IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT,
WAUNONA MESSINGER CROUSER,
REBECCAH MORLOCK, ANTHONY BEEZEL,
MARY MONTGOMERY, MARY LUZADER,
TRUMAN R. DESIST, LARRY BEEZEL, and
JOSEPH BRADSHAW, individuals residing in West Virginia,
on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Case No. 04-C-296-2
(Honorable Thomas A. Bedell)

E.I. DU PONT DE NEMOURS AND COMPANY,
a Delaware corporation doing business in West Virginia,

Defendants.

_____/

Amended Petition for Award of Attorneys' Fees and Litigation Expenses

In February 2008, the Court awarded $127,108,410.64 in attorneys' fees (33 1/3% of jury award) and $7,904,646.65 in litigation costs from the common fund created by a jury award of $381,363,341.25. The Court also reserved jurisdiction for taxing of further litigation costs. More than two years later, after a lengthy appeal and preparation for retrial in March 2011, the parties reached a settlement (pending the Court's final approval). Accordingly, the undersigned law firms serving as class counsel[1] in this matter petitioned the Court on November 30, 2010, for a modified award of fees and expenses from the common fund created by settlement on behalf of the class.

[1] Petitioner firms are (1) Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, (2) Cochran, Cherry, Givens, Smith, Lane & Taylor, PC, (3) The Law Office of Gary Rich, (4) West & Jones, (5) Kennedy & Madonna, LLP, and (6) Hill, Peterson, Carper, Bee & Deitzler, PLCC.

Specifically, class counsel seeks a final order awarding fees at a reduced percentage (19% to 22%) and for additional costs not included in the initial award.

In response to the request, the Court ordered the petitioners to submit a more detailed accounting of expenses as well as affidavits verifying the hours worked on the above styled case since 2003. Petitioners now submit this amended petition with exhibits including verified accountings of each firm's itemized expenses and affidavits from counsel and staff verifying the time spent working on this case for the last seven years.

As stated in the original petition filed in November 2010, the parties have reached a settlement, subject to the Court's final approval, that will provide the class with relief in a relatively quick manner. As a result of this settlement, programs will be established by a claims administrator that will implement a community-wide remediation program and an extensive medical program lasting 30 years. As the Court is aware, if the parties had not reached this settlement, the class faced many more years of litigation with uncertain outcomes. Assuming the plaintiffs proved successful at trial, years of appeals—at both the state and federal level—were a certainty. If an appellate court were to adopt DuPont's proposed trial plan requiring individual trials for every single class member, this litigation had the potential to be the longest (and probably most expensive) in the history of American jurisprudence. Under the circumstances, continued delayed justice would truly be justice denied. In light of the risks, including the possibility of scrutiny by the United States Supreme Court and the guarantee of more years of litigation and appeals, the parties reached a tentative settlement that is now pending final approval by the Court.

The settlement fund is comprised of (1) a $70,000,000.00 cash payment and (2) a 30-year medical monitoring program without any monetary cap but with an estimate value by the Petitioners of between $65,000,000.00 and $90,000,000.00,[2] placing the total value of the recovery made on behalf of the class at $135 million to $160 million. A more detailed discussion of the settlement is included in Petition for Approval of Class Settlement filed contemporaneously with this amended petition. Petitioners are asking for (1) fees in the amount of $30,000,000.00, (2) current litigation expenses in the amount of $10,230,377.55,[3] and (3) $150,000.00 in future litigation expenses with any unused portion reimbursed to the class. Importantly, this request constitutes 19% to 22% of the total value of the settlement and reflects a substantial reduction from the fees awarded by the Court in 2008.[4]

In addition to the itemized accountings submitted by each law firm serving as class counsel (attached hereto as Exhibit A) and the affidavits submitted by counsel and support staff (attached hereto as Exhibit B), petitioners incorporate by reference the following: (1) Memorandum of Law in Support of Petition for Approval of Attorneys' Fees and Litigation Expenses (filed by Petitioners on November 19, 2007)(attached

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[2] The original medical monitoring plan was valued at almost $130,000,000.00 and had a 40-year duration with routine CT scans. The medical monitoring program agreed to in the settlement has a 30-year duration. The plan would remain intact as originally ordered, except that CT scans would not be routine. Instead, scans would be performed when medically diagnostically necessary. The cost of the CT scans from the original program represented approximately 50% of the overall cost. While the reduction in the CT scans will reduce the value of the program, other aspects will be more costly. For example, because the population has aged since the entry of the original order, more people will be immediately eligible for more advanced screening such as urinary tract, skin and gastric testing.

[3] Upon further examination of the itemized expenses, undersigned counsel removed a net total of $12,487.68 from the requested litigation expenses, resulting in an amended request for reimbursement of litigation expenses of $10,230,377.55.

[4] The Court originally awarded $127,108,410.64 (1/3 of the original common fund) for attorneys' fees as well as $7,904,646.65 for litigation expenses.

hereto as Exhibit C), (2) the Affidavits of third-party counsel[5] familiar with class action practice and attesting to the reasonableness of Petitioner's original fee request and litigation expenses (attached hereto as Exhibit D); (3) the testimony of Barry Hill, who appeared before the Court on January 15, 2008, and attested to the reasonableness of attorneys' fees and expenses (attached hereto as Exhibit E); (4) the Court's Order Regarding Plaintiffs' Counsels' Fees and Litigation Expenses and Class Representatives Award and Incentive Payments entered on February 25, 2008 (attached hereto as Exhibit F); and (5) Petition for Attorneys' Fees and Litigation Expenses (filed November 30, 2010)(attached hereto as Exhibit G).

Attorneys and administrative staff from the petitioning law firms will be present at the hearing scheduled for December 30, 2010, and prepared to provide testimony, should the Court so desire, regarding the amount of time expended and expenses incurred during this litigation. Additionally, third-party counsel Barry Hill is prepared to testify at the hearing regarding the reasonableness of the fee award and expenses in light of the proposed settlement, should the Court find it necessary.

A. Since the Court's original award of attorneys' fees and expenses in February 2008, class counsel has spent another three years litigating this case in the appellate and trial court.

The Court is well aware of the history and complexity of this case. Filed on June 15, 2004, the case was removed to federal court and thereafter remanded back to this Court. After numerous hearings, contested motions, discovery disputes, production of hundreds of thousands of documents, depositions taken over more than a dozen states, expert testimony, and a class certification hearing over the span of four years, the

[5] Class counsel attaches hereto the affidavits of Arnold Levin, Richard S. Lewis, and Rhon Jones, previously filed with the Court in December 2007.

protracted litigation culminated in a five-week jury trial. *See* Order at 2-4 (2/25/08). The jury awarded $55,537,522.25 for the costs of property remediation, $196,200,000.00 for punitive damages, and ordered medical monitoring. In post-trial proceedings, the Court valued the medical monitoring at $129,991,821.71, thus creating a common fund for the class of $381,363,341.25.

Relying on West Virginia law as well as evidence presented by class counsel, the Court subsequently awarded attorneys' fees of $127,108,410.64 (1/3 of the common fund) as well as $7,904,646.65 for litigation costs from the common fund. Relying on the factors identified in *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), the Court found a one-third fee and litigation costs sought by class counsel to be reasonable and appropriate under the circumstances. *Id.* at 2, 7. Among other factors, the Court noted the extraordinary investment of time and labor by class counsel, the complexity of the litigation, the trial results, and the experience, reputation and ability of class counsel. *Id.* at 5-7.

Since that award of fees and expenses in February 2008, class counsel's investment of time, labor and expenses has only increased. Both Defendant and Plaintiff/Class Counsel raised appellate issues, some of which were issues of first impression, requiring extensive legal research, strategy and oral argument.[6] Plaintiffs largely prevailed in the appellate process. The appellate court reduced the punitive damages award (finding that punitive damages are not available for medical monitoring claimants) and remanded the statute of limitations issue for trial. Since the remand, class counsel has been preparing for trial of the remaining issue set for March 2011. These

[6] At the end of oral arguments before the Supreme Court, Justice Davis acknowledged the superior quality of briefing and argument presented by both sides. This acknowledgement is an indication of the extraordinary commitment in labor and time by class counsel.

post-trial events have required an additional 7,582.10 hours of attorney and support staff time and another $2.2 million in litigation expenses.[7]

B. Proposed Class Action Settlement necessitates a recalculation of attorneys' fees and litigation expenses.

In November 2010, as the parties were gearing up for another round of onerous and contentious pretrial discovery, the parties entered into negotiations and were at last able to reach a proposed settlement subject to the Court's approval. Recognizing the risks that each side faced in the retrial and inevitable appellate process to follow, the parties compromised on the jury's original award and, in the process, circumvented the inevitable delays related to retrials and appeals that the class was sure to face.

The parties have reached a settlement that will provide the class with relief in a relatively quick manner. Upon Court approval, the claims administrator will begin implementing a community-wide remediation program and a medical monitoring program that will benefit participants for 30 years. The settlement fund is comprised of (1) a $70,000,000.00 cash payment and (2) a 30-year medical monitoring program without any monetary cap but with an estimated value by the Petitioners to be between $65,000,000.00 and $90,000,000.00, placing the total value of the recovery made on behalf of the class at between $135 million and $160 million.

Although the Court originally awarded class counsel one-third of the common fund and expenses, class counsel now seeks to modify (or reduce) their petition for attorneys' fees (and the Court's previous award) from $127 million to $30 million and to increase their petition for litigation costs from $7.9 million to $10, 242,865.23. Not only

[7] Exhibit H (attached hereto) is an accounting from each class counsel firm itemizing expenses incurred since February 25, 2008. Pursuant to the Court's Order of December 3, 2010, class counsel has submitted, by law firm, an itemization of all expenses as well a definition of each expense category. *See* Exhibits A and H (attached hereto).

does this modified fee request recognize a change in the total value of the common benefit (by virtue of the compromise settlement) but it also reduces the requested fee from the original 33 1/3% to between 19% and 22% of the total value of the settlement. The increase in requested litigation expenses reflects the actual hard-costs incurred by class counsel at the post-trial, appellate and retrial process (see Exhibit H).

Class Counsel asks this Court to award its fees and expenses from the common settlement fund created on behalf of the class and valued at between $135 million and $160 million. As outlined in more detail below, the requested fees and costs are reasonable and appropriate in light of the factors considered by courts in similar cases.[8]

C. Basing an award of attorneys' fees on the amount of the common fund is the accepted practice in this type of litigation.

An attorney is the equitable owner of a fund brought into court through his or her services, to the extent of the reasonable value of such services, and the court may award the attorney reasonable compensation to be paid out of it. *Weigand v. Alliance Supply Co.*, 44 W.Va. 133, 28 S.E. 803 (1897) [Syll. Pt. 8]. This is especially true in the "common fund" cases "where the plaintiff, suing on behalf of himself and others of the same class, discovers or creates a fund which inures to the benefit of all." *Roach v. Wallins Creek Collieries Co.*, 111 W.Va. 1, 160 S.E. 860 (1931) [Syll. Pt. 2]. Among these situations are class actions. "[C]lass actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers, and a court has wide discretion to award attorneys' fees and costs." *McFoy v. Amerigas, Inc.*, 170 W.Va.

[8] Consider, for example, *Kay Company v. Equitable Production Co.*, where Judge Goodwin found that a 20% fee was reasonable in a case that lasted four years but was "less complex than other class actions." *Kay Company*, 2010 WL 4501572 at *6 (S.D. W. Va. Nov. 5, 2010). Judge Goodwin stated that "...in this case, the discovery was relatively straightforward-the parties had only one discovery dispute-and motion practice was not extensive." *Id.* The complexity of and breadth of discovery in this action stand in marked contrast to that in *Kay*.

526, 533, 295 S.E.2d 116, 24 (1982). Environmental class actions, in particular, fit into this category by virtue of the significant public benefit they create. *See e.g., Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525 (N.D. Miss. 2003) (awarding attorneys' fees in the amount of 33% of the fund recovered in class action seeking damages for groundwater contamination); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (awarding attorneys' fees in the amount of 36% of the fund recovered in class action seeking damages for pollution from hazardous waste).

Where a common fund has been generated on behalf of a class through a settlement or judgment, class counsel's fees are paid from the common fund. Typically, the percentage method is used to determine the allocation of attorneys' fees from the common fund. *Manual for Complex Litigation* § 14.121 (4th ed. 2004) ("the vast majority of courts of appeals...permit or direct district courts to use the percentage-fee method in common fund case"). Determination of the percentage designated as attorneys' fees is within the sound discretion of the court. In making the determination, the court should be primarily guided by the reasonableness of the fee award. *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1007 (9th Cir. 2002).[9]

D. The factors typically applied to determine reasonableness of fees support Petitioners' request for an award of 19% to 22% ($30,000,000.00).[10]

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[9] *Smith v. Krispy Kreme Doughnut Corporation*, 2007 WL 119157 (M.D.N.C. 2007)("On the question of attorneys fees, the Court finds that in a common fund case such as this, a reasonable fee is normally a percentage of the Class recovery."); *DeLoach v. Phillip Morris Cos.*, No. 00-1235, 2003 WL 23094907, at *3 (M.D.N.C. 2003) (citing with approval *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 215 (D. Me. 2003); *In re Microstrategy, Inc. Sec. Litig.*, 172 F.Supp.2d 778, 787 (E.D. Va. 2001); *In re Vitamins Antitrust Litig.*, MDL No 1285, 2001 WL 34312839 at *3 (D.D.C. July 16, 2001).

[10] This Court has previously approved a comparable request for attorneys' fees and costs. Specifically the Court determined that "after applying the factors outlined by the Court in Aetna, it is clear that the fees sought are reasonable." February 25, 2008, Order Approving Attorneys' Fees and Costs citing *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986) ("The West Virginia Supreme Court of Appeals, consistent with the majority of jurisdictions, had laid out the factors to be considered when evaluating the reasonableness of attorneys' fees.")

Courts have applied a number of factors in determining the reasonableness of fees:[11] (1) time and labor expended; (2) the complexity and duration of the litigation; (3) the size of the fund created and the number of persons benefited; (4) skill required to properly perform the legal services; (5) experience, reputation, and ability of the attorneys; (6) the likelihood of recovery; and (7) fee awards in similar cases.

Few, if any, cases have required the sheer amount of resources as those allocated by the Petitioners in prosecuting this case. The combined amount of hours devoted to this case by the Petitioners is approximately 57,000 hours representing the work of more than 16 attorneys. In addition to the labor, Petitioners have incurred almost $10,230,377.55 in litigation expenses. Moreover, the Petitioners anticipate that even more time will be required during the implementation of the settlement.

The record shows that this case was extraordinarily complex, requiring seven years of intense litigation. Legal issues that arise in class certification are some of the most confounding issues in the practice of law, and this case was no exception to that rule. This case was vigorously defended by a team of exceptional defense firms with national reputations built by successfully defending environmental and class action cases. Petitioners briefed numerous legal and factual issues. In response to repeated assertions of privilege and other discovery matters, Petitioners were involved in twelve hearings before the discovery commissioner. As a result of one of the discovery rulings, DuPont filed a petition for writ of prohibition, which was successfully opposed by Petitioners.

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[11] *Richardson v. Kentucky Nat. Ins. Co.*, 216 W.Va. 464, 607 S.E.2d 793 (2004); *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226, n. 28 (4th Cir. 1978); *In re Royal Ahold N.V. Securities & Erisa Litigation*, 461 F.Supp.2d 383 (D. Md. 2006); *In re Cendant Corp. Litig.*, 264 F.3d 201, 255-256 (3rd Cir. 2001), cert denied by *Mark v. California Public Employees' Retirement Sys.* 535 U.S. 929, 122 S.Ct. 1300, 152 L. Ed. 212 (2002); *Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medico Managed Care, L.L.C.*, 2007 WL 3033489 at *16 (2nd Cir. 2007).

This case also required Petitioners to understand complex scientific and engineering issues concerning chemistry, toxicology, statistics, meteorology, medicine and remediation.

The seven-year duration of this litigation is considered long by almost any measure, but the duration also reflects the extraordinary complexity of the case. Not only does this case have a long history, but, without a settlement, would have a lengthy and uncertain future.

Because of Petitioners' efforts in obtaining this settlement, a $70,000,000.00 cash payment will be generated for the class to be used as set forth in the Memorandum of Understanding. Additionally, more than 8,000 people are entitled to a medical monitoring program without any monetary caps. The medical monitoring is expected to utilize faculty from the West Virginia University as well as employ local health care providers. As a result of the cash settlement and medical monitoring program, a reasonable estimate of the total monetary benefit to the class is $135 million to $160 million. While this settlement represents a compromise from the original verdict amounts, it does remove the uncertainty of a retrial, which had the potential to eliminate any relief for the class, and the years of appeals that would follow.

Very few plaintiffs' firms have the legal and financial resources to take on this type of litigation. Petitioners included attorneys who were skilled trial lawyers with expertise in complex litigation, in particular environmental litigation. Petitioners undertook this litigation on a contingency fee arrangement, which had the significant risk of not only nonpayment of fees, but unrecoverable litigation expenses as well. Numerous uncertainties raised the risk for Petitioners. To name a few: was DuPont legally

responsible for the conduct of Graselli; what effect did DuPont's agreement with T. L. Diamond have on DuPont's liability for T.L. Diamond; what evidence existed that supported DuPont's affirmative defense on the statute of limitations; and were there other sources of contamination. Any of these issues could have substantially affected the chances of a favorable outcome for the Plaintiffs.

The 19% to 22% requested by petitioners is consistent with fees awarded in other class action cases. A survey of recent fee awards in class action cases is presented below.

- 25.5% in *Leach v. E. I. DuPont de Nemours and Company*, Civil Action No.:01-C-608 (Circuit Court of Wood County, W. Va. 2005)
- 33% in *Bynum v. District of Columbia*, 412 F. Supp. 2d 73 (D.D.C. 2006).
- 30% in *Brody v. Hellman*, 167 P.3d 192 (Colo. App. 2007).
- 29% in *In re Educ. Testing Services Praxis Principles of Learning & Teaching, Grades 7-12 Litig.*, 447 F. Supp. 2d 612 (E.D. La. 2006).
- 22.5% in *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D. Del. 2002).
- 33% in *Godshall v. Franklin Mint Co.*, 2004 W.L. 2745890 (E.D. Pa. 2004).
- 33% in *In re FAO Inc. Sec. Litig.*, 2005 WL 3801469 (E.D. Pa. 2005).
- 30% in *Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medico Managed Care, L.L.C.*, 2007 WL 3033489 at *16 (2nd Cir. 2007)
- 33% in *Hainey, et al. v. Parrott, et al.*, 2007 WL 2752375 (S.D. Ohio 2007).

Conclusion

As Judge Goodwin pointed out in his recent decision, two important issues are involved in awarding attorneys' fees in class action cases: the public perception regarding attorneys' fees and the incentive for attorneys to take on "class actions that vindicate the rights that might otherwise go unprotected." The requested fee is consistent with the substantial contribution of time and resources expended over an extended period of time and reflects the risks undertaken by the law firms that litigated this case. Very few, if any, firms would undertake this litigation and incur over $10 million in litigation expenses without any certainty for reimbursement, for this amount of fees. At the same time, the substantial compromise on attorneys' fees demonstrates counsel's commitment to and the importance of providing a timely remedy to the class.

If attorneys are to continue to undertake environmental litigation on behalf of citizens, plaintiffs' attorneys must have the prospect of reasonable compensation. In light of public policy consideration and the factors to determine reasonableness, the amount sought by the Petitioners is reasonable under all the circumstances. Petitioners respectfully request that this Court approve a fee of $30,000,000.00, constituting 19% to 22% of the total recovery made on behalf of the class and reimburse litigation expenses of $10,230,377.55.

Dated: December 15, 2010

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a Delaware corporation doing business in West Virginia,
MEADOWBROOK CORPORATION, a dissolved
West Virginia corporation, MATTHIESSEN & HEGELER ZINC
COMPANY, INC., a dissolved Illinois corporation formerly
doing business in West Virginia, and
T. L. DIAMOND & COMPANY, INC., a New York corporation doing
business in West Virginia,

Defendants.

_____/

CERTIFICATE OF SERVICE

I, Perry Jones, counsel for Plaintiffs, hereby certify that service of Plaintiffs' Amended Petition for Award of Attorneys' Fees and Litigation Expenses has been made upon counsel of record via Federal Express for overnight delivery on this 15th day of December, 2010, addressed as follows:

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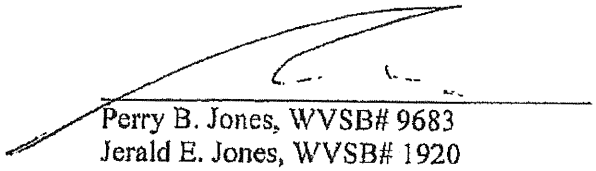

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