IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al., individuals residing in West Virginia, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Case No. 04-C-296-2
Thomas A. Bedell, Circuit Judge

E.I. DU PONT DE NEMOURS AND COMPANY, et al.,

Defendants.

FINAL ORDER AWARDING ATTORNEYS' FEES AND LITIGATION EXPENSES AND AWARDING CLASS REPRESENTITIVES' INCENTIVE PAYMENTS

Presently pending before the Court is the "Petition for Attorney's Fees and Litigation Expenses," filed on November 30, 2010. After a review of the Petition, the Court found that the Petition was woefully indefinite, specifically in regards to its request for litigation expenses. The request for litigation expenses totaled just more than ten million dollars ($10,000,000.00), but was only three (3) pages long and was a list of subtotals and grand totals with no explanation or itemization of the actual expenses.

Thereafter, at the request of the Court, Class Counsel filed the "Amended Petition for Award of Attorney's Fees and Litigation Expenses," on December 15, 2010, which provided hundreds of pages of itemized expenses from 2003 until December 2010. Additionally, after a review of their requested expenses, Class Counsel filed a "Supplement to Amended Petition for Award of Attorney's Fees

and Litigation Expenses" on December 20, 2010, which informed the Court that three hundred and fifteen thousand two hundred and nine dollars and forty-seven cents ($315,209.47) had been erroneously claimed as "investigative" expenses by the law firm of Levin, Papatonio, Thomas, Mitchell, Rafferty & Proctor, and was withdrawn from the total claimed expenses. On January 11, 2011, Class Counsel filed a "Notice of Filing of Affidavits in Support of Petition for Fees and Expenses," which provided the details on the claimed expenses of interest payments on lines of credit maintained by the Cochran Law Firm and Levin Papantonio. Finally, Levin Papatonio filed the "Amended Affidavit of Robert E. Smith" on January 25, 2011, which corrected a previously claimed expense and reduced the total amount of expenses claimed by Levin Papantonio by forty thousand seven hundred and fifty-nine dollars and eighty cents ($40,759.80). In total, the Court's inquiry into the claimed expenses of Class Counsel resulted in a voluntary reduction in claimed expenses of three hundred fifty-five thousand nine hundred and sixty-nine dollars and twenty-seven cents ($355,969.27), and that amount is now available to aid in the property remediation in the Class Area.

After thorough review of all of the relevant pleadings, documents, testimony, the Court Record, and the pertinent law, the Court, for the reasons outlined below, hereby **ORDERS** that Class Counsel shall receive twenty-two million eight hundred thousand dollars **($22,800,000.00)** in attorneys' fees, and, each firm shall receive the following for litigation expenses:

Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.

Total Litigation Expense Award to Levin Papantonio = three million five hundred and seventy-two thousand nine hundred and forty-three dollars and forty-six cents ($3,572,943.46).

Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C.

Total Litigation Expense Award to Cochran Law Firm = four million one hundred and forty-one thousand five hundred and thirteen dollars and ten cents ($4,141,513.10).

West & Jones

Total Litigation Expense Award to West & Jones = seven thousand six hundred and seventy-three dollars and eight cents ($7,673.08).

Law Office of Gary Rich, L.C.

Total Litigation Expense Award to Law Office of Gary Rich = two thousand one hundred and fifty-seven dollars and seventy-nine cents ($2,157.79).

Kennedy & Madonna, LLP

Total Litigation Expense Award for Kennedy & Madonna = eighteen thousand three hundred and eleven dollars and eighty cents ($18,311.80).

Hill, Peterson, Carper, Bee & Deitzler, PLLC

Total Litigation Expense Award to Hill, Peterson, Carper, Bee & Deitzler, PLLC = six thousand seven hundred and eighty dollars and forty-eight cents ($6,780.48).

After reviewing the requested award of incentive payments to the class representatives, the Court finds that an appropriate award is twenty-five thousand dollars ($25,000.00) per representative, instead of the requested fifty thousand dollar ($50,000.00) award per representative, based upon the reduction in the overall recovery of the Classes through the settlement. When the Court previously approved a fifty thousand dollar ($50,000.00) award, the total recovery was nearly four hundred million dollars ($400,000,000.00), and the subsequent opinion of the Supreme Court and settlement significantly reduced that recovery. It would be unfair for the Class Representatives to receive an award without considering the total recovery, which has resulted in a smaller award of attorneys' fees and costs, a smaller sum for property remediation, a shorter and abrogated medical monitoring program, and no punitive damages award.

As previously Ordered by this Court, the Class representatives' incentive payments are to be paid by Class Counsel from their attorneys' fee award, and the only reason the Court is approving payment of the incentive awards is because Class Counsel volunteered their own money to pay for the awards, so the awards will not disadvantage the other members of the Classes.

Finally, the Special Master and Settlement Administrator Report, filed

January 7, 2011, by Edgar Gentle, represents the total amount due for his services from the beginning of his involvement with this case until December 31, 2010. The Court hereby **ORDERS** that Defendant DuPont and Class Counsel are both responsible for one half of his total bill. It has been represented to the Court that DuPont has partially paid for their half, but Class Counsel has not. Both Class Counsel and DuPont shall pay their shares of the Special Master's bill, in full, within thirty (30) days of the entry of this Order. Class Counsel is responsible for their share individually; the Qualified Settlement Funds are **NOT** to be used to pay because Edgar Gentle's work up to December 31, 2010, was in the function of Special Master and Settlement Administrator.

All of Edgar Gentle's work and expenses on and after January 1, 2011, will be considered administrative expenses consistent with the "Final Order Setting Forth the Scope and Operation of the Medical Monitoring Plan," entered by this Court on January 18, 2011.

In support of the above rulings and Orders, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. This action was filed on June 15, 2004, against Defendants E.I. du Pont de Nemours and Company ("DuPont"), T. L. Diamond & Company, Inc., Meadowbrook Corporation, Matthiessen & Hegeler Zinc Company, Inc., Nuzum Trucking Company ("Nuzum"), and Joseph Paushel ("Mr. Paushel") (collectively "Defendants").

2. After extensive discovery and pre-trial litigation, this matter proceeded to trial beginning on September 10, 2007, and the trial lasted for approximately six (6) weeks. The trial consisted of four (4) phases, and the jury returned verdicts in favor of the Plaintiffs after each phase. The verdicts ultimately rendered awards of fifty-five million five hundred and thirty-seven thousand five hundred and twenty-two dollars and twenty-five cents ($55,537,522.25) for property damage and associated remediation costs, an estimated award of approximately one hundred and thirty million dollars ($130,000,000.00) for a future medical monitoring program, and a punitive damages award of one hundred and ninety-six million and two hundred thousand dollars ($196,200,000.00).

3. Said verdicts were the result of the jury finding that the Plaintiffs' property and persons were exposed to elevated and dangerous levels of lead, cadmium, and arsenic, among other heavy metals, due to the long operation of a smelting facility in Spelter which polluted the Class Area.

4. On November 16, 2007, this Court entered an Amended Final Judgment Order finalizing the jury's verdict against Defendant DuPont.

5. Thereafter, both the Plaintiffs and Defendants appealed numerous aspects of this Court's pre-trial, trial, and post-trial rulings to the West Virginia Supreme Court of Appeals.

6. On March 26, 2010, after a lengthy appellate process, the West Virginia Supreme Court of Appeals remanded this matter to the Court with directions to conduct a trial on DuPont's statute of limitations defense. The

opinion, when counting the pages of the majority and individual concurring and dissenting opinions, was the longest ever written by the Supreme Court.

7. The Supreme Court modified and reduced the punitive damages award, but conditionally affirmed the remainder of the verdict, which then consisted of approximately three hundred million dollars ($300,000,000.00). The Supreme Court determined that this Court erred by granting judgment as a matter of law in favor of the Plaintiffs on the Defendants' affirmative defense of the statute of limitations, and directed this Court to hold a second trial to determine if the defense was merit worthy.

8. The effect of the Supreme Court's directive created an all or nothing proposition for the Parties. If the Plaintiffs prevailed on the statute of limitations issue, they would receive the relief obtained in the 2007 trial, as modified by the Supreme Court opinion. If DuPont prevailed, this Court would set aside the 2007 verdicts and render judgment in favor of DuPont, and the Plaintiffs would receive nothing. Perrine v. E.I. du Pont de Nemours and Co., 225 W.Va. 482, ___, 694 S.E.2d 815, 854 (2010).

9. The Plaintiffs and Defendant both considered the directives of the Supreme Court's opinion and prepared for trial, which was set for the month of March, 2011. The Parties reached a settlement agreement after considering the substantial amount of risk and expense remaining in the case. On November 19, 2010, the Parties advised the Court that a proposed compromise and settlement had been reached.

10. The Class was provided with notice of the settlement which stated, in part, that attorneys' fees and litigation expenses would be paid from the settlement and determined by the Court. The Plaintiffs' Counsel mailed the "Notice of Proposed Settlement Regarding the Former Zinc Smelter in Spelter, West Virginia" ("Settlement Notice") to all reasonably identifiable Class members, including some approximate two thousand and five hundred (2500) property owners. The Settlement Notice informed the absent Class members of the nature and terms of the proposed settlement, the date and time of the fairness hearing, the right to object, and the procedure for objection. Additionally, the Settlement Notice directed Class members to an informational website[1] at which they could review the November 19, 2010 Memorandum of Understanding, and the Petition for Attorney Fees and Litigation Expenses, and the other documents related to the requested fees and expenses filed by Class Counsel. The Settlement Notice did not specify the amount claimed by Class Counsel for fees and expenses. Only the Petition, filed in the Court Record and posted on the informational website, actually told the Classes the amount of Class Counsel's fee and expense request.

11. The Settlement Notice was published in the Clarksburg Exponent newspaper on four separate dates: December 1st, 5th, 15th and 22nd, 2010; and in the Shinnston News on three separate dates: December 9th, 16th, and 23rd, 2010. Finally, the Settlement Notice was published in the Charleston Gazette on December 3rd, 10th, 17th, and 24th, 2010. The Settlement Notice provided an

[1] The website, which was established by Settlement Administrator Edgar Gentle, can be accessed at www.perrinedupont.com.

opportunity for Class Members to file any written objections to the proposed settlement with the Claims Administrator and with the Court by December 20, 2010. Only two written objections to the settlement were received. The substance of the objections was that the Plaintiffs' Attorneys should be paid for their work, via their fees, but the additional requested litigation expenses, representing nearly ten million ($10,000,000.00) dollars, were unfair and should not be paid to the attorneys.

12. The Court held a Fairness Hearing on December 30, 2010, where five (5) purported class members voiced their opinions. Of the five, only three raised objections to the requested fees and costs, essentially arguing the requested fees and expenses, which total nearly forty million dollars ($40,000,000.00), were too high and didn't leave enough money for the Classes. The Court also heard the testimony of several class representatives in support of the settlement, and of Barry Hill, Esquire, as an expert in support of Class Counsel's requested fees and expenses. The Court received into evidence the affidavit of Dr. Brookshire, an economist, which provides his opinion as to the value of the medical monitoring program.

13. By the "Final Order Approving Settlement," entered on January 4, 2011, this Court approved the general terms of the settlement, but did not determine how much money would provide an appropriate fee and expense award to Class Counsel. Said determination is provided by this Order.

The Court hereby makes the following Conclusions of Law.

Conclusions of Law

Attorneys' Fees

Class Counsel has requested thirty million dollars ($30,000,000.00) in Attorneys' Fees. In support of this request, they note amount of time and effort that they have expended on this case, the result they obtained for the Classes, and the prior Order of this Court which awarded a thirty-three percent (33%) fee on the basis of the 2007 verdicts. However, those verdicts were abrogated by the Supreme Court, and contingent upon the Plaintiffs winning a second trial, which the settlement resolved. Class Counsel have a contingent fee agreement in place for thirty-three percent (33%), however, in recognition of the limited amount of cash available for property remediation and fees (sixty-six million in the dedicated Qualified Settlement Fund) they request between nineteen and twenty-two percent (19-22%) of their total estimate of the value of the recovery. Unfortunately, the actual total value of the settlement is unknown, because the cost of the medical monitoring plan over the next thirty (30) years can only be estimated.

After reflecting on the amount of effort that Class Counsel has expended over the past seven (7) years, and the wonderful result they have obtained for the Classes, it is clear that they deserve to be paid a reasonable fee. However, the amount of the fee, and the fairness to both Class Counsel and the Classes, is the responsibility of the Court. The Settlement stripped the punitive damages award from the case, so the only money available to Class Counsel is simultaneously available for property remediation. Therefore, every dollar the

Court awards for attorneys' fees will reduce the money available to benefit the Property Class and remove hazardous environmental contamination from the Class area, which was a substantial portion of this lawsuit.

After years of zealous representation of the Classes, the monetary interests of Class Counsel are now in conflict with the monetary interests of the Classes, and only the Court can consider and balance the Classes' interests with just and reasonable compensation for Class Counsel.

To determine a reasonable, fair, and equitable fee, the Court has used two distinct approaches. The first is the percentage of a common fund approach, which requires the Court to set a value on the total recovery, and then award a percentage of that amount as a fee for Class Counsel. The second is the lodestar approach, which, in its initial step, takes the number of hours expended by Class Counsel, multiplies those hours by a reasonable hourly fee, and creates a lodestar number. After the lodestar number is established, the Court then determines a fair multiplier to represent the risk undertaken by litigating the case, the value of the recovery for the Classes, and other pertinent factors. The Court has reached a fair fee under the percentage of common fund approach, and conducted the lodestar approach as a cross check to validate the reasonableness of the final fee award. Kay Co. et al. v. Equitable Production Co., 2010 WL 4501572 (S. D. W. Va., Nov. 5, 2010).

First, the Court used the percentage of common fund approach to establish the attorneys' fee award.

Percentage of Common Fund

Under this approach, the Court considered all of the evidence and argument presented as to the value of the medical monitoring plan, abrogated by the settlement to a shorter duration and few, if any, CT scans, and has assigned its own value to the plan. For the reasons outlined below, the Court has set the present value of the medical monitoring program, for the limited purpose of awarding a fair attorneys' fee, at fifty million dollars ($50,000,000.00). Additionally, as Class Counsel has represented that they are requesting a nineteen to twenty-two percent (19-22%) fee, the Court has examined all of the relevant law and agrees that the fee should be nineteen percent (19%). Therefore, the total value of the common fund is one hundred and twenty million dollars ($120,000,000.00), which is the sum of the seventy million dollars ($70,000,000.00) paid by DuPont and the fifty million dollar ($50,000,000.00) estimated value of the medical monitoring program. Under the percentage of common fund approach, the fair and equitable fee is nineteen percent (19%) of one hundred and twenty million dollars ($120,000,000.00), which is twenty-two million eight hundred thousand dollars ($22,800,00.00). As further outlined below, the Court has conducted a lodestar analysis as a cross check and finds said award to be appropriate.

When an attorney creates a fund through his or her services to the benefit of his or her client, the attorney is entitled to a reasonable fee for the value of such services, and the court determines such a fee. Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S.E. 803 (1897); Boeing Co. v. Van Gemert, 444 U.S.

472, 478, 100 S. Ct. 745 (1980). Class actions are amenable to this approach, because the class attorneys have created a common fund for the benefit of the class. "Class actions are a flexible vehicle for correcting wrongs ... and a court has wide discretion to award attorney's fees and costs." *See generally* McCoy v. Amerigas, Inc., 170 W. Va. 526, 533, 295 S.E.2d 116, 124 (1982).

Class Counsel has not requested a percentage, however, but instead a hard number, thirty million dollars ($30,000,000.00), which they assert represents nineteen to twenty-two percent (19-22%) of the total value of the benefit to the Classes over the lifespan of the settlement.

> **The overarching concern for the trial court is that the fees awarded must be reasonable**. *See Blanchard*, 489 U.S. at 92, 109 S.Ct. 939 (noting that the " 'criterion for the court is ... what is reasonable' ") ... *see also Bostic v. American Gen. Fin., Inc.*, 87 F.Supp.2d 611 (S.D.W.Va. 2000) (concluding that 15% reduction of statutory fee award was necessitated by virtue of inadequate documentation of hours...) **In reviewing the submitted fees on remand, the trial court should take note that the most critical of all the factors looked to in determining a statutory award of attorney's fees is the degree of success obtained**.

Heldreth v. Rahimian, 219 W.Va. 462, 473, 637 S.E.2d 359, 370 (2006). Although Heldreth addressed a statutory award of attorney's fees under the West Virginia Human Rights Act, and not a class action fee award, two primary factors this Court considered when setting the attorneys' fee award were the reasonableness of the fee and the degree of the success obtained, which is substantially worse than the verdict rendered by the jury in 2007.

The West Virginia Supreme Court does not have a case that addresses the distribution of attorneys' fees and expenses from a common fund which includes medical monitoring as an estimated value. Class Counsel has cited

nine cases, of these, seven are from federal court, one from the Circuit Court of Wood County, West Virginia, and the last is from an intermediate appellate court in Colorado. The cases cited by Class Counsel awarded fees between twenty-two point five and thirty-three percent (22.5%-33%) in class actions.[2]

The cases cited by Class Counsel are persuasive legal authority. Therefore, this cases are not binding upon the Court, and the Court's own review of relevant case law has found numerous class action cases where far lower percentage fees were awarded. Silberblatt v. Morgan Stanley, 524 F. Supp. 2d 425 (S.D.N.Y. 2007) (requested fees, including expenses, would have consumed 61% of cash recovery, instead, an award of 20% of the common fund was appropriate); In re TJX Companies, 584 F. Supp. 2d 395 (D. Mass. 2008) (award of 6.5 million in fees out of total benefit of 177 million, approximately 3% fee); In re Nortel Networks, 539 F.3d 129 (2d Cir. 2008) (award of 3% fee); Carlson v. Xerox Corp., 596 F. Supp. 2d 400 (D. Conn. 2009) (award of 16% fee instead of 20% requested fee); Farinella v. Paypal, Inc., 611 F. Supp. 2d 250 (E.D.N.Y. 2009) (award of 20% instead of requested 28%); Hall v. Children's Place Retail Stores, Inc., 669 F. Supp. 2d 399 (S.D.N.Y. 2009) (requested fee of 27% inappropriate, fee of 15-17% appropriate); In re Currency Conversion Fee Antitrust Litigation, 263 F.R.D. 110 (S.D.N.Y. 2009) (fee of 15.25% reasonable).

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[2] Leach v. E.I. Dupont, Civil Action No. 01-C-608 (Circuit Court of Wood County, West Virginia) (approving fee of 25.5%); Bynum v. District of Columbia, 412 F. Supp. 2d 73 (D.D.C. 2006) (approving 33% fee); Brody v. Hellman, 167 P.3d 192 (Colo. App. 2007) (approving 30% fee); In re Educ. Testing Services, 447 F. Supp.2d 612 (E.D. La 2006) (approving 29% fee); In re Warafarin Sodium Antitrust Litigation, 212 F.R.D. 231, 262 (D. Del. 2002) (approving 22.5% fee); Godshall v. Franklin Mint Co., 2004 WL 2745890 (E.D. Pa. 2004) (approving 33% fee); In re FAO, Inc. Sec. Lit., 2005 WL 3801469 (E.D. Pa. 2005) (33%); Central States et al. v. Merck-Medico Managed Care LLC, 2007 WL 3033489 (2nd Cir. 2007) (approving 30% fee); Hainey et al v. Parrott et al., 2007 WL 2752375 (S.D. Ohio 2007) (approving 33% fee).

Here, although Class Counsel argues that they are requesting only nineteen to twenty-two percent (19-22%) of their estimate of the value of the common fund, they are also requesting, between fees and expenses, nearly forty million dollars ($40,000,000.00) of the sixty-six million ($66,000,000.00) paid in cash by DuPont, or nearly sixty-one percent (61%) of the cash available to the Property Class for remediation.

The Southern District of West Virginia recently entered an opinion which lays out a practical approach for determining an appropriate fee award. Kay Co. et al. v. Equitable Production Co., 2010 WL 4501572 (S. D. W. Va., Nov. 5, 2010).

> When a class settlement results in the creation of a common fund for the benefit of the class members, reasonable attorneys' fees may be awarded from the common fund. In calculating such fees, courts have generally employed two different methods: the "**lodestar**" method and the "**percentage of fund**" method. Under the "**lodestar**" **method, a district court identifies a lodestar figure by multiplying the number of hours expended by class counsel by a reasonable hourly rate**. The court may then adjust the lodestar figure using a "**multiplier**" derived from a number of factors, such as the benefit achieved for the class and the complexity of the case. Under the "**percentage of fund**" **method, the court awards the fee as a percentage of the common fund**. The percentage of fund method operates similarly to a contingency fee arrangement in that the attorneys receive a percentage of the final monetary value obtained for their clients.

Id., at 1-2 (internal citations omitted) (emphasis added). Both the lodestar and percentage of fund methods consider similar factors, such as those found in Aetna.

> Where attorney's fees are sought ... the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader

> factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved 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.

Syl. Pt. 4., Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 191-192, 342 S.E.2d 156, 157 (1986). After a review of the above factors, the Court notes the following:

(1) this case required a great deal of time and labor;

(2) the questions of fact and law were novel and complex;

(3) the level of skill needed to litigate this matter is higher than average;

(4) this case surely precluded the Class Counsel from pursuing other valuable employment due to its complexity and longevity;

(5) the customary fee in class actions varies widely, but nineteen percent is not unreasonable;

(6) there is a contingent fee in place, but it is not binding on the Court, nor does Class Counsel assert that a thirty-three percent (33%) fee is appropriate due to the limited recovery provided by the settlement;

(7) the time limitations involved are not of great import;

(8) the amount of money involved is enormous, and the result obtained is substantial, although it falls short of the verdicts of 2007;

(9) the experience, reputation, and ability of Class Counsel are substantial and impressive;

(10) the case was somewhat undesirable for trial attorneys, due to its scope and the power and wealth DuPont is able to assert in its defense;

(11) Class Counsel, at least in some fashion, has been involved with the Class Representatives for nearly ten (10) years;

(12) as noted *supra*, the Court has considered the awards in other similar cases.

After careful consideration of all of the above factors, the Court believes that the nineteen percent (19%) fee requested by Class Counsel is reasonable and appropriate.

Value of Medical Monitoring Fund

It is clear that the total cash value of the settlement is seventy million dollars ($70,000,000.00). DuPont has already paid this amount into two Qualified Settlement Funds. The value of the medical monitoring program is unclear. Class Counsel asserts that the value is seventy-seven million one hundred and eighty-four thousand one hundred and nineteen dollars ($77,184,119.00), which includes the cost of the medical testing and a ten percent (10%) increase for administrative costs. This value is based on the report prepared by the Plaintiffs' expert, Dr. Brookshire, who is an economist who has submitted previous reports about the value of the medical monitoring plan. The only purpose of this value is to support Class Counsel's requested fee, because DuPont is going to pay for the medical monitoring program on an annual basis, and Dr. Brookshire's estimate has no bearing on the actual cost of the plan.

In the February 25, 2008, "Final Order Regarding the Scope, Duration and Cost of the Medical Monitoring Plan," this Court found the present value of the medical monitoring plan to be one hundred and twenty-nine million six hundred and twenty-five thousand eight hundred and nineteen dollars ($129,625,819.00), after careful consideration of significant expert testimony, including an earlier report and affidavit of Dr. Brookshire. This amount, and the medical monitoring plan itself, have been abrogated by the Settlement.

Dr. Brookshire's original report states that, "the present value of total monitoring costs for the class is determined by dividing the class size by 1000 and multiplying the result times $13,863,724." May 23, 2007, at iv. The total value per one thousand (1000) participants, based on the reduction in services and duration provided by the settlement, is now eight million two hundred and fifty-four thousand nine hundred and eighty-six dollars ($8,254,986.00), according to Dr. Brookshire. This is a reduction of five million six hundred and eight thousand seven hundred and thirty-eight dollars ($5,608,738.00) per one thousand (1000) participants from his original estimate based on the reduction in the length of the program from forty (40) to thirty (30) years, and the elimination of most of the previously required CT scans. Dr. Brookshire followed an expert report prepared by Dr. Werntz, which estimated initial participation rates amongst the class and drop out rates. Dr. Werntz estimated that seventy-five (75%) of the eligible population will participate in the first screening, and five percent (5%) will drop out every year thereafter for varying reasons. The potential number of people eligible for the medical monitoring class has been represented to the

Court as approximately eight thousand five hundred (8,500) people, with half currently living in the class area, and half having previously lived in the Class area previously.

The Court finds that Dr. Brookshire's affidavit setting the value of the medical monitoring program was created for and introduced for the sole purpose of justifying the requested attorneys' fees. Although the Court does not discredit the initial report of May 2007, or the supplement filed by affidavit, it is nonetheless mindful of the realities of this situation and of the difficult decision of determining whether to remediate property that has been contaminated for decades or awarding fees to attorneys. Accordingly, the Court has accepted Dr. Brookshire's estimate of a cost of eight million, two hundred and fifty-four thousand nine hundred and eighty-six dollars ($8,254,986.00) per one thousand (1000) participants in the medical monitoring plan. However, the Court does not agree with the assumption that eight thousand five hundred (8,500) people is the proper number of people for beginning the estimation of the value of the plan. The Court instead finds that the number of people in the initial pool available for estimation of participation in the medical monitoring program is five thousand and five hundred (5,500).

Accordingly, following Dr. Brookshire's own formula and methodology, eight million, two hundred and fifty-four thousand nine hundred and eighty-six dollars ($8,254,986.00) times five point five (5.5) equals an estimated value of the medical testing, for the life of the program, of forty-five million, four hundred and two thousand, four hundred and twenty-three dollars ($45,402,423.00). An

upward adjustment of ten percent (10%) for administrative costs equals a total value of forty-nine million nine hundred and forty-three thousand six hundred and sixty-five dollars ($49,943,665.00). Hence, the Court values the medical monitoring plan, for the limited purpose of determining attorneys' fees under the percentage of common fund approach, at fifty million dollars ($50,000,000.00). The Court believes the same to be a fair and equitable estimate, and recognizes that until the plan has been instituted and completed, no one can truly know its value.

In summary, under the percentage of common fund approach, the Court finds an appropriate attorneys' fee award to be nineteen (19%) percent of one hundred and twenty million ($120,000,000.00) dollars, which is twenty-two million eight hundred thousand dollars ($22,800,000.00).

Lodestar Approach

Although the West Virginia Supreme Court of Appeals has not addressed the issue of using the lodestar approach to determine attorneys' fees in a class action, it has approved of its use in other cases where attorneys' fees were awarded and determined by a court.

> In Bishop[3] we equated an adequate fee award with one that is reasonable. In Syllabus point 3 of Bishop we also held that:
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> > When the relief sought in a human rights action is primarily equitable, **"reasonable attorneys' fees" should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate-the lodestar calculation-and (2) allowing, if appropriate, a contingency enhancement.** The general factors outlined in Syllabus Point 4 Aetna

[3] Bishop Coal Co. v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989).

> Cas. & Sur. Co. v. Pitrolo, should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and, (2) the allowance and amount of a contingency enhancement.

Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 177, 597 S.E.2d 302, 310 (2004) (emphasis added); Heldreth v. Rahimian, 219 W.Va. 462, 473, 637 S.E.2d 359, 370 (2006). Further, the Federal Courts have long used the lodestar calculation to determine the reasonableness of an appropriate attorneys' fee award. Kay Co. et al. v. Equitable Production Co., 2010 WL 4501572 (S. D. W. Va., Nov. 5, 2010).

First, the Court has reviewed the affidavits submitted by Class Counsel which document the time they have expended on this case. In total, Class Counsel claims thirty-nine thousand and thirty-seven (39,037) attorney hours expended on this case. When the requested fee of thirty million dollars ($30,000,000.00) is divided by the number of hours, Class Counsel is requesting a fee of approximately seven hundred and sixty-eight dollars ($768.00) per hour. This amount is too high, even when the contingency fee nature of the case is taken into account. There are very few attorneys in the United States who can command anywhere near this amount as an hourly rate. Further, many of those hours were expended by associates, or less experienced attorneys, who can command an even lower hourly rate than experienced attorneys. After a review of local hourly rates, and giving due consideration to the experience and skill of Class Counsel, the Court hereby finds that an appropriate average hourly rate for all of the attorneys that worked on this case is two hundred and seventy five

dollars ($275.00) per hour.

Therefore, to create the lodestar number, the Court has multiplied the hourly rate times the total number of hours worked, (275 x 39,037) which equals the lodestar number of ten million seven hundred and thirty-five thousand one hundred and seventy-five dollars ($10,735,175).

The next step in the lodestar approach is for the Court to determine an appropriate multiplier to recognize the contingency fee nature of the case, the risk Class Counsel took, and the result obtained. The Court additionally has considered all of the factors enumerated under Syllabus Point 4 of Aetna, as outlined *supra*. Further:

> Attorneys' fee awards must be large enough to ensure the availability of counsel in class actions, where the plaintiffs' individual claims may not be large enough take on individually. The risks of investing time and resources in a class action cannot be discounted. It is equally important, however, to consider that fees deemed reasonable by the bar and the judiciary appear unseemly to the general public, and to ensure that those awards are not so large as to unjustly enrich attorneys simply because they have represented a large number of claimants.

Kay Co. v. Equitable Production Co., 2010 WL 4501572, 9 (S.D.W.Va. 2010).

Risk multipliers have been set at various rates, depending on the nature of individual cases. See Yong Soon Oh v. AT&T Corp., 225 F.R.D. 142 (D.N.J. 2004) (multiplier of 2.15 justified by risk of non-recovery and social usefulness of litigation); Trist v. First Fed. Savings and Loan, 89 F.R.D. 8 (E.D. Pa. 1980) (multiplier of 1.36 appropriate); Charal v. Andes, 88 F.R.D. 265 (E.D. Pa. 1980) (multiplier of 1.5 appropriate); Florin v. Nationsbank of Ga., 60 F.3d 1245 (7th Cir. 1995) (multiplier of 1.53 appropriate).

After a review of guiding persuasive case law, and after considering the valuable recovery to the Class and the substantial effort and skill of Class Counsel, the Court finds that the appropriate multiplier for this case is two (2.0). The final step of the lodestar approach is to use the multiplier of two (2.0) on the lodestar number, which is ten million seven hundred and thirty-five thousand one hundred and seventy-five dollars ($10,735,175). The result of this multiplication is twenty-one million four hundred and seventy thousand three hundred and fifty dollars ($21,470,350.00). This amount is close to the amount under the common fund approach, but it is slightly less. Accordingly, the Court finds that the lodestar approach, as a cross check, supports the recovery outlined above and awarded by the Court under the percentage of common fund approach.

Litigation Expenses

The Court has conducted a thorough examination of the hundreds of pages of documents submitted by Class Counsel in support of their request of approximately nine million nine hundred thousand dollars ($9,900,000.00) in litigation expenses. The law clearly supports a recovery for litigation expenses; however, to be recovered, those expenses must be reasonable.

The Court finds that the majority of the claimed expenses are reasonable. However, the Court has found unreasonable and improper expenditures in the claimed travel expenses of Class Counsel. These expenditures are typified by (1) private charter jets instead of normal airfare, (2) limousine fare, which is never a necessary expense, and (3) and extraordinary amount of reimbursements from the individual firms to their employees with no further explanation other than that

it was for a credit card payment. Finally, R. Edison Hill claimed a trip to Las Vegas for a "meeting with co-counsel" and a room at the Hotel Bellagio costing eight hundred and seventy-two dollars and ninety-one cents ($872.91), and meals at the Bellagio costing five hundred and thirteen dollars and seventy-seven cents ($513.77), which is incredibly unreasonable and improper. Due to this improperly claimed expense, R. Edison Hill and his law firm are receiving zero for their claimed travel expenses.

The Court finds that Class Counsel chose to treat themselves to luxurious air travel, meals, lodging, and other unnecessary expenses which shall not be borne by the Classes. Further, the Court finds that the records produced by Class Counsel as to travel are too indefinite to allow the Court to consider each item individually. Many of the itemized travel expenses merely show that a firm reimbursed an employee for expenses on a credit card, without any explanation of what those expenses represent. Therefore, the Court cannot determine the reasonableness of those expenses on an individual basis.

Accordingly, the Court is reducing all claimed travel expenses, unless otherwise noted, by fifty percent (50%). Class Counsel is allowed to recovery for necessary expenditures, but private jets, limos, and trips to the Hotel Bellagio[4] are not necessary expenditures.

Next, the Court has reviewed the request for "interest" payments put forth by Class Counsel. Essentially, two firms, Cochran, Cherry, Givens, Smith, Lane

[4] The Court notes that only one attorney actually itemized a trip to Las Vegas, however, he did so "for meeting with co-counsel" shortly after the trial ended. Although the Court cannot determine (due to the indefiniteness of the records in regards to the reimbursement of individual employees' credit card bills) if any other attorneys or firms are claiming expenses from that trip, it cannot rule out the possibility that they are claiming such unnecessary and improper expenses.

& Taylor, (the "Cochran Law Firm"), and the Firm of Levin, Papatonio, Thomas, Mitchell, Rafferty & Proctor ("Levin Papantonio"), financed the litigation of this case. To do so, they opened lines of credit with financial institutions. While the Court recognizes that funding the litigation of a large toxic tort case is expensive, it is denying the request for interest recoverable as a necessary litigation expense for two reasons. First, such an approval would create a slippery slope where attorneys would find it preferable to finance a case via credit, and claim the interest as an expense in the future. This would be a disservice to their clients. Second, although certain attorneys for the Plaintiffs appear to view this interest as a return on their investment in the case, it is not. Their return on investment is the twenty-two million eight hundred thousand dollar ($22,800,000.00) attorneys' fee award.

Accordingly, the Court awards the following litigation expenses, by firm.

Expenses Awarded – By Firm

Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor, P.A.

Granted Without Modification

1. Filing Fees	=	2,836.00
2. Court Reporting	=	102,345.87
3. Expert Fees and Costs	=	2,451,661.42
4. Witness Fees (mileage)	=	1,003.54
5. Publications/ Reference Materials	=	4,893.16
6. Exhibits	=	11,833.06
7. Supplies	=	32,199.18

8. Court Copies, Wood County	=	607.50
9. Miscellaneous Supplies	=	41,403.55
10. Medical Records	=	4,447.74
11. Service of Process	=	3,472.13
12. Mediation fee	=	740.00
13. Research and Traces	=	89.06
14. Consulting and Technology Services	=	22,637.35
15. Investigation & Film and Video	=	7,876.08
16. Investigation Mileage	=	221.94
17. Photos	=	905.41
18. Copies & Faxes	=	231,448.81
19. Transcription Services	=	1,095.25
20. Telephone/ Conference Calls	=	19,877.05
21. Legal Research/ Westlaw	=	39,568.47
22. Media Production	=	3,868.40
23. Conference Room Rental	=	4,286.41
24. Administrative Temporary Services	=	6,005.86
25. Investigation – Subpoena	=	25.00
26. Technical Support – Trial	=	186,002.00
27. Printing & Class mailings	=	42,621.74
28. Postage/ Fed-Ex / UPS	=	80,735.32
29. External Investigative Services	=	4,017.53
30. Misc. Professional Services	=	2,339.19

31. Paralegal Fees – Depo. Summaries = 4,162.50

32. Referral Fees = 2,508.25

33. Reimbursements from Cochran[5] = minus (767,207.31)

34. Reimbursements to Cochran and others = 556,377.69

Discounted[6]

1. Travel – Discounted by 50% = (708,639.29 x .5) = 354,319.65.

2. "Excess Travel" by 50% = (223,437.32 x .5) = 111,718.66.

Denied

1. Interest payments on line of credit = Zero (claimed 570,546.63)

Total Litigation Expense Award to Levin Papantonio = three million five hundred and seventy-two thousand nine hundred and forty-three dollars and forty-six cents ($3,572,943.46).

Cochran, Cherry, Givens, Smith, Lane & Taylor, P.C.

Granted Without Modification

1. Court Costs / Filing Fees = 47,417.05

[5] The Cochran Law Firm and Levin Papantonio split early costs in this case. They reimbursed each other from time to time from 2005 to 2007. Every dollar that either firm received as a reimbursement from another firm has been deducted from their claimed expenses. Conversely, every dollar that was paid by one firm to another has been claimed as an expense by the paying firm. The Court has done its best to confirm that nothing is being billed as an expense twice, and believes the expenses awarded by this Order to be accurate and not a "double dip" of the actual expenses.

[6] Levin Papantonio did the majority of their air travel via private charter jet. Theses individual trips ranged between five or six thousand dollars round trip. This cost is significantly higher than travelling via commercial airlines. Further, many of these charter jet expenses were paid to LP Air, Inc., which is located in Pensacola, Florida, and has a registered agent named Robert Smith, coincidentally the comptroller at Levin Papantonio, and its officers are Michael Papantonio, Mark Proctor, and Leo Thomas, all of whom are partners at Levin Papantonio. While Levin Papantonio, as a firm, can choose to use a business that provides charter jet service, and is owned by members of its firm, those travel expenses must be reasonable. The expenses claimed by Levin Papantonio for travel are not reasonable.

2. Color Prints	=	3,498.00
3. Communication / Long Distance	=	223.53
4. Contract Labor	=	90,414.60
5. Copies	=	126,540.96
6. Reimbursements - Levin Papantonio & Others	=	minus (550,022.67)
7. Court Reporting	=	253,630.46
8. Expert Fees	=	2,939,682.17
9. Express Mail/ Fed-Ex	=	29,497.85
10. Facsimile Charges	=	318.00
11. Investigative Fees	=	1,673.65
12. Mediation Fees	=	12,743.07
13. Miscellaneous – Supplies & Etc.	=	28,499.72
14. Photographs	=	1,402.94
15. Postage	=	521.32
16. Publication Costs	=	90,973.00
17. Legal Research / Westlaw	=	91,540.21
18. Reimbursements to Levin Papantonio	=	766,763.09

Discounted

1. Travel discounted by 50% = (412,392.30 x .5) = 206,196.15

Denied

1. Interest paid on line of credit = Award of Zero (claimed 864,164.62)

Total Litigation Expense Award to Cochran Law Firm = four million one hundred and forty-one thousand five hundred and thirteen dollars and ten cents ($4,141,513.10).

West & Jones

Granted Without Modification

1. Communication Costs	=	65.26
2. Copies	=	5485.64
3. Litigation Support	=	150.00
4. Supplies	=	107.20
5. Postage	=	566.66
6. Travel	=	1,298.32

Total Litigation Expense Award to West & Jones = seven thousand six hundred and seventy-three dollars and eight cents ($7,673.08).

Law Office of Gary Rich, L.C.

Granted Without Modification

1. Publication Costs	=	2,157.79.

Total Litigation Expense Award to Law Office of Gary Rich = two thousand one hundred and fifty-seven dollars and seventy-nine cents ($2,157.79).

Kennedy & Madonna, LLP

Granted Without Modification

1. Court Costs/ Filing Fees	=	660.00
2. Hotel	=	4,382.61
3. Car Rental	=	933.82
4. Copies	=	129.00
5. Parking, Tolls & Gasoline	=	545.56
6. Meals	=	581.74
7. Postage	=	69.16

Discounted

1. Airfare by fifty percent (50%) = (22,019.83 x .5) =		11,009.91

Total Litigation Expense Award for Kennedy & Madonna = eighteen thousand three hundred and eleven dollars and eighty cents ($18,311.80).

Hill, Peterson, Carper, Bee & Deitzler, PLLC

Granted Without Modification

1. Telephone – Long Distance	=	169.56
2. Photocopies	=	5,202.75
3. Postage	=	192.57
4. Outside Photocopies	=	1,115.60
5. Other – State Bar Fee	=	100.00

Denied

1. Travel & Lodging = ZERO (claimed 8,777.47)

Total Litigation Expense Award to Hill, Peterson, Carper, Bee & Deitzler, PLLC = six thousand seven hundred and eighty dollars and forty-eight cents ($6,780.48).

Class Representatives Incentive Award Request

After the verdict was rendered in 2007, Class Counsel, as part of their first request for attorneys' fees and expenses, moved the Court to allow an incentive award to each of the named class representatives in the amount of seventy five thousand dollars ($75,000.00) to be paid from the common fund. The Court denied this Motion and found that such an incentive payment is not supported by the law. The Plaintiffs moved for reconsideration, and changed the amount from seventy five thousand dollars ($75,000.00) per representative to fifty thousand dollars ($50,000.00) per representative, and the awards were to be paid from the attorneys' fees instead of the common fund. The Court approved this Motion on the grounds that the attorneys for the Classes could do as they wished with their own fees.

As part of their Petition, Class Counsel has requested that the Court approve a fifty thousand dollar ($50,000.00) payment per representative, to be paid from the attorneys' fees distributed through this Order.

The Court has reviewed the applicable law, and finds that fifty thousand dollars ($50,000.00) per representative is unfair based on the reduced recovery

available to the Classes. See Kay Co. v. Equitable Production Co. 2010 WL 4501572, 9 (S.D.W.Va. 2010) (reducing incentive payments from requested $25,000 per representative to $15,000.00 per representative). However, it is clear that the Class Representatives have made substantial investments of their own time and effort during the seven (7) years this case has been pending, so the Court finds that they do deserve an incentive award. "Incentive awards are routinely approved in class actions to encourage socially beneficial litigation by compensating named plaintiffs for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class." Id. at * 11-12 (internal citations omitted).

After reviewing the total settlement and estimating its value to the Classes, the Court hereby **ORDERS** that each named class representative shall receive twenty-five thousand dollars ($25,000.00) as an incentive payment, to be paid by Class Counsel from the attorneys' fee award. Twenty-five thousand dollars ($25,000.00) is a significant award, and it fairly compensates the representatives without creating an unfair windfall for them in comparison to the relief accorded the other Class members.

ORDER

For the foregoing reasons, the Court hereby **ORDERS** the following:

(1) That Claims Administrator Edgar Gentle distribute twenty-two million eight hundred thousand dollars ($22,800,000.00) from the sixty-six million dollar ($66,000,000.00) Qualified Settlement Fund to Class Counsel as an attorney fee award within forty-five (45) days of the date of entry of this Order.

(2) That Claims Administrator Edgar Gentle shall distribute the following amounts to Class Counsel as an award and reimbursement of expenses incurred during this case from the sixty-six million dollar ($66,000,000.00) Qualified Settlement Fund within forty-five (45) days of the date of entry of this Order.

Litigation Expense Awards

A. Levin Papantonio = $3,572,943.46.

B. Cochran Law Firm = $4,141,513.10.

C. Kennedy & Madonna = $18,311.80.

D. West & Jones = $7,673.08.

E. Hill, Peterson, Carper, Bee & Deitzler, PLLC = $6,780.48.

F. Law Office of Gary Rich = $2,157.79.

(3) Defendant DuPont and Class Counsel are hereby **ORDERED** to pay their respective shares of the fees and expenses represented in the Special Master and Settlement Administrator Report, filed January 7, 2011, by Edgar Gentle, which represents the total amount due for his services from the beginning of his involvement with this case until December 31, 2010. The Court hereby **ORDERS** that Defendant DuPont and Class Counsel are both responsible for one half of Edgar Gentle's total bill. It has been represented to the Court that DuPont has partially paid for their half, but Class Counsel has not paid anything yet. Both Class Counsel and DuPont shall pay their shares of the Special Master's bill, in full, within thirty (30) days of the entry of this Order.

(4) Class Counsel shall pay each Class Representative twenty-five thousand dollars ($25,000.00) from their fee award and the same payment shall be made within fourteen (14) days of Class Counsel's receipt of their fee award.

(5) Lastly, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court directs entry of this Order as a Final Order as to the claims and issues above upon an express determination that there is no just reason for delay and upon an express direction for the entry for judgment.

IT IS SO ORDERED.

Finally, it is **ORDERED** that the Clerk of this Court shall provide certified copies of this Order to the following:

David B. Thomas
James S. Arnold
Stephanie Thacker
Allen Guthrie & Thomas, PLLC
500 Lee St., East, Suite 800
P.O. Box 3394
Charleston, WV 25333-3394

Meredith McCarthy
901 W. Main St.
Bridgeport, WV 26330
Guardian ad litem

Edgar Gentle, III
Gentle, Turner, & Sexton
501 Riverchase Parkway East,
Suite 100
Hoover, AL 35244
Special Master

J. Farrest Taylor
Cochran, Cherry, Givens, Smith,
Lane & Taylor, P.C.
163 West Main St.
Dothan, AL 36301

ENTER: January 27, 2011

Thomas A. Bedell, Circuit Judge

THOMAS A. BEDELL, JUDGE
15th Judicial Circuit of West Virginia
Harrison County Courthouse
301 West Main Street, Room 321
Clarksburg, West Virginia 26301
304-624-8630
FAX 304-624-8736

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to: David B Thomas 304-345-9941
Assistant Taylor 334-793-8280
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from: Becky - Judge Bedell

date: ~~1/26/11~~ 1/27/11

subject: Perrini et al v. Dun Prop et al
04-C-296-2

pages: 35 & inclusive

NOTES: