other class funds. *See* Plaintiffs' Memorandum Of Points And Authorities In Support Of Motion For Final Approval Of The Class Action Settlement, filed herewith.

13. The parties reached agreement on all material terms of the Settlement prior to commencing negotiation of Plaintiffs' Counsel's attorneys' fees and expenses or the Class Representatives' incentive awards.

14. The results achieved here by Plaintiffs' Counsel in the face of a strong defense are excellent, particularly considering the task of litigating such a complex case.

15. As of the time of this filing, Appointed Counsel have received only five objections, the parameters of which were set forth in the settlement notice sent to Class Members by direct mail, publication in various consumer magazines, advertisements broadcast on television, and posted on the internet. Two of the objections were filed with the Court (Dkts.

178, 182), and three additional ones were received by Appointed Counsel and not filed with the Court. None of the objections were related to attorneys' fees, expenses or incentive awards.<sup>5</sup>

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

16. 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.<sup>6</sup>

17. In June 2011, the EPA began investigating widespread reports of damage stemming from the use of Imprelis.

18. 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.

19. 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.

20. 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

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<sup>5</sup> To date, 37,824 claims have been filed. The deadline for filing an objection is August 21, 2013. The deadline for opting-out of the Proposed Settlement was June 28, 2013.

<sup>6</sup> Under the Settlement Agreement, DuPont does not admit liability.

incident reports involving damage (including death) to non-target trees . . . related to the application of Imprelis.”

21. 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.

22. On October 20, 2011, in light of the multitude of lawsuits filed in federal courts across the country, and upon the motions of counsel in several of those actions, the Judicial Panel on Multidistrict Litigation (“JPML”) consolidated and transferred all pending federal Imprelis suits to this Court, giving it jurisdiction over pretrial proceedings in the transferred actions. [Dkt. 1]. *See also In re Imprelis Herbicide, Mktg., Sales Practices & Prods. Liab. Litig.*, 825 F. Supp. 2d 1357 (J.P.M.L. 2011). Following the JPML centralization order, Appointed Counsel continued their active prosecution of these cases, and continued structuring the case for discovery and trial.

23. On January 11, 2012, the Court appointed Adam J. Levitt of Wolf, Haldenstein, Adler, Freeman & Herz, Richard J. Arsenault of Neblett, Beard & Arsenault, Hollis L. Salzman of Labaton Sucharow, and Jonathan D. Selbin of Lieff, Cabraser, Heimann & Bernstein as Plaintiffs’ Interim Co-Lead Counsel for the proposed class. [Dkt. 56]. The Court had previously

appointed Robert Kitchenoff of Weinstein, Kitchenoff & Asher as Liaison Counsel. [Dkt. 40].

On February 12, 2013, the Court appointed Gregory S. Ascioffa of Labaton Sucharow as Interim Co-Lead Counsel, replacing Ms. Salzman who had departed from the firm. [Dkt. 160].

24. On March 30, 2012, Appointed Counsel filed an 88-page, 9 count Master Class Action Complaint, on behalf of a nationwide class and state subclasses of property owners, self-applicators, such as golf courses, and lawn care operators who were harmed by Imprelis. [Dkt. 66].

25. While litigation proceeded on one front, the Parties simultaneously explored and pursued potentially settling the litigation. 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 (the "Settlement"). [Dkt. 118, Ex. A]. The Settlement was the result of nine months of hard-fought, often spirited, arm's-length negotiations 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.

26. Also on October 19, 2012, Appointed Counsel moved for Preliminary Approval Of Class Settlement, For Certification Of Settlement Classes, And For Permission To Disseminate Class Notice. [Dkt. 117, 118].

27. By Order dated February 12, 2013 [Dkt. 160], the Court found that "the proposed settlement is within the range of possible approval, the requirements of conditional class certification are met, and the proffered notice plan is well designed." [Dkt. 159 at 1]. The Court conditionally certified the Settlement Classes and granted preliminary approval of the Proposed



Settlement. *Id.* at 6-8. The Court also approved the proposed notice to class members. *Id.* at 8. *See also* Dkt. 166 (amending language in the order).

28. The fairness hearing on final approval of the Proposed Settlements and Appointed Counsel's request for attorneys' fees, reimbursement of expenses and incentive awards for class representatives is scheduled for September 27, 2013. [Dkt. 160].

### **III. THE WORK PERFORMED AND RESULTS ACHIEVED**

#### **A. Litigation Efforts of Plaintiffs' Counsel**

29. Since the inception of this Action, Plaintiffs' Counsel, led by Appointed Counsel, have prosecuted this action and devoted all necessary resources to obtain the best possible result for the Classes, with no guarantee of repayment. Even after DuPont created the Imprelis Claim Resolution Process, they continued to vigorously defend themselves in the civil class action litigation. At each step, Plaintiffs' Counsel were met with persistent and fierce opposition from defense counsel from some of the most well-respected law firms in the world.

30. As described below, Plaintiffs' Counsel worked tirelessly to manage multiple and overlapping processes of litigation, including discovery, among other essential tasks. Appointed Counsel's time and effort in advancing this case to its current posture have provided substantial benefits to all Plaintiffs' Counsel and their clients.

##### **1. Investigation and Discovery**

31. Plaintiffs' Counsel engaged in an extensive investigation of the facts and potential claims in this case prior to the JPML transfer of these actions. This included consulting with an array of top academic experts in the fields of horticulture, turf science and soil, and conducting substantial legal and fact research, including preliminary evaluations of DuPont's Imprelis Claim Resolution Process.

32. Prior to the transfer, Appointed Counsel also litigated a preliminary injunction motion in the District of Delaware that, while ultimately denied, focused the Court and all parties on key issues relating to evidence preservation in this litigation. Plaintiffs' Counsel also separately litigated discovery issues in the Northern District of Ohio, the results of which paved the way to the production of early, key discovery.

33. Following JPML transfer of these actions and this Court's consolidation thereof, Appointed Counsel continued to actively prosecute these cases—just as had been done pre-JPML transfer in the underlying constituent actions.

34. Appointed Counsel vetted and retained a varied team of experts appropriate to the litigation. Working with these experts, Appointed Counsel created and distributed an evidence preservation protocol, and further investigated the Imprelis Claim Resolution Process.

35. Appointed Counsel's prosecution efforts also encompassed a variety of discovery methods. Appointed Counsel sought, received, and analyzed nearly 500,000 pages of documents pertaining to the development, marketing, and sale of Imprelis. Appointed 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.

36. On March 15, 2012, Adam Levitt and Richard Arsenault took the sworn statement of Jon Claus, a DuPont scientist and DuPont's expert regarding the latency period of Imprelis, providing Appointed Counsel with substantial knowledge about the product and its environmental effects.

37. During this same period of time, a team of Plaintiffs' Counsel, under the direction and supervision of Appointed Counsel, researched 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 and Implied Warranty, Negligence, Strict Products Liability—Failure to Warn, Strict Products Liability—Design Defect, Nuisance, and Trespass.

38. Appointed Counsel also vetted and retained seven of the best 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 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.

39. Appointed Counsel also actively vetted the Imprelis® Claim Resolution Process. Appointed 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 process enabled Appointed Counsel and the experts to design a process to fairly process and compensate Imprelis-related claims.

## **2. Pleadings**

40. Utilizing this accumulated body of factual evidence and legal research, and with guidance from the team of experts, Appointed Counsel, with the assistance of Plaintiffs' Counsel, drafted an 88-page, 9 count Master Class Action Complaint, on behalf of a nationwide class and state subclasses of property owners, 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. Settlement Counsel, with the assistance of Plaintiffs' Counsel, also drafted, and filed on March 30, 2012, a memorandum discussing the various states' laws relied upon in

the Master Class Action Complaint. DuPont filed its answer to the Master Class Action Complaint on August 15, 2012.

41. Appointed Counsel next turned their attention to structuring the case for discovery and trial, successfully negotiating with the attorneys for DuPont a Protective Order [Dkt. 69], entered as an Order on April 3, 2012, and an Order for Preservation of Documents, Electronically Stored Information, and Other Tangible Things [Dkt. 76], entered on May 9, 2012 as Case Management Order No. 2. These two orders apply to all actions in this consolidated MDL, and included the following benefits:

- The preservation of all potentially Discoverable Records under Federal Rule of Civil Procedure 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 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 methodology for exchanging information on the computer systems and other record storage systems in their possession, custody, and 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 unique procedures for challenging the confidentiality of such materials.

42. Also for the benefit of all counsel and their clients, Appointed Counsel negotiated a schedule for DuPont's responses to the Master Class Action Complaint and the complaints filed by individual Plaintiffs, requiring DuPont's response to all complaints on rolling basis of 10 complaints every fifteen days. Rather than file motions to dismiss, DuPont answered or was scheduled to answer each of those Complaints pursuant to the above-described, Court-approved schedule.

43. Appointed Counsel also had to respond to collateral attacks to the leadership structure and the settlement by other counsel. [Dkt. 91].

**B. Settlement Negotiations and Results for the Class**

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

45. On January 24, 2012, the Parties began a series of formal settlement mediation sessions under the direction of Magistrate Judge Diane M. Welsh (Ret.). These negotiations were informed by the factual, legal, and scientific information obtained in preparing the Master Class Action Complaint, including that obtained in the Claus sworn statement, incorporated the advice and experience of Appointed Counsel's retained experts, and greatly assisted by Judge Welsh.

46. Over most of 2012, 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. The meetings between the Parties ranged

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.

47. Due to the difficult and protracted nature of these 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, including 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. Appointed Counsel also kept Plaintiffs' Counsel updated on the proposed settlement and the status of settlement negotiations during this time.

48. Upon gaining a full understanding of the Imprelis Claim Resolution Process and in consultation with Judge Welsh, Appointed Counsel negotiated the Settlement, capitalizing on DuPont's existing structure and expenditure in crafting the materially enhanced Settlement relief (summarized below). The Settlement Claims Process provides numerous additional benefits, improvements, and transparency for members of the Settlement Classes that demonstrably surpass the benefits DuPont offered under its then-existing Imprelis Claim Resolution Process.

49. The final MOU was signed on July 7, 2012, nearly six months after formal negotiations began. All Plaintiffs' Counsel were notified of the MOU and its terms by email on August 7, 2012. The multi-page email explained the essential terms of the MOU as well as how the potential Settlement differs from the Imprelis Claim Resolution Process.

50. In connection with preparing the Settlement, Appointed Counsel continued to engage in numerous, lengthy meetings and telephone calls with counsel for Defendant. After continued negotiation and multiple rounds of edits to the Settlement, the parties agreed to the settlement terms and executed the Settlement on October 19, 2012 and filed the Settlement with the Court. Appointed Counsel contemporaneously filed an Amended Master Class Action Complaint that conformed with the Class definitions in the Settlement. 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.

51. As part of the Settlement, DuPont agreed to provide significant benefits to each of the three settlement classes. [Dkt. 118 at 10-16].

52. For members of the Property Owner Class, the Settlement provides that they will receive a warranty on replacement trees, with the warranty expiring on May 31, 2015. DuPont will also remove damaged trees or provide compensation for their removal under specified circumstances and will pay for damaged trees pursuant to the schedule set out in Exhibit 15 to the Settlement Agreement (payments for replacement trees may be used in any way a class member wishes). DuPont will also pay each Property Owner Class Member certain tree care and maintenance payments pursuant to the schedule set forth in Exhibit 18 to the Settlement Agreement, as well as an additional payment for incidental damages in an amount equal to 15% of the total value of the other payments and services provided to that Class Member under the settlement. Should Class Members disagree with the settlement amount offered, they may appeal their offer to a panel of arborists. Finally, Property Owner Class Members will not be releasing any claims for environmental or personal injury damages by participating in the settlement.

53. The Settlement provides that members of the Applicator Class will receive compensation for customer site visits, field work, and other such expenses incurred prior to September 6, 2011, as well as continued compensation for such activities if they elect to participate in the claims process. To the extent they have not already done so, Applicator Class Members may also participate in the Imprelis recall program. By participating in the proposed settlement, applicators will not release their rights to recover for lost profits or for damages arising from suits brought against them by third parties relating to Imprelis.

54. For members of the Self Applicator Class, the Settlement provides that they will receive all the benefits provided to members of the Property Owner Class, plus reimbursement for time and expenses spent investigating and documenting Imprelis damage, subject to a \$2,000 maximum for such reimbursement claims.

55. Additionally, the Settlement provides that all notice and claims administration expenses related to the settlement will be paid by DuPont. DuPont also agreed to pay up to \$6.5 million in attorneys' fees and \$500,000 in costs, and this payment will not be deducted from any funds earmarked for class members. DuPont also agreed to pay certain bonus payments for class representatives for service to the class (\$1,500 for individual property owners, \$2,500 for commercial entities), and these amounts likewise will not be deducted from other class funds.

**C. Preliminary Approval of Settlement and Claims Program**

56. After executing the Settlement Agreement, Appointed Counsel expended considerable time and effort preparing and filing a comprehensive submission for preliminary approval of proposed settlements with the Court. This included drafting the notice of motion, motion, memorandum of law, long-form notice for mailing to the Class, short-form notice for publication, and proposed orders.



57. The Court held a hearing on the Motion For a Preliminary Approval of the Settlement on February 5, 2013 and conditionally certified the Settlement Classes and granted preliminary approval of the Proposed Settlements on February 12, 2013. [Dkt. 160].

58. Appointed Counsel has also actively supervised and participated in the notice and claims administration program approved by the Court, and has worked closely (and continues to work closely) with the claims administrator and DuPont to effectuate the program.

59. Since the Settlement was filed (and continuing through the present), Appointed Counsel has continued to field hundreds of calls from individual class members and clients regarding the Settlement and related issues.

60. In addition, Appointed Counsel is moving for final approval of the Settlement, and will handle any appeals.

#### **IV. RISKS OF THE LITIGATION**

##### **A. Risks of Dispositive Motions, Not Achieving Class Certification, Not Surviving Summary Judgment, or Not Establishing Liability or Damages at Trial**

61. 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.

62. Appointed Counsel extensively researched the numerous complex legal and procedural issues and arguments DuPont raised or could have raised. In sum, while Appointed Counsel maintain that none of these arguments had merit, they all posed great risk.

63. Plaintiff also faced significant risks at the class certification and summary judgment stages, as well as at trial.

64. For example, during the class certification proceedings, DuPont would likely have argued, among other things, that individual issues predominate, and therefore the Class should not be certified. Though Appointed Counsel contends that such an argument would be unsuccessful, the risk remained until the Court ruled on the issue.

65. The high caliber of the opposition that Plaintiffs' Counsel faced and the resources at the DuPont's disposal are also significant factors to consider in evaluating the litigation risks faced by Appointed Counsel.

66. Here, DuPont is represented by highly skilled and experienced counsel from prestigious law firms with tremendous resources to litigate the case. Though Appointed Counsel are accustomed to and experienced in negotiating with opposing counsel of the highest quality, this factor favors their requested fee award.

**B. Risk of Non-Payment Assumed by Plaintiffs' Counsel**

67. The Settlement was obtained in the face of substantial risk, including the fact that the litigation itself was inherently risky for Appointed Counsel to undertake and finance, particularly Appointed Counsel who, as Interim Co-Lead Counsel, took the lead in managing and litigating the case and negotiating the settlement agreements. The commencement of a class action is no guarantee of success.

68. Plaintiffs' Counsel faced a great risk of non-payment for their time and effort in litigating this case. Plaintiffs' Counsel advanced all costs and expenses to prosecute this highly complex litigation on a wholly contingent basis. Plaintiffs' Counsel have received no compensation during the more than two-year course of the litigation, and have spent a total of 22,557.45 hours litigating the case, incurred \$11,598,933.75 in lodestar and \$563,017.84 in expenses through June 30, 2013 (discussed in more detail below). Despite the many risks they

faced, Plaintiffs' Counsel committed their financial and human resources to this litigation and achieved an outstanding result for the Settlement Classes.

69. The Settlement confers a substantial benefit on the Settlement Classes and eliminates many of the risks and costs of continuing this litigation in a lengthy, complex and hard-fought proceeding. For this, Plaintiffs' Counsel should be fairly compensated and reimbursed.

#### **V. TIME AND EXPENSES INCURRED BY PLAINTIFFS' COUNSEL**

70. Plaintiffs' Counsel are well-known and highly-regarded lawyers with extensive experience prosecuting and settling some of the most complicated class actions. They routinely take on complex claims such as the ones at issue in this action and are not afraid to take a case to trial, if the circumstances are warranted. In light of this extensive experience with similar cases, Appointed Counsel's belief that the Settlement is fair and reasonable weighs in favor of the reasonability of the Settlement and the requested attorneys' fee award.

71. Consistent with their responsibilities, Appointed Counsel devised a protocol for Plaintiffs' Counsel to report their firms' monthly time and expense reports. Appointed Counsel sent a copy of the time and expense protocol memorandum, together with samples of the required Microsoft Excel report form, to each firm representing Class members in this litigation. In our protocol, Appointed Counsel required that each firm contemporaneously record and transmit to Appointed Counsel each month, via email, a detailed task-based spreadsheet with time entries.

72. The reports contain a chronological listing of time reported for work performed by attorneys, paralegals and other professionals in specific activity categories, a description of specific work performed in each category sufficient to demonstrate that the work was performed

at the direction of Appointed Counsel and benefited the Classes, the hourly rates associated with each person at the time the work was performed (the professional's "historic" rate), and the firm's resulting lodestar reported for that month. Additionally, the protocol required that each firm submit, via email, litigation-related expenses incurred by the firm for the month.

73. To ensure that the time and expense entries submitted by each firm were reported in a uniform matter, the protocol required that all reports be submitted by the 15th day of each month for time and expenses incurred in the preceding month.

74. All time and expense reports submitted to Appointed Counsel by Plaintiffs' Counsel have been retained and preserved on a computer server.

75. Plaintiffs' Counsel have spent 22,557.45 hours litigating this case, and they have incurred a total of \$11,598,933.75 in lodestar and \$563,017.84 in expenses through June 30, 2013.

76. The following chart summarizes the aggregate time and expenses of Plaintiffs' Counsel, as set forth in more detail in their Declarations and accompanying exhibits, submitted herewith as Exhibits 1 - 56 to this Declaration:

<b>Ex.</b>	<b>Firm</b>	<b>Total Hours (Inception - June 30, 2013)</b>	<b>Total Lodestar at Current Rates (Inception - June 30, 2013)</b>	<b>Total Expenses (Inception - June 30, 2013)</b>
1	Grant & Eisenhofer P.A.	79.60	\$51,755.00	\$97.38
2	Labaton Sucharow LLP	2,168.60	\$1,348,622.00	\$51,363.36
3	Lieff, Cabraser, Heimann & Bernstein, LLP	1,631.60	\$815,681.00	\$49,656.54
4	Neblett, Beard & Arsenault	1,771.75	\$1,120,588.50	\$52,526.72
5	Weinstein Kitchenoff & Asher LLC	1,642.00	\$989,294.00	\$37,655.21
6	Wolf Haldenstein Adler Freeman & Herz LLP	1,562.90	\$944,710.00	\$50,556.57
7	Ann Miller, LLC	145.30	\$94,445.00	\$20.00
8	Berger & Montague, PC	1,249.95	\$569,940.75	\$57,464.21
9	Chestnut Cambronne PA	175.10	\$101,700.00	\$4,653.06
10	Chimicles & Tikellis LLP	887.30	\$527,405.00	\$7,306.33
11	Climaco, Wilcox, Peca, Tarantino & Garofoli, LPA	1,404.25	\$425,707.50	\$9,572.83
12	Cohen & Malad, LLP	241.50	\$120,368.50	\$1,439.14
13	Cohen, Milstein, Sellers & Toll, PLLC	7.00	\$4,495.00	\$958.31
14	Cross & Simon, LLC	134.60	\$46,763.00	\$220.10
15	Cuneo Gilbert & LaDuca, LLP	36.75	\$21,050.00	\$0.00
16	The DiCello Law Firm	92.00	\$31,393.75	\$3,453.60
17	Dworken & Bernstein Co., L.P.A.	56.80	\$16,022.50	\$1,713.49
18	Edelson & Associates, LLC	28.70	\$19,803.00	\$40.20
19	Fink + Associates Law	50.75	\$32,175.00	\$494.93
20	Foley & Mansfield PLLP	623.10	\$233,285.00	\$32,035.08
21	Fox Rothschild LLP	323.80	\$174,199.00	\$825.77
22	Fruth, Jamison & Elsass, PLLC	31.00	\$7,512.50	\$1,573.92
23	Grossman Roth, P.A. (includes time from Schuckit & Associates, P.C.)	575.90	\$271,003.75	\$32,927.82
24	Gunderson Sharp & Walke, LLP	70.50	\$31,135.00	\$1,044.40
25	Gustafson Gluek PLLC	451.75	\$222,222.50	\$5,774.99
26	Helsper & Mahelke, P.C.	7.50	\$1,425.00	\$0.00
27	James L. Deese Law Firm	0.00	-	\$350.00
28	Katz & Korin, PC	63.20	\$22,102.50	\$350.00
29	Kohn, Swift & Graf, P.C.	70.40	\$29,060.00	\$489.97
30	Kuhlman & Lucas, LLC	73.60	\$25,580.00	\$454.59
31	Larson King, LLP	64.10	\$36,802.50	\$2,355.72
32	Levin, Fishbein, Sedran & Berman	156.00	\$167,312.50	\$820.50
33	Lockridge Grindal Nauen P.L.L.P.	92.50	\$53,143.75	\$8,424.47

<b>Ex.</b>	<b>Firm</b>	<b>Total Hours (Inception - June 30, 2013)</b>	<b>Total Lodestar at Current Rates (Inception - June 30, 2013)</b>	<b>Total Expenses (Inception - June 30, 2013)</b>
34	Mehri & Skalet, PLLC	26.30	\$15,780.00	\$0.00
35	The Miller Law Firm, PC	420.60	\$222,859.00	\$5,675.29
36	Murray & Murray Co. L.P.A.	86.90	\$40,456.75	\$1,435.74
37	Murphy, Collins & Bixenman, P.L.C.	10.30	\$2,060.00	\$500.00
38	Oliver Law Group PC	94.50	\$51,250.00	\$1,818.87
39	Parker Waichman LLP	375.10	\$277,675.00	\$2,174.28
40	Perkins Coie, LLP	328.00	\$179,769.50	\$45,533.78
41	Pinckney, Harris & Weidinger, LLC	128.20	\$50,653.00	\$953.73
42	Prickett, Jones & Elliott, P.A.	27.40	\$11,178.00	\$554.36
43	The Protzman Law Firm	45.30	\$20,385.00	\$423.72
44	Robert D. Greenbaum & Associates, LLC	237.60	\$160,380.00	\$7,504.06
45	Robins, Kaplan, Miller & Ciresi L.L.P.	198.80	\$63,582.50	\$10,257.60
46	Rosenthal, Monhait & Goddess, P.A	107.70	\$47,565.00	\$2,349.05
47	Scott Kalish Co. LLC	2.50	\$1,090.00	\$350.00
48	Seeger Weiss LLP	200.80	\$102,089.00	\$2,572.24
49	Sheller, P.C.	46.00	\$22,756.25	\$354.24
50	The Simon Law Firm, P.C.	89.60	\$33,232.50	\$982.41
51	Siprut PC	79.30	\$32,170.50	\$155.80
52	Starr Austen & Miller LLP	1,393.30	\$496,500.00	\$22,602.78
53	Whitfield Bryson & Mason LLP	59.30	\$14,587.50	\$653.86
54	Wilentz, Goldman & Spitzer, P.A.	920.20	\$571,547.00	\$22,658.61
55	Zausmer, Kaufman, August & Caldwell, P.C.	294.20	\$161,191.00	\$1,007.59
56	Zimmerman Reed, P.L.L.P.	1,415.75	\$463,472.75	\$15,880.62
	<b>Total</b>	<b>22,557.45</b>	<b>\$11,598,933.75</b>	<b>\$563,017.84</b>

77. Appointed Counsel have incurred \$563,017.84 in costs and expenses, including such items as postage, telephone, transportation/meals/lodging, and computer research. These expenses devoted to this case by Plaintiffs' Counsel were all reasonable and necessary to the prosecution of this action.<sup>7</sup>

<sup>7</sup> If the Court determines that Plaintiffs' Counsel be reimbursed only for non-taxable costs, then the total amount of expenses incurred would be \$522,591.55. This figure was calculated by excluding the

78. In addition, no Class member to date has objected to the proposed fee award, even though the Notice was mailed to each potential Class member, published in various consumer magazines (including Parade and USA Weekend), broadcast on television, and posted on the internet.

79. The Notice advised Settlement Class Members that Appointed 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.

80. The Notice further advised that Appointed Counsel will apply to the Court for, and DuPont has agreed not to oppose, an award of up to \$6,500,000.00 in fees and \$500,000.00 in costs, which DuPont has agreed to pay in addition to—not out of—the Settlement Class Members' recoveries.

## **VI. LODESTAR COMPARISON SUPPORTS THE REASONABLENESS OF THE AWARD**

81. Based upon the total lodestar incurred by Plaintiffs' Counsel as set forth above (\$11,598,933.75), the requested fee of \$6.5 million results in a negative (or fractional) multiplier of 0.56 (or 56% of actual lodestar). Lodestar is the reasonable value of the professional services provided by Plaintiffs' Counsel.

82. This negative multiplier is on par with (indeed, is much lower than) fees normally awarded in this District and the Third Circuit, which routinely uphold fee awards where there is a negative multiplier.

83. In addition to the work necessary to obtain final approval and implementation of the settlement, and any appeals related thereof, Appointed Counsel will remain actively involved

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following expenses from Exhibit 2 of Plaintiffs' Counsel's declarations submitted herewith as Exhibits 1 – 56: duplicating, filing fees, service fees, and court reporting service/transcript fees.

in assisting class members and overseeing the settlement for its duration. This additional work likely will entail hundreds of additional hours of attorney and paralegal time.

84. Thus, it is appropriate to award a fee where there is a *negative* multiplier.

**VII. INCENTIVE AWARD IS REASONABLE AND APPROPRIATE**

85. The named Plaintiffs have devoted a significant amount of time, effort and expense in assisting Plaintiffs' Counsel's prosecution of this case for the benefit of the Classes.

86. The named Plaintiffs actively pursued the Class' interests by undertaking the responsibilities attendant upon serving as Class Representatives, including consulting with Plaintiffs' Counsel about the litigation and, in some cases, working alongside experts in evaluating the damage to their property.

87. Accordingly, in recognition of the time and effort that the Class Representatives expended for the Class' benefit, Appointed Counsel request that the class representatives be awarded incentive payments for their service to the class of \$1,500.00 for individual property owners and \$2,500.00 for commercial entities. These amounts will be paid separately by DuPont and will not be taken from the Class' recoveries.

88. These incentive awards are within the range of payments awarded by other courts in this circuit.

89. In addition, no Class members to date have objected to the fact that an incentive award would be requested by Appointed Counsel on behalf of the Class Representatives for their contributions to the Action, which was disclosed in the Notice.



I declare under penalty of perjury under that the foregoing statements are true and correct.

Executed on this 7th day of August 2013 at New York, New York.



GREGORY S. ASCIOLLA