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 OF LAW IN SUPPORT OF THEIR MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR SETTLEMENT CLASS REPRESENTATIVES

FILED: August 7, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES and STATUTES

OTHER

I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Settlement Class Representatives, through Settlement Counsel,[1] respectfully move this Court for an award of attorneys' fees and reimbursement of litigation expenses, as well as incentive awards for the Settlement Class Representatives, pursuant to the class action settlement between E.I. du Pont de Nemours & Company ("DuPont") and the Classes ("Settlement").

II. BACKGROUND

A. Essential Facts and Procedural History

Imprelis®, an herbicide intended to kill unwanted weeds while leaving other vegetation intact, was sold by DuPont beginning in October 2010. Unfortunately, Imprelis® killed more than just weeds; it also killed trees and other non-target vegetation.[2] On August 11, 2011, following an investigation by the United States Environmental Protection Agency ("EPA"), the EPA ordered DuPont "to immediately cease the distribution, sale, use or removal of Imprelis®." At the time of that announcement, over 7,000 adverse incident reports arising out of the application of Imprelis® had been submitted by DuPont to the EPA.

---

[1] The Court appointed Adam J. Levitt of Grant & Eisenhofer P.A.; Richard J. Arsenault of Neblett, Beard & Arsenault; Gregory Asciolla of Labaton Sucharow LLP; Jonathan D. Selbin of Lieff, Cabraser, Heimann & Bernstein, LLP; and Robert S. Kitchenoff of Weinstein Kitchenoff & Asher LLC to serve as Settlement Counsel (Dkt. 160). Prior thereto, Mr. Levitt, Mr. Arsenault, Mr. Selbin and Hollis Salman (later replaced by Mr. Asciolla) were appointed Interim Co-Lead Counsel (Dkt. 45) and Mr. Kitchenoff was appointed Liaison Counsel (Dkt. 40). The term Settlement Counsel, Interim Co-Lead Counsel, and Liaison Counsel are referred to herein as "Appointed Counsel." Appointed Counsel, as well as the other firms that were directed to work on this case by Appointed Counsel, are referred to herein as "Plaintiffs' Counsel." Unless otherwise noted, all capitalized terms in this Memorandum shall have the same meaning as set forth in the Settlement Agreement.

[2] DuPont does not admit liability. This factual recitation is based upon the Corrected Master Class Action Complaint filed by Plaintiffs' Counsel on October 25, 2012 (Dkt. 123) ("Master Complaint").

On September 6, 2011, in response to the damages caused by Imprelis®, DuPont implemented the Imprelis® Claim Resolution Process. The purpose of Imprelis® Claim Resolution Process was to compensate property owners for damages caused by Imprelis®. As set forth in Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Classes, and for Permission to Disseminate Class Notice ("Memo for Preliminary Approval") (Dkt. 118), as well as Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Final Approval of the Class Action Settlement ("Memo for Final Approval") (Dkt. 187), there were a significant number of deficiencies in DuPont's plan. Such deficiencies included, *inter alia*, a too-short warranty on replacement trees; a secret payment schedule for replacement trees; no independent appeal process; and a broad, general release and class action waiver by the injured parties. *See* Memo for Preliminary Approval at 10-16.

On July 14, 2011, the first federal court class action lawsuit was filed against DuPont seeking damages or Imprelis®-related injuries. Many similar lawsuits were filed and, following proceedings before the Judicial Panel on Multidistrict Litigation, the cases were centralized in this Court on October 20, 2011 (Dkt. 1). After fifteen months of litigation and intensive, arms-length negotiations, the parties reached a settlement that provides significant benefits for Class Members beyond the DuPont-designed, Imprelis® Claim Resolution Process. *See, e.g,* Settlement Agreement and Release ("S.A.") (Dkt. 117-2); Memo for Preliminary Approval. Preliminary approval of the Settlement Agreement and the proposed notice plan was granted on February 12, 2013 (Dkt. 160).

B. Plaintiffs' Counsel Have Vigorously Prosecuted This Case

The settlement with DuPont is the product of extensive work by Plaintiffs' Counsel. As of result of their significant effort, examples of which are highlighted below, Plaintiffs' Counsel have achieved significant benefits for potential Class Members. *See generally*, Declaration of Gregory S. Asciolla, attached hereto as Exhibit A.

1. Pre-MDL Activities

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.

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.

2. Discovery

Following transfer of all Imprelis®-related actions to this Court, Plaintiffs' Counsel actively engaged in the discovery process. These crucial efforts included: (i) the exchange and review and documents; (ii) vetting and retention of experts; (iii) a highly technical, scientific deposition; and (iv) negotiating a protective order and an ESI protocol.

By way of example, Plaintiffs' Counsel sought, received, and analyzed over a half-million pages of documents pertaining to the development, marketing, and sale of Imprelis®.

Plaintiffs' Counsel also obtained and reviewed all documents DuPont provided to the EPA, as well as all publicly available information about Imprelis®. The review of these documents was invaluable to Plaintiffs' Counsel in litigating the case and negotiating the Settlement.

Plaintiffs' Counsel retained a panel of seven experts to assist them with the prosecution of this litigation and the negotiation of this settlement. These individuals provided invaluable expertise and assistance to Plaintiffs' Counsel and the Settlement Class in the areas of EPA regulation, herbicide product development, causation, latency, damage valuation, tree replacement, and soil remediation.

Appointed Counsel deposed Jon Claus, DuPont's Global Technical Product Manager. Mr. Claus' testimony provided details regarding, *inter alia*, Imprelis®' potential latency period and biodegradation process. This deposition also assisted Plaintiffs' Counsel, as well as Plaintiffs' panel of experts, in determining how to best approach the litigation and to negotiate the settlement with DuPont.

Plaintiffs' Counsel successfully negotiated a Protective Order governing confidential information (Dkt. 69) and an Order for Preservation of Documents, Electronically Stored Information, and Other Tangible Things (Dkt. 76, Case Management Order No. 2). Summarily stated, these Orders provide for the preservation of documents, identification of custodians and ESI protocols, confidentiality designations, and protocol for challenging confidentiality designations.[3]

[3] This process and these agreements, now entered as Orders of this Court, benefitted all plaintiffs, including those who requested exclusion from the Class, and will facilitate any discovery necessary in follow-on litigation.

3. Vetting of the Imprelis® Claim Resolution Process

The Imprelis® Claim Resolution Process, as originally formulated, began with a site inspection of each property whose owner had expressed an interested in participating in the process. During the inspection either the property owner's lawn care operator (if it was participating in the Imprelis® Claim Resolution Process) or a DuPont team composed of an arborist and an outside administrative representative, would walk the property, examine trees for Imprelis® damage, photograph and measure Imprelis® damaged trees, and fill out a claim form with tree ratings from which DuPont makes a determination whether the damaged trees should be replaced or receive care (including trimming and other treatment). The DuPont team would conduct a second property inspection on a randomly selected sample of the claims submitted by each participating lawn care operator.

During the course of the litigation, one of Plaintiffs' Counsel, accompanied by an independent arborist, attended a representative sample of both types of inspections to evaluate the Imprelis® Claim Resolution Process. Plaintiffs' attorney-arborist teams participated in the inspection of Imprelis®-damaged properties in Pennsylvania, New Jersey, Delaware, Indiana, Michigan, Minnesota, and Wisconsin in order to obtain a first-hand understanding of the inspection process and to ensure that these inspections were being performed in the best interests of the property owners. As a result of these inspections, Appointed Counsel gained vital insight into the Imprelis® Claim Resolution Process and its deficiencies, and then used their insight to negotiate an improved claims process as part of the settlement with DuPont.

4. State Law Claim Memorandum and Master Class Action Complaint

On March 30, 2012, Plaintiffs' Counsel filed their 88-page, nine-count Master Complaint on behalf of a nationwide class and state subclasses of property owners, lawn care operators, and

self-applicators (such as golf courses) whose property was harmed by Imprelis®. The Master Complaint was the product of several months' of effort by Plaintiffs' Counsel, their expert panel, and their clients.

Also informing the Master Complaint was a detailed memorandum (Dkt. 65) submitted by Plaintiffs' Counsel that highlighted the similarities and differences among and between the various states' laws. The memorandum, which was the product of extensive research by Plaintiffs' Counsel, analyzed the laws of Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, and Wisconsin regarding claims for consumer fraud, breach of express and implied warranties, negligence, and strict products liability under theories of failure to warn, design defect, nuisance, and trespass.

5. Settlement Negotiations

The settlement negotiations in this litigation took place over a nine month period, from January 2012 until October 2012. These lengthy negotiations, which were conducted at arms'-length and with the assistance of a mediator, were hard-fought by the parties at every turn.

The parties first met to discuss the possibility of settlement on January 24, 2012, shortly after the appointment of Interim Co-Lead Counsel. Subsequent meetings were held between the parties in February and March 2012 in New York, New York. Magistrate Judge Diane M. Welsh (Ret.) was retained to mediate the settlement, and a series of formal mediation sessions were held with Judge Welsh in April, May, and June 2012. The parties also engaged in a vast number of settlement discussions outside of Judge Welsh's mediation sessions. These "outside" negotiation sessions ranged from formal sessions during which the parties spent hours negotiating particular

documents, to web meetings and hundreds of phone calls and email exchanges aimed at resolving material issues.

After approximately five months of difficult negotiations, on July 7, 2012, the parties executed a Memorandum of Understanding ("MOU") setting forth the essential terms of the yet-to-be-executed settlement agreement. The protracted negotiations continued for another four months, until October 19, 2012, at which time the parties reached final agreement and executed the Settlement Agreement that was preliminarily approved by this Court on February 12, 2013 (Dkt. 160). The material terms of the Settlement Agreement, as well as a discussion of the additional benefits the Settlement Agreement provides to Class Members over and above the Imprelis® Claim Resolution Process, are detailed on pages 7-9 of Plaintiffs' Memo for Final Approval and incorporated herein by reference.

6. Separately Negotiated Attorneys' Fees and Expenses and Incentive Awards to Class Representatives

Following execution of the MOU, and only after finalizing all material terms of the Settlement Agreement (including DuPont's agreement to pay all costs of notice and settlement administration), the parties negotiated Plaintiffs' Counsel's fees, reimbursement of expenses, and incentive awards to Settlement Class Representatives. The fees, expenses, and incentive awards sought by Plaintiffs' Counsel were negotiated with the assistance of Judge Welsh after the material terms of the Settlement Agreement were finalized in order to ensure that there was no conflict between the interests of Plaintiffs' Counsel and the interests of the Class Members. As a result of Judge Welsh's intervention, and as explicitly set forth in the notices sent to potential Class Members, DuPont has agreed to pay attorneys' fees and expenses of up to $7 million ($6.5 million in fees, $500,000 in expenses), and incentive awards in the amount of $1,500 (per

individual property owner) or $2,500 (golf courses, lawn care operators, and other commercial Settlement Class Members). These payments, if approved by the Court, will *not* come out of the compensation to Class Members but, instead, will be paid separately and directly by DuPont.

III. PLAINTIFFS' COUNSEL'S APPLICATION FOR AWARD OF REQUESTED FEES AND REIMBURSEMENT OF EXPENSES WARRANTS APPROVAL

Plaintiffs' Counsel seek Court approval of $6,500,000 in attorneys' fees and $500,000 in reimbursement of expenses in connection with their work on behalf of the Class Members in this litigation. DuPont has agreed to pay these negotiated attorneys' fees and expenses (and incentive awards) independently from, and in addition to, any payments DuPont makes to Class Members pursuant to the Settlement Agreement.

Class Members were given reasonable notice that Plaintiffs' Counsel would be making this request, and Class Members will still have an adequate opportunity to object to this Motion after its filing. The attorneys' fees requested are a fraction of the lodestar, and represent less than 2% of the value of the "common fund" to date. Plaintiffs' Counsel's willingness to go forward with the Settlement does not hinge on either the Court's final approval of the Settlement or the negotiated fee and expense award request.

A. Reasonable Notice of the Requested Fees, Litigation Expenses, and Incentive Awards and An Opportunity to Object Has Been Given to the Class

Federal Rule of Civil Procedure 23(h) provides that "[n]otice of the motion [for an award of attorneys' fees and costs] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). The timing of such a motion is significant:

> Given the requirements of Rule 23(h), and pursuant to the Court's fiduciary responsibilities to the class, the Court issues this Order setting forth a schedule with a deadline for objections to counsel's fee request that falls *after* the filing of the application and the class notice of that deadline for objections and instructions for appropriate corresponding notice to class members, so that the class has an adequate opportunity to review and prepare objections, if any, to class counsel's entire fee motion consistent with Fed. R. Civ. P. 23(h).

August 26, 2012 Order, *In re: Processed Egg Products Antitrust Litig.*, MDL No. 2002, Case No. 08-md-02002 (E.D. Pa.) ("*Eggs*"), Dkt. 727 at n.2.

As set forth below, reasonable notice of Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards for Settlement Class Representatives ("Motion for Fees and Expenses") and an opportunity to object has been given to Class Members.

1. Summary of the Notice Provided

Kinsella Media designed a broad state-of-the art, notice program that ensured Settlement Class members are apprised of their rights. The extensive notice program included direct notice of the Settlement to all those who have contacted DuPont and, more importantly, widespread notice to homeowners through an extensive television, print-media, and Internet campaign. Kinsella Media estimated the notice program would reach 75.9% of homeowners and 73.8% of adults 35 and older nationally, and 80-87% of adults 35 and older in the areas where most Settlement Class Members are likely to be located. These media target audiences were selected by Kinsella Media because they reflect the demographics of the Settlement Class and are measurable in terms of paid media delivery. *See* Declaration of Katherine Kinsella at ¶¶ 18-19, attached to Memo for Final Approval as Exhibit D (Dkt. 187-4).

Pursuant to Order of Court dated February 11, 2013 (Dkt. 160) granting preliminary approval, as modified on March 11, 2013 (Dkt. 166), notices[4] regarding the Settlement were sent to 64,400 potential Class Members on March 22, 2013, with an additional 2,491 notices sent to individuals who contacted DuPont.[5] *See* Dec. of Kimberly K. Ness at ¶ 5, attached to Memo for Final Approval as Exhibit E (Dkt. 187-5); Kinsella Decl. at ¶¶ 8-9. Notice was published in Parade and USA Weekend, two weekly newspaper supplements included in the weekend editions of 1,418 newspapers nationwide and five national consumer magazines. Kinsella Decl. at ¶¶ 12-13. Other components of the notice program included distribution of a multimedia news release, television spots, social media posts, RSS feed, a website, and a call center. *Id.* Further details regarding the notice program and its effectiveness can be found in the Ness and Kinsella Declarations.

The notices expressly notify potential Class Members that Settlement Counsel would be seeking Court approval of (i) attorneys' fees and expenses of up to $7 million, and (ii) incentive awards in the amount of $1,500 (per individual property owner) and $2,500 (per multi-residential or commercial property owner, golf course, or lawn care operator). *See* Long Form Notice for Classes 1 and 3 at ¶ 24 (Dkt. 117-8); Long Form Notice for Class 2 at ¶ 21 (Dkt. 117-9). In sections entitled "How will the lawyers be paid?" the notices provide:

> Class Counsel will ask the Court for attorneys' fees and expenses of up to $7 million to be paid by DuPont. Class Counsel will also

[4] Property owners and self-applicators received one type of long-form notice, lawn care professionals received a different long-form notice.

[5] Consistent with the Class Action Fairness Act, 28 U.S.C. § 1711 *et seq.*, counsel for DuPont caused Rust Consulting, Inc., a national class action notice provider, to send notice of the proposed settlement to the appropriate State and Federal officials on October 29, 2012. Those entities have lodged no objection to the settlement. *See* Ness Decl. at ¶ 4.

> request specials awards (of $1,500 per individual property owner or $2,500 per multi-residential or commercial property owner, golf course, or lawn care operator) for the Class Representatives, who helped the lawyers on behalf of the whole Class. These fees and expenses will *not* come out of compensation to Class Members, either individually or as a whole Class. DuPont will pay these amounts separately, after the Court makes the final decision about appropriate attorneys' fees and expenses.

Id. The notices also explain the process of, and set deadlines for, opting out of the settlement as well as objecting to the settlement. *See generally id.*

2. Timing of Motion for Fees and Expenses

The schedule approved by the Court requires Plaintiffs to file their Motion for Fees and Expenses in advance of the deadline for asserting objections consistent with Rule 23(f). (Dkt. 160 at ¶¶ 9-10 (setting forth relevant portion of schedule).) The Order also explicitly states that among the objections that a Class Member may assert is an objection to "the proposed Fee and Expense Award":

> 9. The parties shall file a Motion for Final Approval of the Settlement and any Fee and Expense Application no later than August 7, 2013;
>
> 10. Any Settlement Class Member may object to the fairness, reasonableness, or adequacy of the proposed Settlement, ***including the proposed Fee and Expense Award***. Each Settlement Class Member who wishes to object to any term of the Agreement must do so by filing a written objection with the Clerk of Court and mailing it to the Parties' respective counsel at the addresses set forth in the Long Form Notice. Any such objection must be filed with the Clerk of Court and received by the Parties' respective counsel no later than the Objection Filing Deadline, which is August 21, 2013.

(Dkt. 160 at ¶ 10 (emphasis added).)[6] Accordingly, pursuant to the Court's Order, Class Members have two weeks after the filing of Plaintiffs' Motion for Fees and Expenses to lodge their objections to Plaintiffs' "proposed Fee and Expense Award." This Motion for Fees and Expenses and supporting papers will be available on the Settlement website.

Two weeks is a sufficient amount of time for Class Members to object to a motion for fees and expenses. *See, e.g., Batmanghelich v. Sirius XM Radio, Inc.*, CV 09-9190, 2011 U.S. Dist. LEXIS 155710, at *5 (C.D. Cal. Sept. 13, 2011) ("Plaintiff's application for attorneys' fees and costs and a Class Representative service payment was filed with the Court and made available for Class Members to review on the settlement website two weeks prior to the deadline for Class Members to file objections to the Settlement, giving Class Members adequate time to review the application and object to the attorneys' fees, costs and/or service payment."). Accordingly, reasonable notice of Plaintiffs' Motion for Fees and Expenses and an opportunity to object has been given to Class Members.

B. The Fee Requested by Plaintiffs' Counsel is Fair and Reasonable

A court may exercise its discretion to award attorneys' fees by applying the lodestar method or percentage-of-recovery method. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 (3d Cir. 2011); *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006). The former method "multiplies the number of hours the class counsel worked on a case by a reasonable hourly billing rate for such services," while the latter "applies a certain percentage to the [settlement] fund." *In re Diet Drugs Antitrust Litig.*, 582 F.3d 524, 540 (3d Cir. 2009) (citations and internal quotations omitted). The lodestar method, although used as a cross-check in percentage-of-recovery cases, is more commonly applied in the first instance to statutory fee-

[6] Plaintiffs' Motion for Fees and Expenses will be available on the settlement website.

shifting cases. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998) (lodestar method "is designed to reward counsel for undertaking socially beneficial litigation in cases where expected relief has a small enough monetary value that percentage-of-recovery method would provide inadequate compensation"). The percentage method is preferred when there is a common fund, *i.e.*, where the attorneys' fees and the award to the class come from the same source. *Lewis v. Smith*, No. 08-3800, 2010 U.S. App. LEXIS 27606, at *24-25 (3d Cir. July 28, 2010); *In re: General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig. ("G.M. Trucks")*, 55 F.3d 768, 820 n.39 (3d Cir. 1995) (the common fund doctrine "provides that a private plaintiff, or plaintiffs' attorney, whose efforts create, discover, increase or preserve a fund to which others have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees").

This case does not present a traditional common fund case. The attorneys' fees (and expenses and incentive awards) are not drawn from a common fund; to the contrary, DuPont has agreed to pay the attorneys' fees and other amounts in addition to whatever it pays Class Members pursuant to the Settlement Agreement. *See, e.g.*, *Drazin v. Horizon Blue Cross Blue Shield of N.J., Inc.*, No. 12-2642, 2013 U.S. App. LEXIS 11830, at *7-8 (3d Cir. June 11, 2013) (NOT PRECEDENTIAL) ("not a common fund case because, under the terms of the Settlement, the defendants, not the class, were required to pay an award of attorneys' fees up to an agreed-upon cap"); *In re Bluetooth Headset Prods. Liab. Litig.*, No. 07-ML-1822, 2012 U.S. Dist. LEXIS 268324, *3 (C.D. Cal. July 31, 2012) ("As the settlement is not a common fund, the Court again concludes that the lodestar method is a more appropriate method of calculating a reasonable fee."); *Ryan v. Am. Inst. of Tech., Inc.*, 2011 U.S. Dist. LEXIS 35190 (D. Ariz. Mar. 21, 2011) (not a common fund case because defendant agreed to pay attorneys' fees on top of

gross settlement amount). In short, this is a claims-made settlement with an indefinite, uncapped total value to Class Members. *Cf. Court Awarded Attorney Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 250-253 (Oct. 8, 1995) (lodestar method may be preferable in actions where relief cannot be reasonably calculated); *G.M. Trucks,* 55 F.3d at 822 (citing Task Force report with approval); *Cooperstock v. Pennwalt Corp*., 820 F. Supp. 921, 926 (E.D. Pa. 1993) (applying the lodestar method after finding that the benefit conferred upon the class plaintiffs was "unquantifiable")).

Based on the foregoing, Plaintiffs' Counsel believe that evaluation of the request for attorneys' fees is appropriately performed under the lodestar method, but nonetheless present an evaluation under both the lodestar and percentage of recovery methodologies. Regardless of the method the Court applies or the specific factors considered, the fundamental requirement is that any fee be fair and reasonable. *In re AT&T Corp. Sec. Litig.*, No. 00-5364, 2005 U.S. Dist. LEXIS 46144, at *29 (D.N.J. Apr. 22, 2005), *aff'd*, 455 F.3d 160 (3d Cir. 2006).

1. The Request for Attorneys' Fees Is Fair and Reasonable Under the Lodestar Method

The lodestar method is "presumptively reasonable." *Planned Parenthood of Cent. New Jersey v. Attorney General of the State of New Jersey*, 297 F.3d 253, 265 n.5 (3d Cir. 2002). Pursuant to this method, the Court initially evaluates (1) the reasonableness of the hourly rate and (2) whether the hours were reasonably expended. *See, e.g, Public Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1185, 1188 (3d Cir. 1985). The lodestar then may be adjusted depending on the following factors:

> (1) The time and labor required; (2) the novelty and difficulty of the questions involved; (3) the requisite legal skill necessary; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the

> fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount at controversy and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Hensley v. Eckerhart, 461 U.S. 424, 430 n. 3 (1983); *Public Interest*, 51 F.3d at 1185 n.8. Not all of these factors need to be considered, but, when considering an adjustment, the most significant factor is the results obtained (*i.e.*, the success of the plaintiffs). *Id.* at 433-34.

Here, Plaintiffs' Counsel's lodestar is $11,598,933.75 (based on 22,557.45 hours), resulting in a fractional multiplier of 0.56 (requested fee award ÷ lodestar).

a. Plaintiffs' Counsel's Hourly Rates Are Reasonable

Plaintiffs' Counsel's hourly rates are reasonable, and have been expressly evaluated and approved by this and other District Courts in other class action matters. *See In re Mercedes-Benz Tele Aid Contract Litig.*, MDL No. 1914, 2011 U.S. Dist. LEXIS 101995, at *19 (D.N.J. Sept. 9, 2011) ("These rates reflect the experience and skill of the lawyers involved and are comparable to rates the courts have approved in similar cases in other metropolitan areas.").

In assessing the reasonableness of an attorney's hourly rate, courts consider the prevailing market rate in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Barkouras v. Hecker*, Civ. Action No. 06-366, 2007 U.S. Dist. LEXIS 44615, at *12 (D.N.J. June 20, 2007) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984)). Courts look to the forum in which the District is located to determine the hourly rates that should apply. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 704 (3d Cir. 2005).

Here, Plaintiffs' Counsel's customary rates, which were used for purposes of calculating lodestar here, have been approved in this District and elsewhere: *See, e.g.*, Exhibits A-D to

Memorandum in Support of Designation of Richard J. Arsenault, Adam J. Levitt, Hollis L. Salzman, and Jonathan D. Selbin as Interim Lead Counsel Pursuant to Fed. R. Civ. P. 23(g) (identifying settled cases in this and other jurisdictions) (Dkt. 46-49); *see also Eggs*, No. 08-md-2002, 2012 U.S. Dist. LEXIS 160764 (E.D. Pa. Nov. 9, 2012) (approving Weinstein Kitchenoff application for fees); *Nichols v. Smithkline Beecham Corp.*, 2005 U.S. Dist. LEXIS 7061 (E.D. Pa. Apr. 22, 2005) (approving Labaton application for fees (formerly Goodkind Labaton Rudoff & Sucharow LLP)); *In re Flonase Antitrust Litig.*, 2013 U.S. Dist. LEXIS 85926 (E.D. Pa. June 19, 2013) (approving Grant & Eisenhofer applications for fees); *McLennan v. LG Elecs. USA, Inc.,* No. 10cv03604, 2012 U.S. Dist. LEXIS 27703 (D.N.J. Mar. 2, 2012) (approving Lieff Cabraser application); *In re Genetically Modified Rice Litig.*, 4:06MD1811 CDP, 2012 WL 6085141 (E.D. Mo. Dec. 6, 2012) (approving Neblett Beard fees).

b. The Number of Hours Plaintiffs' Counsel Worked Is Reasonable

The number of hours worked by Plaintiffs' Counsel is reasonable. Appointed Counsel have made every effort to prevent the duplication of work or inefficiencies that might have resulted from having multiple firms on the case, and have sought to restrict time submissions to those efforts that have substantially advanced the litigation.

By way of example, Appointed Counsel set forth the criteria for the billing of time (and expenses) by Plaintiffs' Counsel at the inception of this litigation. Time has been billed to one of eight categories: (1) Investigations (factual research); (2) Discovery; (3) Pleadings, Briefs (incl.

legal research); (4) Court Appearances and Preparation; (5) Settlement; (6) Class Certification; and (7) Trial & Preparation; and (8) Case Management and Litigation Strategy.[7]

In accordance with these criteria, Plaintiffs' Counsel have submitted their reports to Labaton Sucharow LLP. Mr. Asciolla, as an Appointed Counsel, has prepared a summary report ("Summary Report") of each firm's cumulative time, lodestar and expenses from inception through June 30, 2013. Asciolla Decl. ¶ 76. The Summary Report shows, *inter alia*, that Plaintiffs' Counsel spent 22,557.45 hours litigating this case.[8]

Each firm that has worked on this litigation has submitted a declaration and individual summary chart setting forth its fees, identifying the individuals who worked on this litigation (including usual customary historical rates and length of experience), and describing each firm's contributions to this litigation. *See generally*, Declarations of Plaintiffs' Counsel, attached to the Asciolla Decl. as Exhibits 1-56. Generally speaking, however, Plaintiffs' Counsel, engaged in substantial discovery, including the review of over a half-million pages of documents; retained and consulted with a panel of experts; negotiated an ESI protocol and protective order; vetted the Imprelis® Claim Resolution Process; researched and drafted the Master Complaint, as well as submitted a detailed analysis of the claims; battled through contentious settlement negotiations; and arranged for an extensive notice program to alert Class Members to the Settlement. The fact that Plaintiffs' Counsel could have spent those attorney hours, and those out-of-pocket

[7] As part of time and expense reporting obligations in this case, Plaintiffs' Counsel were directed to bill their expenses to the following categories: Expert Fees; Messengers; Filing Fees; Service Fees; Computer Research; Disclosure/Docutrieval; Federal Express; Contribution to Litigation Fund; Research Items; and Court Reporter Service/Transcript Fees.

[8] Where defendants agree to pay fees and costs separately from the benefits, the Court the Court "may rely on summaries submitted by the attorneys and need not review actual billing records." *Rite Aid*, 396 F.3d at 306-07.

expenditures, litigating other matters further supports the fee request. *See Lazy Oil Co. v. Witco Corp.*, 95 F. Supp.2d 290, 323 (W.D. Pa. 1997) ("In addition to noting the vast amount of work which was required in prosecuting this case, we also note Class Counsels' representation that their involvement in this litigation required them to abstain from working on other matters.").

Moreover, Appointed Counsel's responsibilities will not end with final approval. Appointed Counsel also have ongoing obligations under the Settlement Agreement, including: monitoring the claims process and, if necessary, auditing a sample of the claims processed; choosing an arborist for the appeal panel and overseeing the appeal process; and with regard to Class 1 and Class 3 Members, making reasonable efforts to obtain proof of whether Imprelis was used on the Class Member's property in the event that DuPont finds the Applicator's spray records or declaration insufficient. *See generally* Settlement Agreement at III.C.1. None of this time will be compensated, and it is not accounted for in the materials submitted to the Court.

Finally, not only were Plaintiffs' Counsel's hours reasonable, they served an important public purpose as well: The extremely robust notice campaign significantly increased awareness of the problems caused by the application of Imprelis® and alerted a substantial proportion of Class Members to the Settlement. *See* Kinsella Decl. at ¶¶ 17-19, 28.

c. No Adjustment to the Negotiated Fee Is Warranted

No adjustment to the negotiated fee is warranted. [9] First, there is no question that Plaintiffs' Counsel have obtained a positive result for Class Members with this Settlement. In particular, Plaintiffs' Counsel dramatically improved the benefits which Class Members will now receive (and have already begun receiving) under the Settlement Agreement through their hard

[9] Because the fee was negotiated and is being paid by DuPont, no upward adjustment can be made.

work. Such benefits include (some of which are dependent upon the particular Class): extensions of the applicable warranty; public pricing schedules for replacement trees; the ability of certain Class Members to use settlement funds to purchase trees or simply keep such funds; independent appeal panel; limited release of liability (excluding environmental and personal injury claims, and lost profits or business interruption claims); broad notice program; reimbursement for out-of-pocket expenses and time spent remediating and examining Imprelis® damage. *See* Memo for Final App. at 7-9.

Second, because of the contingent nature of this action, there was always a risk of nonpayment. As this District has noted, attorneys who undertake representation of a class are "unable to mitigate any of the risk of nonpayment; instead, they [a]re required to spend or incur obligations to effectively litigate th[e] case." *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 423 (E.D. Pa. 2010). *See also In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 516 (W.D. Pa. 2003) ("Aside from investing their time, counsel had to front copious sums of money…. Thus, the risks that counsel incurred in prosecuting this case were substantial and further support the requested fee award."). Here the risk of non-payment remains high because (appropriately so) the attorneys' fees and expenses were negotiated after, and were not contingent upon, the parties reaching an agreement. If the Settlement is not approved, it will have almost no effect on Class Members, but it would negate DuPont's obligation to pay attorneys' fees.

Third, this case was also highly complex, and an understanding of the science behind the product and its interaction with trees and other vegetation was paramount and implicated novel and difficult questions. Plaintiffs' Counsel retained a panel of experts in a variety of disciplines to assist them in understanding and evaluating Imprelis®, its effects, and its impact in order to

properly manage this litigation, as well as to evaluate the Imprelis® Claim Resolution Process and, ultimately, negotiate, draft, and finalize the Settlement Agreement. Plaintiffs' Counsel also found it necessary to depose a DuPont employee relating to, *inter alia*, Imprelis®' potential latency period and biodegradation process.

Finally, the reputation, experience, and ability of Plaintiffs' Counsel were essential to the success in this litigation. Plaintiffs' Counsel, and particularly Appointed Counsel, are highly skilled in prosecuting consumer class actions and have demonstrated expertise in successfully managing complex MDL litigation. *See, e.g.,* Motion and Memorandum in Support of Designation of Richard J. Arsenault, Adam J. Levitt, Hollis L. Salzman, and Jonathan D. Selbin as Interim Lead Counsel (Dkt. 45-51); Mem. Op. Granting Prelim. App. ("Interim Co-Lead Counsel are well experienced and qualified…") (Dkt. 159). As a result of Plaintiffs' Counsel's skills and efforts, Class Members will receive substantially more benefits from this Settlement Agreement than they would have received under the original formulation of the Imprelis® Claim Resolution Process proposed by DuPont. *See* Memo for Final Approval at 7-9 (cataloging the additional benefits provided by Settlement Agreement over Imprelis® Claim Resolution Process).

The high "quality of opposing counsel" also supports the request for attorneys' fees. *See In re Am. Investors Life Ins. Co. Marketing and Sales Practices Litig.*, 263 F.R.D. 226, 224 (E.D. Pa 2009) (where counsel was skilled in litigating class actions, defendants were represented by a leading law firm, and the case was vigorously litigated, fee request was appropriate). Here, DuPont is represented by Bartlit Beck Herman Palenchar & Schott, LLP, Crowell & Moring LLP, and Ballard Spahr LLP, three nationally regarded law firms. The litigation and the negotiation of the MOU and Settlement Agreement were hard fought by both parties.

d. Plaintiffs' Counsel's Negotiated Fee Results in a Fractional Multiplier

The fee requested by Plaintiffs' Counsel has a *fractional* multiplier of 0.56. It is certainly appropriate to award a fee where there is a fractional multiplier (sometimes referred to as "negative" when the value is less than 1). *See In re Flonase Antitrust Litig.*, Civ. Act. No. 08-3301, 2013 U.S. Dist. LEXIS 85926, at *41 (E.D. Pa. June 19, 2013) ("A negative multiplier strongly underscores the risk counsel accepted to prosecute this case to trial."); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 284-85 (3d Cir. 2009) (affirming fee award and noting that lodestar multiplier was less than one).

An attorney fee award representing a multiplier of less than 1.0 is well within the range of awards approved by the Third Circuit. *See, e.g.*, *Sullivan,* 667 F.3d at 333 (affirming lodestar multiplier of approximately 3.3); *Milliron v T-Mobile USA, Inc.,* 423 Fed. Appx. 131, 135 (3d Cir. 2011) (affirming award representing multiplier of 2.21 and commenting that, "[a]lthough the lodestar multiplier need not fall within any pre-defined range, we have approved a multiplier of 2.99 in a relatively simple case") (internal citations omitted); *In re Cendant Corp. Prides Litig.* (*"Cendant Prides"*), 243 F.3d 722, 742 (3d Cir. 2001) (approving a suggested multiplier of three and stating that multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied"); *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, No. 03-cv-4372, 2009 U.S. Dist. LEXIS 112989, at *28-29 (D.N.J. Dec. 4, 2009) (lodestar ratio of 0.35 supported court's reasonableness analysis and finding that plaintiffs' fee request fair, adequate and reasonable); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2008 U.S. Dist. LEXIS 569, at *18-19 (E.D. Pa. Jan. 3, 2008) (finding the requested fee percent fair and reasonable when lodestar multiplier was 0.81).

2. Alternatively, the Request For Attorneys' Fees Is Fair and Reasonable Under the Percentage-of-Recovery Method

The Third Circuit has relied upon the percentage-of-recovery method in cases where a traditional settlement fund does not exist but a reasonable valuation of the settlement can still be made. *See, e.g., Prudential*, 148 F.3d at 333-334 (3d Cir. 1998); *G.M. Trucks*, 55 F.3d at 822. The percentage-of-recovery method has also been used in cases where the attorneys' fees are independently negotiated and paid for by the defendant and not out of a common fund. *G.M. Trucks*, 55 F.3d at 820-822 (attorneys' fees paid by defendant independently from a settlement fund create a constructive common fund); *Hall v. Best Buy Co. Inc.*, 274 F.R.D. 154, 172 (E.D. Pa. 2011) (same).

In determining whether the requested fee is appropriate under the percentage-of-recovery method, courts in this Circuit typically consider the following factors:

> (1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; (7) the awards in similar cases; (8) the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (10) any "innovative" terms of settlement.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (factors 1-7); *Prudential*, 148 F.3d at 340 (factors 8-10).

Like the lodestar factors, the percentage-of-recovery factors "need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest."

Id. Moreover, many of the factors appropriate to an analysis of a requested fee under the percentage-of-recovery method have already been addressed in the context of the lodestar analysis. [10] Only non-duplicative, relevant factors are addressed below.

a. Size of the Fund Created and Number of Persons Benefitted

As suggested above, this case does not involve a "traditional" settlement fund; *i.e.*, the Settlement Agreement does not provide for a specific dollar amount to be paid by DuPont to resolve the litigation. Instead, DuPont has agreed to pay all valid claims; the parties have separately negotiated amounts to be paid for attorneys' fees, expenses, and incentive awards; and DuPont has agreed to pay all costs of notice and administration associated with the claims process. However, for purposes of analyzing the propriety of the requested and negotiated attorneys' fee under the percentage-of-recovery method, an interim constructive common fund using these values could be tentatively calculated.

To date, DuPont has paid to or on behalf of 24,524 Class Members a total of $377,706,351.64. *See* Declaration of Anthony Reid, attached to Plaintiffs' Memo for Final Approval as Exhibit C (Dkt. 187-3). DuPont has also agreed to pay $7,000,000 in attorneys' fees and expenses above whatever it pays to Class Members, $6,500,000 of which has been allocated by the parties to attorneys' fees and $500,000 to expenses. Incentive awards, if approved, will total $63,000. Notice and administrative costs paid by DuPont to date, are at least $3,471,164.[11]

[10] For example, *Gunter/Prudential* factors 3-6 and 8 are substantially addressed in Section III.B.1. above.

[11] DuPont has paid Kinsella Media, LLC and Rust Consulting, Inc. $3,471,164 for notice and administrative costs. Other entities have been retained by DuPont that are also involved in the administration of the claims process, but Plaintiffs do not know the amounts such entities have (or will be) paid.

Added together, the total value of the uncapped settlement fund to date is $ 388,240,515.64. The requested attorneys' fee of $6.5 million is well less than 2% of this amount and will continue to diminish as DuPont pays more claims and administration costs. As set forth herein and in other materials filed with the Court, this Settlement provides an excellent recovery for Class Members in light of the complexity, duration, and expense of ongoing litigation and the risk of establishing liability and damages. *See, e.g.*, Memo for Final App. at 12-25.

b. Absence of Substantial Objections

The deadline for objecting to the Settlement Agreement, including the proposed Fee and Expense Award, is August 21, 2013 (Dkt. 160). To date, 37,824 claims have been filed (Reid Decl. at ¶ 5a), but only two objections, both which are unrelated to attorneys' fees, expenses or incentive awards, have been filed with the Court (Dkt. 178, 182), reflecting the overwhelming approval of potential Class Members of the Settlement Agreement.[12] *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005) (finding that the district court did not abuse its discretion in finding the absence of substantial objections by class members to the fee requests weighed in favor of approving the fee request); *Lake Forest Partners, L.P. v. Sprint Commcn's Co.*, Case No. 12-0999, 2013 U.S. Dist. LEXIS 84681, at *12 (W.D. Pa. June 17, 2013) ("The absence of objections by class members to Settlement Counsel's fee-and-expense request further supports finding it reasonable."). Accordingly, this factor weighs in favor of Plaintiffs' request for payment.

[12] Three additional objections have been received by Appointed Counsel, but those objections were not filed with the Court, and they are unrelated to attorneys' fees, expenses or incentive awards.

c. Awards in Similar Cases

Because of the size of the fund in this case, and the expectation that the fund will grow as DuPont continues to process claims, the fund can be appropriately characterized as a "mega-fund." *See Rent-Way*, 305 F. Supp. 2d at 514 ("Courts and legal commentators seem to define 'mega funds' as those consisting of at least $ 50 to $ 100 million."). In evaluating the propriety of an award in a mega-fund case, it is appropriate to look at cases which have comparably-sized settlement funds, and not necessarily comparable subject matter. *See, e.g., Cendant Prides*, 243 F.3d at 737; *see also In re Linerboard Antitrust Litig.*, MDL No. 1261, 2004 U.S. Dist. LEXIS 10532, *42-43 (E.D. Pa. June 2, 2004) (collecting cases in this Circuit awarding attorneys' fees in an amount equal to approximately 25-30% of the settlement fund in class actions of a similar size, even if not similar subject matter).[13]

To date, DuPont has expended $388,240,515.64 on resolving Imprelis® damage claims. In cases with comparably-sized funds, courts have awarded attorneys' fees in the 5% range. *See, e.g.*, *In re Auction Houses Antitrust Litig.*, No. 00-648, 2001 U.S. Dist. LEXIS 1713 (S.D.N.Y. Feb. 22, 2001) ($512 million fund, 5.2% fee award), *aff'd*, No. 01-7626, 2002 U.S. App. LEXIS 15327 (2d Cir. July 30, 2002); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993) ($305 million fund, 5.25% fee award); *see also Cendant Prides*, 243 F.3d at 737 (chart of mega-fund settlements). And, although this is not quite a super-mega-fund case (settlement fund in excess of $1 billion), in such extreme cases the courts have not awarded plaintiffs' counsel less than 4.8% of the settlement fund ($1.045 billion), and have awarded as much as

[13] In mega-fund-type cases, factors such as the size of the fund, the skill and efficiency of the attorneys, and awards in similar cases should be given less weight. *Prudential*, 148 F.3d at 289; *In re Daimlerchrysler AG Secs. Litig.*, 2004 U.S. Dist. LEXIS 31774, at 53 (D. Del. Jan. 28, 2004). Nonetheless, Plaintiffs' Counsel have endeavored to address each factor herein.

15% in a similarly-sized case. *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 180561, *17-18 (E.D. Pa. Oct. 19, 2012) (identifying super-mega-fund settlements in approximately the $1 billion to $6 billion range and corresponding attorneys' fees).

Here, the percentage of recovery is less than 2% of the fund, less than comparable mega-fund settlements and less than super-mega-fund settlements. The percentage of recovery for Plaintiffs' Counsel will only continue to decrease as DuPont continues to pay claims. Accordingly, the $6.5 million attorneys' fee sought by Plaintiffs' Counsel is well within the range of reasonableness.

d. Plaintiffs' Counsel's Negotiated Fee Is Lower Than the Standard Contingent Fee Agreement

Contingency fees of 30% or higher are standard in private contingency fee litigation. *See, e.g., In re Merck & Co. Vytorin ERISA Litig.*, No. 08-285, 2010 U.S. Dist. LEXIS 12344, at *41042 (D.N.J. Feb. 9, 2010) ("the 33.33% fee award requested reflects commonly negotiated fees in the private marketplace"); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (ED. Pa. 2000) ("[I]n private contingency fee cases, particularly tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery."); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085, 2005 U.S. Dist. LEXIS 27013, at *46 (D.N.J. Nov. 9, 2005) ("[a]ttorneys regularly contract for contingent fees between 30% and 40% with their clients in non-class, commercial litigation"); *In re U.S. Bioscience Sec. Litig.*, 155 F.R.D. 116, 119 (E.D. Pa. 1994) (Special Master's report examining practice by attorneys in this district who reported negotiating agreements between 30-40%).

Here, 30% of $388,240,515.64 (calculable fund to date) is $116,472,154.69. Plaintiffs' Counsel, subject to Court approval, will only receive $6,500,000 in attorneys' fees, less than 2% of the settlement fund.

e. Innovative Terms of the Settlement Favor an Award of Fees

The Settlement Agreement contains several innovative terms. First, Class Members do not need to wait to get paid until after final approval (if granted). DuPont is processing and paying claims while final approval is pending. Second, even if the Settlement is not finally approved, Class Members will still get all the benefits that Plaintiffs' Counsel have negotiated for them, except for the right to appeal DuPont's resolution of a claim to an independent arborist appeal. Third, the settlement is uncapped. DuPont has agreed to pay all timely-filed valid claims, as well as attorneys' fees and expenses as negotiated (if approved), incentive awards (if approved) and costs of notice and administration.

Accordingly, this factor weighs in favor of approval of the Settlement.

C. The Request for Reimbursement of Litigation Expenses Incurred Is Reasonable

Plaintiffs' Counsel have incurred expenses of $563,017.84 for which they have not been reimbursed. *See* Asciolla Decl ¶ 76, Summary Chart (summary of expenses for all firms); Exs. 1-56, Firm Declarations (setting forth non-taxable expenses by firm). Appointed Counsel also contributed to a common expense litigation fund ("Litigation Fund") to pay expert fees, mediator fees, and certain other limited fees. Appointed Counsel's reconciliation of the Litigation Fund is Exhibit 3 to the Declaration of Robert S. Kitchenoff (attached to the Asciolla declaration as Exhibit 5). These expenses were reasonable and necessary to the litigation of this case and arise predominantly out of expert, discovery, and settlement-related activities.

Subject to Court approval, DuPont has agreed to pay, and Plaintiffs' Counsel has agreed to accept, $500,000 in satisfaction of their expenses. For the reasons set forth below, Plaintiffs' Counsel's request for reimbursement of litigation expenses is reasonable.

1. An Expense Award That Is Separately Negotiated and Paid in Addition to Settlement Benefits Afforded to the Class Is Entitled to a Presumption of Reasonableness.

Courts give substantial deference to the reasonableness of awards that, like here, are independently negotiated and do not impact the relief afforded to the class, as opposed to awards that are drawn from common funds. *See, e.g.*, *In Re: Zurn Pex Plumbing Products Liability Litig.,* No. 08-MDL-1958, 2013 U.S. Dist. LEXIS 27155, at *10 (D. Minn. February 27, 2013) ("The fact that fees and expenses will be paid separate from, and in addition to the class members' benefits, is an important consideration."); S*nell v. Allianz Life Ins. Co. of N. Am.*, No. 97-2784, 2000 U.S. Dist. LEXIS 13611, 2000 WL 1336640, at *19 (D. Minn. Sept. 8, 2000) (a court's "acceptance of the fee request is facilitated by the fact that the fee amount was independently negotiated by the settling parties, and comes from a source that does not impact upon the total settlement fund that is available to the Class").

Here, DuPont has agreed to reimburse Plaintiffs' Counsel for expenses in the amount of $500,000, and Plaintiffs' Counsel has agreed to accept that amount as payment in full of their expenses, even though their actual expenses exceed $500,000. The reimbursement amount was separately negotiated from the material terms of the Settlement Agreement and, like the attorneys' fees, is not contingent upon the Court's final approval of the Settlement or the requested expense payment, and is in addition to the relief the Class Members will receive under the Settlement Agreement. Thus, the reasonableness of Plaintiffs' Counsel's request may be

presumed at the outset of the Court's analysis because the Class Members' benefits under the Settlement Agreement are not affected by the reimbursement of expenses.

2. Federal Rule of Civil Procedure 23(h) Authorizes Reimbursement of Non-Taxable Costs

Federal Rule of Civil Procedure 54(d) governs the recovery of costs in the event of a judgment. Rule 54(d)(1) permits the clerk of court to tax certain litigation costs against a losing party without the need for a motion. The permitted taxable costs are set forth in 28 U.S.C. § 1920.[14] Rule 54(d)(2) provides that claims for nontaxable costs must be brought by motion. In other words, an award of nontaxable costs is not automatic where a case has resulted in an adverse judgment against a party.

Rule 54(d)(2) "is not addressed to the particular concerns of class actions." Fed. R. Civ. P. 23, Comments to 2003 Amendments, Subdivision (h). Rule 23(h), however, is so concerned, and provides in relevant part:

> In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.

Fed. R. Civ. P. 23(h). The Comments to the 2003 Amendment elucidate the Rule's purpose:

> This subdivision does not undertake to create new grounds for an award of attorneys fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all

[14] Taxable costs under this provision are limited to: (1) fees of the clerk and marshal; (2) fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) docket fees under section 1923 of this title; (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title. *Race Tires of Am., Inc. v. Hoosier Racing Tire Corp.,* 674 F. 3d 158 at 163, 164 (3d Cir. 2012).

> awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel.
>
> ***
>
> This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs.

Fed. R. Civ. P. 23, Comments to 2003 Amendments, Subdivision (h). Thus, the purpose of Rule 23(h) is simply to *permit* the court (in its discretion) to award nontaxable costs, not to *preclude* an award of taxable costs. *But see Eggs*, 2012 U.S. Dist. LEXIS 160764, at *19-20 (a common fund case, this Court concluded that only non-taxable costs of litigation, 28 U.S.C. § 1920, may be awarded to Plaintiffs' Counsel).

Rule 23(h) is meant to permit settling parties to shift any or all of their litigation costs, including their nontaxable costs, to a party that agrees to pay for them (subject to the Court's reasonableness evaluation). If Rule 23(h) is interpreted to the contrary, as it was in *Eggs*, then the Rule essentially takes away a remedy from a settling party that a non-settling party would have available to it.[15] Such an interpretation in a case such as this, where not only did DuPont agree to reimburse Plaintiffs' Counsel for $500,000 in expenses, but DuPont also agreed to pay that money over and above what the Class Members are receiving under the settlement agreement, is particularly problematic.

[15] If the Court determines that Plaintiffs' Counsel may only be reimbursed for non-taxable costs, even though the expenses in this case are not drawn from a common fund but separately paid by DuPont, then the total amount of non-taxable expenses for which they have not been reimbursed is $522,591.55. This figure was calculated by excluding the following categories of expenses from Exhibit 2 of the Counsel Declarations submitted herewith as Exhibits 1 – 56: duplicating; filing fees; service fees; and court reporting service/transcript fees. *See* Asciolla Decl. at ¶ 77 n.7. Whether or not the reimbursement is limited to non-taxable costs, the requested expense award is less than the amount of Plaintiffs' Counsel's unreimbursed expenses.

Here, there is nothing in the Settlement Agreement that would preclude Plaintiffs' Counsel from seeking reimbursement of both taxable and nontaxable costs that it reasonably incurred in connection with this litigation. In fact, numerous courts since the enactment of Rule 23(h) have routinely awarded class counsel all their costs, without distinguishing between their taxable or nontaxable nature, in cases where the reimbursement did not reduce any benefit to the class. *See, e.g.*, *Shames v. Hertz Corp.*, No. 07-CV-2174, 2012 U.S. Dist. LEXIS 158577, at *70-71 (S.D. Cal. Nov. 5, 2012) ("class counsels' out-of-pocket costs were reasonably incurred in connection with the prosecution of this litigation, were advanced by class counsel for the benefit of the Class, *and shall be reimbursed in full* in the amount requested"); *Johansson-Dohrmann v. CBR Sys.*, No. 12-cv-1115, 2013 U.S. Dist. LEXIS 103863, at *31-32 (S.D. Cal. July 24, 2013) (where reimbursement of costs was to be paid directly by defendant and would not reduce the funds available to the class, the court concluded that class counsel's costs were reasonably incurred in connection with the prosecution of the litigation, "*and should be reimbursed in full in the amount requested*"); *Fleury v. Richemont North America, Inc.*, No. C-05-4525, 2008 U.S. Dist. LEXIS 112459, at *22 n.5 (N.D. Cal. Aug. 6, 2008) (permitting plaintiffs' counsel to shift its expert costs, which were barred by statute, to the defendant because plaintiffs' counsel were seeking reimbursement pursuant to the settlement agreement, and not a statute).

Accordingly, Plaintiffs' Counsel's requested reimbursement is reasonable.

IV. MODEST INCENTIVE AWARDS FOR THE SETTLEMENT CLASS REPRESENTATIVES ARE APPROPRIATE

Incentive awards may be provided to class representatives as a reward for efforts that benefit the class.[16] *See Chakejian v. Equifax Info. Servs., LLC*, 275 F.R.D. 201, 220 (E.D. Pa. 2011). In evaluating the appropriateness of an award, courts consider (i) the financial, reputational, and personal risks to the plaintiff; (ii) the degree of plaintiffs' litigation responsibilities; (iii) the length of litigation; and (iv) the degree to which the plaintiffs benefitted as class members. *Id.*

Plaintiffs' Counsel request that 22 individual property owners each receive an incentive award of $1,500, and 12 multi-residential or commercial property owners, golf courses, and lawn care operators each receive an incentive award of $2,500; in total, $63,000. These modest awards are well-deserved, as these Class Representatives assisted in the investigation, preparation and prosecution of this case, took time away from their personal lives and their businesses to collect documents for production; undergo interviews by Appointment Counsel; made their property available for at least one (and sometimes several) property inspections; assisted their counsel in drafting the original complaint; reviewed and approved the terms of the Settlement on behalf of Class Members; and consulted with Plaintiffs' Counsel on an as-needed basis during the litigation. No objections to these awards have been received.

The modest incentive awards requested by Plaintiffs' Counsel for Settlement Class Representatives are within the acceptable range of payments awarded by courts for class

[16] No class representative was promised an incentive award. *See* Class Representative Declarations attached to Memo for Final Approval as Exhibit H (Dkt 187-8, 187-9, and 187-10).

representatives.[17] *See, e.g.*, *Hall*, 274 F.R.D. at 173-174 (approving incentive award of $5,000 per named plaintiff); *In re CertainTeed Corp. Roofing Shingle Prods. Liab. Litig.*, 269 F.R.D. 468, 476 (E.D. Pa. 2010) ("If the named plaintiff was deposed, the named plaintiff's incentive payment will be $5,000; if the named plaintiff was not deposed, the named plaintiff's incentive payment will be $2,500."); *Beckman*, 751 F. Supp. 525, 535 (E.D. Pa. 1990) (approving $ 5,000 awards for nine representatives in case involving more than 22,000 claimants and a settlement of $ 22 million); *Alexander v. Wash. Mut., Inc.*, No. 07-4426, 2012 U.S. Dist. LEXIS 171611 (E.D. Pa. Dec. 4, 2012) (finding $2,500 incentive award to be appropriate where no objections received and $4 million settlement).

Finally, the incentive awards, like the attorneys' fees and expenses, were negotiated *after* the materials terms of the Settlement had been finalized. Also like the attorneys' fees and expenses, DuPont has agreed to pay the incentive awards (subject to Court approval) over and above what Class Members receive under the Settlement Agreement.

V. SUPPLEMENTAL INFORMATION FOR CONSIDERATION

In *Eggs*, this Court issued an Order dated July 18, 2012 (Dkt. 704) seeking supplemental information regarding plaintiffs' motion for an award of fees and for reimbursement of expenses. A copy of this Order is attached hereto as Exhibit B. Although the majority of the information that was sought by this Court in *Eggs* is already covered by Plaintiffs' Counsel's analysis of the

[17] A 2006 study indicates that the median incentive award for class representatives was $4,000 per representative. Theodore Eisenberg & Geoffrey P. Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study," 53 *UCLA L. Rev.* 1303, 1308 (2006), cited in *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 535 (E.D. Pa. 1990). Here, Plaintiffs' Counsel proposes that Settlement Class Representatives receive considerable less than the median amount.

Gunter and *Prudential* factors herein, the additional information sought by this Court in *Eggs* is addressed below.

A. Management, Auditing and Quality Control Measures Concerning Time, Expenses, and Costs

Appointed Counsel has sought to manage time and expenses in this litigation in a systematic and efficient manner. *See Eggs*, Dkt. 704 at ¶ 2h (auditing and control measures concerning time, expenses, and costs), ¶ 2i (efforts to manage, minimize or cap expenses and costs).

Since the inception of this litigation until the execution of the Settlement Agreement, weekly calls have been held to divide work among Appointed Counsel, to delegate assignments to non-lead counsel, to monitor the activities of both Appointed Counsel and non-lead counsel working under the supervision of Appointed Counsel, and to approve larger expenses and costs (in advance of incurring the expense or cost). Such measures minimize duplication and provide a check on the work being done as well as the expenses and costs being incurred.

Time, expenses, and costs have been carefully monitored throughout the litigation. As set forth above, Plaintiffs' Counsel have been required to submit time and expenses on a monthly basis to Appointed Counsel. These monthly reports are reviewed to ensure that they reflect the work delegated by Appointed Counsel, and that that hours and related expenses are proportionate to the task. Plaintiffs' Counsel were advised that time and expenses not authorized by Appointed Counsel, or not found to provide some benefit to the Class Members, will not be reimbursed.

B. Agreements Among Counsel Regarding Fees, Expenses, and Budgeting

In *Eggs*, the Court sought information regarding the following:

> Any understandings or agreements, including any informal policies, reached with or among counsel concerning the time,

> amount, or rate for calculating fees; any budget(s) set for the litigation; any standards concerning expenses incurred; or other terms relating to fees and expenses.

Eggs, Dkt. 704 at ¶ 2g; *see also* ¶ 2m (Section C, below).

There was an understanding and agreement among Appointed Counsel, which was communicated to Plaintiffs' Counsel, that all fees and expenses billed in this litigation were to be reasonable and necessary to the advancement of the Class Members' interests. In addition, Plaintiffs' Counsel were directed to bill their time, and the time of any non-attorneys working at their direction, at their usual and customary, historical hourly rates in effect at the time the work was performed. Consistent with the practice in *Eggs*, Appointed Counsel seek leave to file *in camera* herewith a document containing information regarding agreements related to referral arrangements, or any fee or cost sharing among Plaintiffs' Counsel ("Private Agreements Chart").

Only Appointed Counsel contributed to a Litigation Fund. These funds were used to pay expert fees, mediator fees, and certain other limited fees.

No budget was set for the litigation.

C. Agreements Among Counsel, or Between Counsel and Clients, Regarding the Motion for Fees and Expenses, Including Incentive Awards

In *Eggs,* the Court inquired as to the existence of any agreements relating to counsel's motion for fees and expenses, including incentive awards. *See Eggs*, Dkt. 704 at ¶ 2m; *see also* ¶ 2g. To the extent that there is an agreement among counsel that impacts fees and expenses, or between counsel and clients that impacts fees and expenses (*e.g.*, contingent fee agreements), such information will be included in the Private Agreements Chart. No client has been

promised an incentive award in this litigation. *See* Client Declarations attached to Memo for Final Approval as Exhibit H.

VI. CONCLUSION

For the foregoing reasons, Settlement Class Representatives, by and through Settlement Counsel, respectfully request that Plaintiffs' Counsel be awarded the requested attorneys' fees and reimbursement of expenses, and that incentive awards be granted.

Dated: August 7, 2013

Respectfully submitted,

/s/ Robert S. Kitchenoff
Robert S. Kitchenoff
Mindee J. Reuben
WEINSTEIN KITCHENOFF & ASHER, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
(215) 545-7200
(215) 545-6535 (fax)
kitchenoff@wka-law.com
reuben@wka-law.com

Gregory S. Asciolla
Charles B. Vincent
LABATON SUCHAROW LLP
140 Broadway
New York, New York 10005
(212) 907-0700
(212) 818-0477 (fax)
gasciolla@labaton.com
cvincent@labaton.com

Jonathan D. Selbin
Darsana Srinivasan
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Telephone: (212) 355-9500
jselbin@lchb.com
dsrinivasan@lchb.com

Richard J. Arsenault
NEBLETT, BEARD & ARSENAULT
2220 Bonaventure Court, P.O. Box 1190
Alexandria, Louisiana 71301
(800) 256-1050
(318) 561-2591 (fax)
rarsenault@nbalawfirm.com

Adam J. Levitt
John Tangren
GRANT & EISENHOFER, P.A.
30 North LaSalle Street, Suite 1200
Chicago, Illinois. 60603
(312) 214-0000
(312) 214-0001 (fax)
levitt@gelaw.com
jtangren@gelaw.com

Plaintiffs' Interim Co-Lead Counsel and Settlement Class Counsel