

IN THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, CAROLYN HOLBERT,
WAUNONA MESSINGER CROUSER,
REBECCA 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,
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.

**Memorandum of Law in Support of Petition
For Attorneys' Fees and Litigation Expenses**

Petitioners (the law firms that represented the class in this litigation) seek the award of attorneys' fees and litigation expenses from the common fund created on behalf of the class. At the same time, plaintiffs have moved for an award of attorneys' fees and expenses from DuPont. Any amount of attorneys' fees and litigation expenses awarded to plaintiffs will reduce the amount of the attorneys' fees and litigation expenses deducted from the common fund.

Petitioners are asking for fees in the amount of 33 1/3% percent of the common fund and expenses in the amount of \$8,001,669.59.¹ These amounts are reasonable in light of the factors considered by courts in similar cases. Petitioners have itemized their litigation expenses in Exhibit A to this Memorandum and detailed their time in Exhibit B. Petitioners will provide testimony supporting their expenses and time at the December 20, 2007, hearing.

This petition is submitted on behalf of the law firms of Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor; Cochran, Cherry, Givens, Smith, Lane & Taylor; The Law Office of Gary Rich; West & Jones; and Kennedy & Madonna. The grounds for this petition are set forth in this document and in affidavits and other supporting documentation that will be submitted at or before the December 20, 2007 hearing.

History of the Spelter Litigation

For the last three and one-half years, Petitioners have diligently fought for the rights of the class members. To fight this unprecedented battle, Petitioners devoted approximately 50,000 hours to this cause and incurred expenses exceeding \$8,000,000.00.² Throughout this litigation, DuPont has vigorously contested every issue and employed seven law firms to defend this action. In addition to requiring enormous expenditures of time and money, this case required the petitioners to master complex legal and scientific issues. Petitioners took this case on a

¹Petitioners' expenses will have increased slightly by December 20, 2007, when the Court conducts a hearing to finalize the medical monitoring and property remediation plans proposed by Plaintiffs. With leave of Court, the Petitioners will provide supplemental documentation addressing additional expenses at the hearing.

² Petitioners have not found a case where counsel advanced more in case expenses than was advanced in this case.

contingency fee basis and, in doing so, took a substantial risk. The magnitude of the undertaking, the resources devoted to the cause, the risks involved, and the results obtained for the class justify an award of attorneys' fees in the amount of 33 1/3% and a reimbursement of expenses in the amount \$8,001,669.59.

Initially, to determine whether the smelter had in fact contaminated off-site properties, petitioners contracted with Dr. George Flowers, a Ph. D. geochemist, to sample in the areas surrounding the smelter. At the time of Dr. Flowers' initial sampling, petitioners gathered information on the site including the types of contaminants associated with zinc smelting. During this first round of sampling, Dr. Flowers collected and analyzed approximately 900 soil samples. A pattern emerged in the data showing that the area had been impacted heavy metal pollution from the smelter.

With sufficient information from Dr. Flowers' first round of testing to show widespread contamination, petitioners assembled a team of experts. Included within this team were Dr. Kirk Brown, soil scientist and remediation expert, Dr. James Stewart and Dr. David MacIntosh, experts in the fate and transport of contaminants, Dr. James Kornberg, a medical doctor with expertise in risk assessment, Dr. Michael Brookshire, an economist who specializes in determining the costs of medical monitoring programs, and Dr. John Kilpatrick, an expert in the effect of contamination on property values. Later, Petitioners added Dr. Carl Werntz, a physician with the West Virginia School of Public Health. Petitioners incurred \$4,798,166.03 in expert fees.

Petitioners filed a lawsuit on behalf of the class in June 2004. Based upon the federal officer doctrine, DuPont responded by removing this case to the United States District Court for

the Northern District of West Virginia. Petitioners filed a motion to remand, which was granted by the district court on May 17, 2005. During the time that the case was pending in federal court, however, the parties engaged in discovery as required by Rule 26 of the Federal Rules of Civil Procedure.

Following remand, the Court entered a scheduling order that governed the litigation through the class certification hearing. During this time, petitioners built a case for certification, completing class discovery, addressing discovery disputes with the discovery commissioner and Court, and briefing the issues surrounding class certification. In May 2005, the Court conducted a three day hearing on the issue of class certification.

Preparing for class certification was akin to preparing for trial, requiring disclosure of witnesses and exhibits, drafting of motions, responding to motions, and assembling evidence. Following certification, the Court entered a scheduling order governing discovery and other deadlines through trial. Throughout discovery, both before and after class certification, Petitioners were relentless in demanding and ensuring that DuPont produced every relevant document. DuPont fought production of thousands of documents, simply refusing to produce documents or producing heavily redacted documents, usually on the basis of attorney work product doctrine or attorney-client privilege. In response, Petitioners filed numerous motions to compel. Over twelve hearings were conducted by the discovery commissioner requiring her to review, *in camera*, thousands of documents. Petitioners typically prevailed in their motions to compel and generally obtain most, if not all, of the contested documents.

Over 70,000 discovery documents (hundreds of thousands of pages) were reviewed by the petitioners. Many of these documents were not easily obtained, either because of the

defendants' refusal to produce them or because they were not easily accessible. For example, petitioners spent several days in an abandoned warehouse, which did not have electricity, to review documents from the Matthiessen & Hegeler era. Petitioners also tediously retrieved and reviewed the pleadings and the transcripts from the 1929 Grasselli litigation. Petitioners negotiated permission to review documents at the Hageler Museum in Wilmington, Delaware, where DuPont had archived many of its older documents that it had failed to produce during discovery. In addition to the documents produced by the parties (whether willingly or by order of the discovery commissioner), Petitioners also obtained documents, usually through third-party subpoenas, from various third parties, including, but not limited to, the United States Environmental Protection Agency, the West Virginia Department of Environmental Protection, and contractors who worked for DuPont and T.L. Diamond. After reviewing these documents, they were coded according to issues and incorporated into a computerized data base.

In addition to paper discovery, the parties took over eighty depositions. Many of the depositions lasted two days and required extensive preparation to incorporate the documents relevant to each witness. DuPont hired eleven experts. Petitioners exhaustively researched the background of each of DuPont's experts and meticulously examined their opinions.

On June 28, 2007, the parties attempted mediation. DuPont made one exceptionally low offer, in Petitioners' opinion, which proved to be correct by the jury's verdict. DuPont stated that further negotiations would be meaningless.

Trial preparation required hundreds of hours. During this trial preparation, petitioners were faced with numerous pretrial deadlines including deadlines for summary judgment motions and motions in limine. Before trial, DuPont moved for summary judgment on eight issues,

moved to limit the testimony of the plaintiffs' experts, and filed twelve motions in limine. Petitioners filed numerous pretrial motions, filed responses to each of the pretrial motions filed by DuPont, and filed two successful summary judgment motions of their own. Petitioners reviewed tens-of-thousands of documents to generate an exhibit list. In addition, petitioners spent hundreds of hours in preparation for expert direct examinations and cross-examinations. As this Court is well aware, the trial lasted five weeks.

DuPont twice filed petitions for writ of prohibition, both of which Plaintiffs responded to and overcame. In its second petition, on the eve of trial, DuPont filed a lengthy brief, which attacked practically every aspect of class certification. The Supreme Court of Appeals for West Virginia voted 5 – 0 to reject the petition.

I. If this Court does not award Plaintiffs attorneys' fees and expenses, Petitioners are entitled to an award of attorneys' fees and expenses under the common fund doctrine.

Petitioners ask this Court to award its fees and expenses from the common fund created on behalf of the class. Specifically, Petitioners request fees in the amount of 33 1/3% percent and expenses in the amount of \$8,001,669.59. These amounts are reasonable in light of the factors considered by courts in similar cases.

A. 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. 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 25% 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 fund recovered in class action seeking damages for pollution from hazardous waste).

Where a common fund has been generated on behalf of 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).³

³ *Smith v. Krispy Kreme Doughnut Corporation*, 2007 WL 119157 (M.D.N.C.).
“On the question of attorneys fees, the Court finds that in a common fund case such as this, a

B. The factors typically applied to determine reasonableness of fees support Petitioners' request for an award of 33 1/3%.

Courts have applied a number of factors in determining the reasonableness of fees:⁴ (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 50,000 hours representing the work of over 16 attorneys. In addition to the labor, Petitioners have incurred over \$8,000,000.00 in litigation expenses.

The record shows that this case was extraordinarily complex, requiring 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

reasonable fee is normally a percentage of the Class recovery. *DeLoach v. Philip 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)).

⁴ *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 W.L. 3033489 at *16 (2nd Cir. 2007).

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

As result of Petitioners' efforts, approximately 2,900 properties are entitled to remediation and an estimated 5,000 to 8,000 people are entitled to medical monitoring. The monetary value of the remediation exceeds \$55,000,000.00 and the value of the medical monitoring could equal or exceed \$120,000,000.00. In addition, the class members will benefit from the award of \$196,200,000.00 in punitive damages.

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 of nonpayment of fees, but litigation expenses as well. Numerous uncertainties raised the risks for Petitioners. To name a few: was DuPont legally responsible for the conduct of Graselli; what effect, if any, 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.

Thirty-three and one-third percent is consistent with fees awarded in other class action cases. A survey of recent fee awards in class action cases is presented below. One important factor to keep in mind when reviewing the survey of awards is that, unlike this case, the cases below were settled and not tried to verdict.

- 25.5%: *Leach v. E. I. DuPont de Nemours and Company*, Civil Action No.: 01-C-608 (Circuit Court of Wood County, W. Va. 2005) (Attorneys' fees in the amount of 25.5% approved by the court.).
- 33%: *Bynum v. District of Columbia*, 412 F. Supp. 2d 73 (D.D.C. 2006).
- 30%: *Brody v. Hellman*, 167 P.3d 192 (Colo. App. 2007)
- 29%: *In re Educ. Testing Service Praxis Principles of Learning & Teaching, Grades 7 -12 Litig.*, 447 F. Supp. 2d 612 (E. D. La. 2006)
- 22.5%: *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D.Del. 2002) aff'd 391 F.3d 516 (3rd Cir. 2004) (many courts have considered 25% to be the benchmark figure in class action lawsuits, with adjustments up or down for case specific factors).
- 33%: *Godshall v. Franklin Mint Co.*, 2004 W.L. 2745890 (E.D. Pa. 2004).
- 33%: *In re FAO Inc. Sec. Litig.*, 2005 W.L. 3801469 (E.D. Pa. 2005).
- 30%: *Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medico Managed Care, L.L.C.*, 2007 W.L. 3033489 at *16 (2nd Cir. 2007):
- 33%: *Haney, et al. v. Parrott et al.*, 2007 W.L. 2752375 (S.D. Ohio):
- 30%: *In re Linerboard Antitrust Litig.*, 2004 W.L. 1221350 (E. D. Pa. June 2, 2004).
- 33 1/3%: *In re Remeron Direct Purchaser Antitrust Litig.*, No.03-0085, 2005 W. L. 3008808 (D.N.J. Nov. 9, 2005)("Courts within the Third Circuit often award fees of 25% to 33 1/3 % of the recovery.").

Conclusion

Wherefore, Petitioners respectfully move this Court to award a fee of 33 1/3% of the common fund, which is the sum of the value of the medical monitoring program, the costs of

remediation, the value of the punitive damage award, and any accumulated interest. In addition, Petitioners move this Court for reimbursement of expenses in the amount of \$8,001,669.59 from the common fund.

Dated: November 19, 2007.

Perry B. Jones
By Thomas T. Jones

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Attorneys for Plaintiffs

**IN THE CIRCUIT COURT OF
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WAUNONA MESSINGER CROUSER, REBECCA MORLOCK,
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on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Case No. 04-C-296-2
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E.I. DU PONT DE NEMOURS AND COMPANY,
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,

CERTIFICATE OF SERVICE

I, Perry Jones, counsel for Plaintiffs, hereby certify that service of the Memorandum of Law in Support of Petition for Award of Attorneys' Fees and Reimbursement for Litigation Costs has been made upon counsel of record via Federal Express for overnight delivery on this 19th day of November 2007, addressed as follows:

Jim Arnold, Esq.
Allen, Guthrie, McHugh & Thomas, P.L.L.C.
500 Lee Street, East, Suite 800
Charleston, WV 25301
Counsel for Defendant E. I. Du Pont De Nemours and Company

Perry B Jones
By Thomas T. Farley

Perry B. Jones, WVSB# 9683

Jerald E. Jones, WVSB# 1920

West & Jones

360 Washington Ave

Clarksburg, WV 26302

SPELTER CASE EXPENSES

Communication Costs Total		\$17,580.58
Outside Litigation Support Total		\$86,999.95
Copies		\$339,796.74
Court Reporting Total		\$356,999.73
Court Costs/Filing Fees Total		\$57,406.08
Experts Total		\$4,698,930.20
- Analytics, Inc.	\$11,428.17	
- Disposal Safety Inc.	\$345,696.15	
- Economic Geographics	\$44,681.00	
- EH&E	\$746,868.37	
- George Flowers	\$369,862.19	
- Greenfield Advisors	\$1,181,595.36	
- IOEH	\$39,681.80	
- Michael Brookshire	\$54,865.04	
- Severn Trent Laboratories	\$7,976.00	
- SI Group	\$714,459.14	
- WVU Medical Corp	\$2,500.00	
- SI Group	\$443,031.82	
- COHBI Physicians	\$564,230.05	
- Rock Wilson	\$18,870.60	
- Greenleaf Surveying	\$10,098.37	
- Metro Market Trends	\$43,953.14	
- Severn Trent Lab	\$99,133.00	
Consulting Services Total		\$167,633.12
Investigative Fees Total		\$298,073.65



Miscellaneous Total		\$282,484.85
- Supplies	\$8,343.48	
- Parking	\$600.00	
- Lunch (staff while working)	\$181.32	
- US EPA	\$6,420.78	
- Supplies, etc.	\$68,320.85	
- Trial Production	\$197,041.00	
- Process Service	\$1,113.55	
- Supplies	\$184.87	
- Facility Rental	\$90.00	
- Process Service	\$60.00	
- Document Expense	\$129.00	

Photographs/Videographers Total **\$18,261.32**

Postage Total **\$76,415.58**

Publication Costs Total **\$84,939.44**

Research Total **\$78,435.26**

Travel Total **\$882,981.88**

Interest Total **\$554,731.21**

GRAND TOTAL \$8,001,669.59

SPELTER CASE TIME

Hours

Cochran, Cherry, Givens, Smith Total **10,118.30**

Attorneys

-	J. Farrest Taylor	2855.62
-	Angela J. Mason	2212.22
-	Joseph D. Lane	1141.18
-	J. Keith Givens	1115.26
-	Jake A. Norton	428.90
-		

Staff

-	Christian Campbell	558.50
-	Shanna Conrad	283.70
-	Judi Cassidy	279.57
-	J. Heath Loftin	263.50
-	Lara Eccles	155.20
-	Wesley Fain	150.60
-	Alexis Armstrong	145.90
-	Ashley Adderhold	117.20
-	Haley Starling	75.50
-	Cara Morales	60.25
-	Connie Melton	51.00
-	Jenny Stripling	22.00
-	Tessie Steverson	6.25

Levin, Papantonio, Thomas, Mitchell Total **34,202.20**

Attorneys

-	Steve Medina	6,660.30
-	Ned McWilliams	6,120.50
-	Mike Papantonio	2,163.80
-	Mark Proctor	1,112.00
-	Virginia Buchanan	3,318.00
-	Amanda Slevinski	1,659.00
-	Brian Barr	601.00
-	Larry Morris	215.00
-	Clay Mitchell	156.00

Staff

-	Nathan Bess	1429.50
-	Karla Shivers	5,114.00
-	Rita Lee	1,628.00
-	Carol Moore	4,025.60



Law Office of Gary W. Rich Total		2792.10
- Gary Rich	1843	
- Deanna Pennington	28.5	
- Clayton W. Patterson	12.4	
- Staff	908.20	

West & Jones Total		1160.40
Attorneys		
- Jerald E. Jones	74.5	
- Perry B. Jones	1085.90	

Kennedy & Madonna Total		1238.20
- Kevin Madonna	828.10	
- Robert Kennedy, Jr.	218.50	
- Daniel Estrin	191.60	

TOTAL HOURS		49,511.20
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