McLaughlin, *supra*, § 6:20 (quoting the MCL 4th § 21.611[203] at 313)). It should be noted that a "second opt-out opportunity helps to provide the supervising court the 'structural assurance of fairness,' called for in *Amchem Products Inc.*" MCL, *supra*, § 21.611 at 312. With that said, "[t]here is no presumption that a second opt-out opportunity should be afforded. That question is left entirely to the court's discretion." McLaughlin, *supra*, § 6:20 (quoting 2003 Report of the Judicial Conference, Committee on Rules of Practice and Procedure (commentary on amended [Federal Rules of Civil Procedure,] Rule 23(e)(3))[now (e)(4)]).

The next question is whether to allow class members who have opted-out at the certification stage to rejoin the class – i.e., opt-in – at the settlement stage. The decision to allow opt-ins is within the discretion of the bargaining parties. *See* MCL, *supra*, § 21.312 at 294 (stating that "[e]ven if a class member has opted out after receiving a certification notice, the parties might direct notice to such opt outs to give them an opportunity to opt back into the class and participate in the proposed settlement"). A reviewing court can take this fact into consideration when approving or disapproving of the proposed settlement.

5. Time Between Notice and Important Deadlines

One of the main functions of the settlement notice is to communicate important dates. *McLaughlin on Class Actions* states that

> Courts have consistently held that 30 to 60 days between the mailing (or other dissemination) of class notice and the last date to object or opt out[, if allowed], coupled with a few more weeks between the close of objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement.

Id. § 6:17 at 117-118.

[203] McLaughlin on Class Actions incorrectly cites the MCL; this error has been corrected and the citation provided is the correct citation.

C. Final Approval

There are two aspects to final approval; procedure and substance; for final approval to withstand appellate scrutiny, a reviewing court must be mindful of both. The procedure for final approval begins at the conclusion of the preliminary review stage. As laid out *supra*, a reviewing court must ensure that the notice of the proposed settlement is proper. The next procedural issue is the fairness hearing, which will be discussed below. At the fairness hearing, the court will deal with the substance of the proposed settlement; i.e., whether the settlement is fair, adequate and reasonable. The Court will also receive objections to the proposed settlement.

1. Fairness Hearing

Before a reviewing court can approve a proposed settlement a fairness hearing must be held.[204] Fed. R. Civ. P. 23(e)(2); McLaughlin, *supra*, § 6:7 at 67-68; *see also* MCL, *supra*, § 21.632.

> The fairness hearing is critical because it is the point at which the [proposed settlement] is put to a public test, where the judiciary lends its moral force to the deal. Given that so much rides on the fairness hearing, it remains a relatively underdeveloped and undertheorized aspect of civil adjudication.

William Rubenstein, *A Transnational Model of Adjudication*, 89 Geo. L.J. 371, 436 (2001). In fact, this author goes on to suggest that "fairness hearings are often pro forma in nature." *Id.* This authors' point is well taken; but even so, there are certain aspects to a fairness hearing that are universally accepted.

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[204] Interestingly, a fairness hearing is not required by Rule 23 of the West Virginia Rules of Civil Procedure. However, the requirement to hold a fairness hearing is universally accepted, and this Court finds that this procedure should be followed in West Virginia.

First and foremost, the fairness hearing is a tool for the proponents of the settlement to convince a reviewing court that the settlement is fair, adequate, and reasonable. MCL, *supra*, § 21.634. A fairness hearing is not a hearing on the merits of the case. *Mars Steel Corp. v. Continental Ill. Nat'l Bank and Trust*, 834 F.2d 677, 684 (7th Cir. 1987). Furthermore, the fact that a better settlement could have been negotiated is wholly irrelevant to the proceeding. See *In re Prudential Securities, Inc. L.P. Litig.*, MDL No. 1005, 1995 WL 798907 (S.D.N.Y. 1995)(citing *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D.Ga.1993)). The sole focus is on the fairness, adequacy, and reasonableness of the proposed settlement.

Second, the proponents can prove that the settlement is fair, adequate, and reasonable through any vehicle available in regular litigation, including but not limited to witness or expert testimony, and/or affidavit. *Id.* Third, the fairness hearing is also a vehicle by which class members can object to the proposed settlement. *Id.* "Time limits on the arguments of objectors are appropriate, as is refusal to hear the same objections more than once." *Id.* Ultimately, a reviewing court should be aware that "[a]n extended hearing may be necessary." *Id.*

2. Fair, Adequate, and Reasonable

To receive final approval, a reviewing court must determine that a proposed class action settlement is fair, adequate, and reasonable. *Starcher*, 176 W.Va. at 392, 343 S.E.2d at 677. Although many courts, commentators, and learned treatises have attempted to establish objective factors for courts to consider in deciding this issue, no such binding authority exists in West Virginia. However, the United States District Court for the Southern District of West Virginia, in several opinion orders, and at least one West Virginia Circuit Court, specifically the 15th

Judicial Circuit, have adopted the Fourth Circuit Court of Appeals criteria to determine whether class action settlements that each have reviewed were fair, adequate, and reasonable.

Specifically, the Honorable Joseph R. Goodwin states:

> I must, however, apply the more specific analysis adopted by the Fourth Circuit for determining whether the settlement satisfies the [Federal Rules of Civil Procedure] Rule 23 requirements. The Fourth Circuit has adopted a bifurcated analysis, separating the inquiry into a settlement's "fairness" from the inquiry into a settlement's "adequacy." . . . In assessing the "fairness" of a proposed settlement, the court must consider the following four factors: "'(1) the posture of the case at the time the settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of class action litigation.'" . . . In determining the "adequacy" of the settlement, the court looks to the following:
>
> > (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Groves v. Roy G. Hildreth and Son, Inc., 2011 WL 4382708 at 4-5 (S.D.W.Va. 2011) (citations omitted).[205]

In the 15th Judicial Circuit of West Virginia, the Honorable Thomas A. Bedell used these same factors to determine the fairness and adequacy of a proposed class action settlement. *Perrine, et al. v. E.I. du Pont de Nemours and Company, Final Order Approving Settlement,* January 4, 2011 at 10-11. (dkt. No. 04-C-296-2). The Court notes that Judge Bedell used these

[205] These factors were also used by the Honorable John T. Copenhaver, Jr. in deciding whether a class action settlement was fair, adequate and reasonable in *James A. Muhammad et. al. v. National City Mortgage, Inc. f/k/a National City Mortgage Co.*, No. 2: 07-0423 (S.D.W.Va. 2009).

factors after finding that "Rule 23(e)(2) of the West Virginia Rules of Civil Procedure provides that a class action may not be dismissed or compromised without approval of the court. Rule 23 does not provide any more direction for the court, nor does the common law of West Virginia." *Id.* at 8.

In fact, the only guidance as to the appropriate factors for consideration that this Court can find from the West Virginia Supreme Court of Appeals is contained in a dissenting opinion in the *Starcher* case. Specifically, the Honorable Thomas E. McHugh, writing for the dissenters, elaborated on the "most important factors" in considering the fairness, adequacy, and reasonableness of a proposed settlement; these factors are:

> (1) The strength of plaintiff's case on the merits balanced against the amount offered in settlement;
> (2) Presence of collusion in reaching a settlement;
> (3) The reaction of members of the class to the settlement;
> (4) The opinion of competent counsel[;]
> (5) The stage of the proceedings and the amount of discovery completed.

Starcher, 176 W.Va. at 393-394, 343 S.E.2d at 679 (McHugh, J., dissenting) (quoting 3B J. Moore, *Moore's Federal Practice § 23. 80[4] (2nd ed. 1985)).*

The leading treatise on the West Virginia Rules of Civil Procedure states that:

> Factors that a trial court should consider in making a determination of whether a settlement is fair, adequate, reasonable and not the result of collusion or fraud include: (1) the likelihood of success at trial, (2) the range of possible recovery, (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable, (4) the complexity, expense and duration of litigation, (5) the substance and amount of opposition to the settlement, and (6) the stage of proceedings at which the settlement was achieved.

Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure,* § 23 (e)[2] at 626 (4th ed. 2012).

The Court is also aware of authority from other Federal Circuits which attempt to determine these factors. For instance, a leading case from the Third Circuit of Appeals states the factors as follows:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through the trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh v Jepson, 521 F.2d 153, 157 (3rd Cir. 1975). Because of a "sea-change in the nature of class actions[,]" these factors were later updated by the Third Circuit to include,

> [T]he maturity of the underlying substantive issues, as measured by the experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other factors that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved-or likely to be achieved-for other claimants; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.

In re Prudential Ins. Co. of Am., 148 F.3d 283, 323 (3rd Cir. 1998) (citations omitted).

The Sixth Circuit Court of Appeals states that there are seven factors to consider:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives;

> (6) the reaction of absent class members; and (7) the public interest.

UAW v. General Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007)(citations omitted). The Court goes on to state that:

> The fairness of each settlement turns in large part on the bona fides of the parties' legal dispute. Although this inquiry understandably does not require us to "decide the merits of the case or resolve unsettled legal questions," we cannot "judge the fairness of a proposed compromise" without "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement."[206]

The Court again notes that the *Manual for Complex Litigation*, *McLaughlin on Class Actions: Law and Practice,* and other sources go through extensive lists of various factors gleaned from courts across the country to assist in making this determination.[207]

In reviewing all of these decisions, it is obvious that the basic components are the same, whether presented in lists or as subparts to general considerations of "fairness" and "adequacy."

The Court believes that the Fourth Circuit factors used by Judges Goodwin and Bedell in recent major class actions in West Virginia, provide a thorough template for reviewing the fairness, adequacy, and reasonableness of West Virginia class action settlements, with two modifications. First, each case has certain factors that are unique to it. A review of the cases from other jurisdictions and of learned treatises makes this readily apparent. For that reason, this Court has adopted a tenth factor-other factors unique to this action-as another ground for review. Second, rather than attribute some factors to "fairness" , and others to "adequacy", the Court believes that all ten factors, collectively, should be used to determine if the proposed settlements

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[206] The Court notes that this decision is among those cited by Cleckley, Davis & Palmer in their treatise as authority for the factors outlined above.

[207] *See* MCL, *supra*, § 21.62; *McLaughlin, supra*, § 6.7 at 69-71; *Wright, Miller & Kane, supra*, §1797.1

are fair, adequate, and reasonable, without attributing whether a specific factor falls under one of these three categories.

Therefore, in the absence of binding precedent from the common law of West Virginia, this court will apply the Fourth Circuit Court of Appeals factors, as amplified by the other factors mentioned herein, to make an overall determination as to whether the settlements are fair, adequate, and reasonable.

Accordingly, the court will focus its analysis first on the nine (9) Fourth Circuit factors and then on the other factors unique to this action.

a. The posture of the case at the time settlement was proposed:

This factor includes consideration of the issues raised by Justice McHugh as "the stage of the proceedings" and by Cleckley, Davis and Palmer as "the stage of the proceedings at which the settlement was achieved." The *Girsh* court refers to this as "the stage of the proceedings."

b. The extent of discovery that had been conducted:

Justice McHugh, the 3rd Circuit and the 6th Circuit refer to this as "the amount of discovery that has been completed", "the amount of discovery completed", and "the amount of discovery engaged in by the parties," respectively.

c. The circumstances surrounding the negotiations:

This is described by Justice McHugh as "the presence of collusion in reaching a settlement." Cleckley, Davis, and Palmer make the factor a part of the overall test, requiring that a trial court determine that "a settlement is fair, adequate, reasonable and not the result of collusion or fraud" (emphasis added). The Sixth Circuit mandates that courts consider "the risk

of fraud or collusion." Although not specifically mentioned in the above cases, other courts and commentators have warned reviewing courts to also consider matters which have been raised by the objectors in the case at bar, specifically, whether there are illusory benefits, whether the agreement contains a clear sailing agreement on fees, whether attorney's fees are so high in relation to the actual or probable class recovery that they suggest a strong possibility of collusion, and whether particular segments of the class are treated significantly different from others.

d. The experience of counsel in the area of class action litigation:

Justice McHugh touches upon this in the factor of "the opinion of competent counsel." However, Justice McHugh's characterization also implicitly relates to the information that competent counsel has gained in discovery and in developing and appreciating the posture of the case. This is also reflected in the 6th Circuit's factors as "the opinions of class counsel."

e. The relative strength of the Plaintiff's case on the merits:

There are multiple variations of this factor. Justice McHugh lists it as "the strength of plaintiff's case on the merits balanced against the amount offered in settlement." Cleckley, Davis, and Palmer refer to it as "the likelihood of success at trial", "the range of possible recovery", and "the point on or below the range of possible recovery at which a settlement if fair, adequate and reasonable." The Third Circuit looks to "the risk of establishing liability", "the risks of establishing damages", "the range of reasonableness of the settlement fund in light of the best recovery", and "the range of reasonableness of the settlement fund to a possible recovery in

light of all the attendant risks of litigation." The Sixth Circuit uses "the likelihood of success on the merits."

f. The existence of any difficulties of proof or strong defenses the Plaintiffs are likely to encounter if the case goes to trial:

The factors cited by Justice McHugh, by Cleckley, Davis, and Palmer, and the Third and Sixth Circuits also cover this Fourth Circuit factor. Additionally, the Sixth Circuit factor of "the risk of maintaining a class action throughout the trial" seems to weigh on the difficulties of proof or of strong defenses the Plaintiffs could encounter during a trial.

g. The anticipated duration and expense of additional litigation:

Cleckley, Davis and Palmer refer to this as "the complexity, expense and duration of litigation", as do the Third and Sixth Circuits.

h. The solvency of the Defendants and the likelihood of recovery on a litigated judgment:

The Third Circuit refers to this as "the ability of defendants to withstand a greater judgment."

i. The degree of opposition to the settlement:

This is listed as "the reaction of members of the class to the settlement" by Justice McHugh. Cleckley, Davis and Palmer refer to this as "the substance and amount of opposition to the settlement", while the Third Circuit refers to it as "the reaction of the class to the settlement." The Sixth Circuit examines "the reaction of absent class members."

j. Other factors which are unique to this action

Further, there are other considerations, which, while not factors under the Fourth Circuit test, merit scrutiny in conjunction with, and in addition to them as they are unique to this action. They are the history of success of medical monitoring actions in West Virginia, the history of cases against Monsanto for its production of 2,4,5-T at the Nitro site, the public interest, the ease for processing claims under the settlement, and the presence or absence of governmental participation.[208]

Courts have long recognized that the history of success in certain types of actions can be particularly germane to class action settlement approval. In *Mars Steel Corporation v. Continental Illinois National Bank, et. al.* (834 F.2d 677), Judge Posner of the 7th Circuit Court of Appeals stated that:

> Furthermore, although many "prime rate" cases have been brought against banks in recent years, none has resulted in a victory at trial for the plaintiffs and apparently none in a settlement significantly (if at all) more favorable to the plaintiffs than the *Mars* settlement.

Id. at 682.

More recently, in *Bowling v. Pfizer*, 143 FRD 141 (1992), in approving a class action settlement, in discussing the strength of the plaintiff's case stated that:

> We find that the Green firm (objector) has vastly overstated the strength of the Plaintiff's case. We first note that despite years of litigation, no Court has ever awarded a judgment in favor of a plaintiff with a properly functioning heart valve. While one court did allow a claim against Pfizer-Shiley to proceed past the summary judgment stage, approximately twenty-seven courts have not. These twenty-seven counts have granted summary judgment to Pfizer-Shiley when the plaintiffs have sued over his or her properly functioning heart valve.

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[208] The last three factors are discussed in the other resources cited in note 203, *supra*.

Id. at 162.

Finally, the plaintiff's likelihood of success on the merits – or some slight variation of that factor – is the most important factor in the Fourth Circuit and many other Federal circuits McLaughlin, *supra*, §6:7 at 69-71.

Summary

When applying these factors, a reviewing court cannot decide the merits of the case or resolve unsettled legal questions. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981). A reviewing court should simply note the issues and apply the factors. Furthermore, a reviewing court "must consider the settlement as a whole; the court has no authority to modify the individual provisions of a settlement agreement." McLaughlin, *supra*, § 6:4 at 39 (citing *Evans v. Jeff D.*, 475 U.S. 717, 726-727, 106 S. Ct. 1531, 89 L. Ed 2d 747 (1986).

To conclude, in *McLaughlin on Class Actions*, after going through its list of factors, the author notes that "these factors are not necessarily exclusive and not always entitled to the same weight. The Court should look at all the circumstances of the case and determine whether the settlement is *within the range of reasonableness.*" McLaughlin, *supra*, § 6:7 at 71-72. (emphasis added) (footnotes omitted).

As one court has observed, "[a] settlement is by nature a compromise between the maximum possible recovery and the inherent risks of litigation. The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 258 (D. Del. 2002) (citation omitted.)

The same can be said in this case; no one factor is controlling and much depends upon its specific facts. Ultimately, these factors are a guide to help this Court to determine if this settlement is within a range of reasonableness; i.e., fair, adequate, and reasonable.

3. Objections

In this section the Court will discuss the law that applies to handling objections to settlements of class actions. The common law of West Virginia is silent on this issue, and so the Court has again looked to Federal jurisprudence, the law developed by other state court systems, and learned treatises for guidance.

In the first section, the Court will discuss the general rules applicable to handling objections. In the second section, the Court will review the law applicable to several of the specific objections raised by objectors, *infra.*

a. The General Law Applicable to Ruling on Objections to Class Action Settlements

"General objections without factual or legal substantiation carry little weight." 3 *Newberg on Class Actions* §11.58 (citing *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985)). Similarly, objections that amount to "merely expressing discontent with the settlement without substantive argument or presentation of evidence," are properly overruled as long as the objectors have been given the opportunity to be heard and the settlement is otherwise fair. *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 232 (S.D. W. Va. 2005); *see also Thomas v. Albright*, 139 F.3d 227, 233 (D.C. Cir. 1998).

Objections based on class members' preference or class members' preferred terms have no relevance to whether a settlement is fair, reasonable, or adequate. *See Ball v. AMC Entm't,*

Inc., 315 F. Supp. 2d 120, 129 (D.D.C. 2004). It "is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

The Court must distinguish between genuine and self-interested objections: "Some objections . . . are made for improper purposes, and benefit only the objectors and their attorneys (e.g., by seeking additional compensation to withdraw even ill-founded objections). An objection, even of little merit, can be costly and significantly delay implementation of a class settlement. . . . A challenge for the judge is to distinguish between meritorious objections and those advanced for improper purposes." *Manual for Complex Litigation* at § 21.643.

In reviewing the essence of a proposed settlement, "it should [not] be forgotten that compromise is the essence of settlement." *Cotton v. Hinton,* 559 F.2d 1326, 1330, 15 Fair Empl. Prac. Cas. (BNA) 1342, 15 Empl. Prac. Dec. (CCH) P 7864 (5th Cir. 1977). "When sufficiency of discovery have been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement. *City Partnership Co., v. Atlantic Acquisition Ltd. Partnership,* 100 F.3d 1041, 1043 (1st Cir. 1996); *see also City of New York v. Exxon Corp.,* 697 F. Supp. 677, 692, 19 Envtl. L. Rep. 20332 (S.D.N.Y. 19881). "The trial court should not make a proponent of the proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might [be] gained.'" *Access Now, Inc.v. Claire's Stores, Inc.,* 2002 WL 1162422 (S.D. Fla. 2002) (quoting *Cotton* at 559 F.2d 1326). Significant weight should be given to the judgment of experienced counsel that the settlement and any proposed plan of allocation is in the best interest of the class. The district court also must consider the settlement as a whole; the court has no authority to modify the individual provisions of a settlement agreement. *See, Yeagley v. Wells Fargo & Co.,* 2008 WL 171083, *3 (N.D. Cal.

2008), *rev'd on other grounds,* 365 Fed. Appx. 886 (9th Cir. 2010) ("[t]he Court does not 'have the ability to delete, modify, or substitute certain provisions. The settlement must stand or fall in its entirety.'"); *Ingraham v. The Coca-Cola Co.,* 200 F.R.D. 685, 691-692 (N.D. Ga. 2001) ("[t]he central question at issue is not whether any particular provision could have been negotiated in a slightly different or marginally more favorable way. Rather, the Court must determine the fundamental fairness, adequacy, and reasonableness of the settlement, taken as a whole.")

b. The Law Applicable to Ruling on Specific Objections to These Settlements

i. The Applicability of the *Cy Pres* Doctrine

The Court cannot rewrite the Settlements to include *cy pres* mechanisms. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475-76 (5th Cir. 2011) (reversing and remanding a district court's decision to impose *cy pres* on the parties settling a class action). When parties agree to an equitable distribution of settlement monies, courts defer to the parties' agreement. *See Wilson v. Southwest Airplanes, Inc.*, 880 F.2d 807, 815-16 (5th Cir. 1989); *see also Mangone v. First USA Bank*, 206 F.R.D. 222, 230 (S.D. Ill. 2001) ("Courts have broad discretion in distributing unclaimed class action funds, and where the parties agree on the distribution of unclaimed class funds, the court should defer to the method of distribution.").

A *cy pres* mechanism is unnecessary when the Class Members have been located and provided with adequate notice. *Cf. In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1031 (N.D. Ill. 2000) (finding *cy pres* appropriate when there was great difficulty identifying customers of electronic transfers).

ii. Factors Indicating Collusion, Including "Clear Sailing" Agreements," and The Timing of Negotiations on Attorneys' Fees

One of the major grounds for objections to class action settlements is the assertion that there has been collusion between Class Counsel and the defendant to the detriment of the Class Members. All class actions settlements must be approved by the Court. A great body of case law and commentary have addressed this process.[209] However, the majority of this discussion has centered around class actions that were certified solely for the purpose of settlement. To put these cases in context, a discussion of settlement class cases is in order.

The instant case is not a settlement class[210] as it has been fully litigated and was certified as a class years prior to settlement. Settlement classes and litigation classes are reviewed under the same rules, however, the U.S. Supreme Court has urged the lower federal courts to bring heightened vigilance to the review of settlement classes to ensure no collusion or other conflicts of interest undermine the settlement. *McLaughlin on Class Actions* defines settlement classes as:

> A true "settlement class" arises when the named parties to an uncertified class action reach a provisional settlement that they wish to make binding on the class as a whole. In those cases, the parties move the court for simultaneous class certification and approval of the settlement. Typically, the court then orders a combined notice of the certification, opt-out rights, and the proposed settlement with a hearing on class certification. If the settlement is approved and the class is certified, absent class members who do not opt out are bound by the settlement agreement.

Denney v. Jenkins & Gilchrist, 230 F.R.D. 317, R.IC.O. Bus. Disp. Guide (CCH) P 10837 (S.D.N.Y 2005).

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[209] *In re General Motors Corp., Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 31 Fed, R. Serv. 3d 845 (3rd Cir. 1995). *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999), *In re Community Bank of Virginia*, 418 F.3d 277 (3rd Cir. 2005).

[210] Settlement classes are also referred to as settlement-only classes and these terms are used interchangeably throughout this Order.

When a settlement is negotiated before class certification, the danger of collusion between defendants and class counsel is heightened. Moreover, a settlement agreement "generates [ ] momentum" and may look, to class members and even to the court, "like a *fait accompli.*" *See Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, R.IC.O. Bus. Disp. Guide (CCH) P 10837 (S.D.N.Y 2005) citing *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677 (7th Cir. 1987). Therefore, "a proposed settlement negotiated before class certification is subjected to a higher degree of scrutiny than a later settlement." 5–23 Moore's Federal Practice—Civil § 23.161 (3d ed.2004). *Accord County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323 (2d Cir.1990). It has been said that, "prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny." *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). Moreover, settlement classes are often brought without the intention of being litigated as in *Anchem.*

Among the factors required to determine whether collusion occurred are the use of clear sailing agreements and the time when the attorneys' fees were negotiated. A clear sailing agreement is an agreement "where the party paying the fee agrees not to contest the amount to be awarded by the fee-settling court so long as the award falls beneath a negotiated ceiling." *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291 (1999) (citing *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 520 n.1 (1st Cir. 1991)). The Courts have expressed concern regarding the allocation between the class payment and the attorney's fees being of little or no interest to the defendant. *See, Stanton v. Boeing Co.*, 327 F.3d 938, 964, 55 Fed. R.Serv. 3d 1299 (9th Cir. 2003) ("[w]here the class payment and fees are negotiated together, there is thus a

concern that class counsel engaged in 'a tradeoff between the merits of relief and attorney's fees."); *True v. American Honda Motor Co.,* 749 F. Supp. 2d 1052, 1078 (C.D. Cal. 2010).

However, these arrangements are often negotiated "so that defendants have a more definite idea of their total exposure." *Waters*, 190 F.3d at 1291, 1293 n.3 (1999). "Courts have expressed mixed views about the relationship between clear-sailing provisions and adequacy of representation." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 425 (6th Cir. 2012). On one hand, where "the amount of fees is important to the party paying them, as well as to the attorney recipient, it seems . . . that an agreement 'not to oppose' an application for fees up to a point is essential to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." *Malchman v. Davis*, 761 F.2d 893, 905 n. 3 (2d Cir. 1985) *abrogated on other ground, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997). On the other hand, "the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 520 n.1 (1st Cir. 1991).

However, courts are less suspicious of "clear sailing" agreements when they result from an arm's-length negotiation. *See Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 259-60 (7th Cir. 1988). Further, "not every 'clear sailing' provision demonstrates collusion." *See Gooch*, 672 F.3d at 426.

A learned treatise has stated that:

> "[t]here is a presumption that the class representatives and counsel handled their responsibilities with the independent vigor that the adversarial process demands. Consequently, courts customarily demand evidence of improper incentives for the class representatives or class counsel, such as a promise of excessive

> attorney fees in return for a low-cost, expedited settlement-before abandoning the presumption."

Cleckley, Davis, & Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(e) at 631 n. 863 (4th ed. 2012).

The same treatise also states that Courts generally reject assertions of collusion where there is proof that a settlement is fair, adequate, and reasonable. *See* Cleckley, Davis, & Palmer, *supra* § 23(e) at 626; *Wright v. Stern*, 553 F. Supp. 2d 337, 343 (S.D.N.Y. 2008) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiation between experienced, capable counsel after meaningful discovery.").

Many class action settlement agreements include a negotiated attorneys' fee and incentive award up to a specified maximum figure. While clear sailing agreements are permissible, the district court must evaluate the provision and determine whether any reason exists to believe class counsel bargained away benefits to a class in order to obtain a higher attorney's fee. *In re Bluetooth Headset Products Liability Litigation,* 654 F.3d 935, (9th Cir. 2011); *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 525, Fed. Sec. L.Rep. (CCH) P 95781, 19 Fed. R. Serv. 3d 472 (1st Cir. 1991). Ultimately, the best evidence that no untoward trade of benefits for fee lies in the actual value obtained for the class relative to the strength and value of the claims surrendered. *Sobel v. Hertz Corp.,* 2011 WL 2559565, *15 (D. Nev. 2011).

While there has been much debate regarding clear sailing agreements, commentators have also noted that class action "settlement agreement[s] typically include a 'clear sailing' clause." *Consumer Privacy Cases,* 175 Cal. App.4th 545, 96 Cal.Rptr.3d 127 citing, Alexander, *Rethinking Damages in Securities Class Actions* 48 Stan.L.Rev. 1487, 1534 (1996); Henderson,

Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements, 77 Tul.L.Rev. 813, 815-816 (2003); Herr, Ann. Manual for Complex Litigation (4th ed.2008) 21.662, 21.71, pp. 522-524, 533-534). Moreover, commentators have agreed that such an agreement is proper and to the extent it facilitates completion of settlements, this practice should not be discouraged. (4 *Newberg, et al.,* on Class Actions 15:34 at 112. (footnote omitted.)

Courts have also identified "a special danger of collusiveness when the attorney fees, ostensibly stemming from a separate agreement were negotiated simultaneously with the settlement. McLaughlin, *supra,* §6.4 at 36 (citing *In re Community Bank of Northern Virginia,* 418 F.3d 277, 308 (3d Cir. 2005)). It is a good practice for counsel to defer discussion of fees at least until after negotiations of the substantive terms of the settlement are concluded, and to maintain a record that demonstrate this chronology. *Id.* (remanding approval of settlement class because, *inter alia,* "[a]side from class counsels' own assertions that fees were discussed after negotiations of the settlement had concluded, no other record evidence supports such an assertion.) However, it is worth observing that *In re Community Bank* is a settlement only class case.

iii. The "Silencing" of Experts as a Term of the Settlement

The West Virginia Supreme Court of Appeals has held in Syllabus Point 6 of *State ex rel. Ward v. Hill* that:

> Absent a formal agreement among defendants in a litigation involving multiple defendants, the circuit court should not generally permit a settling defendant's expert witnesses to testify for the remaining defendants. When a settlement agreement between the settling defendant and the plaintiffs prohibits the continued use of the settling defendant's expert witnesses by the remaining defendants, the circuit court, subject to Rule 26(b)(4)(B) [1988] of the *West Virginia Rules of Civil Procedure,* should honor

> that agreement by not permitting the remaining defendants to use or present such information in the preparation for or conduct of the trial.

State ex rel. Ward v. Hill, 200 W.Va. 270, 489 S.E.2d 24 (1997).

In *Ward*, the Court balanced the competing interests that "the public has a right to every man's evidence" *U.S. v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884, 891 (1950), *quoting* John H. Wigmore, Evidence § 2192 (3rd ed.) with the "encouragement of settlement rather than litigation to resolve controversies by upholding contracts fairly made that so contravene public policy."

iv. The Size of the Proposed Attorneys' Fee Compared to the Payment of the Settlement

The law concerning this objection is discussed in the accompanying *Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments*, specifically, in the discussion of *Boeing v. Van Gemert*, 444 US 472, 100 S.Ct. 745, 62 L. Ed.2d 676 (1980) and *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 129 (11th Cir. 1999).

v. Incentive Payments to the Class Representatives

"Incentive *awards* are fairly typically in class action cases. Such awards are discretionary and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing up the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriquez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009).

In that decision, the Court found that due process was satisfied because the settlement notice alerted class members to the class website and settlement agreements which provided that

all incentive payments would come out of the attorneys' fees after the court determined the amount of the award.

This rule was also followed in *Bessey v.Packerland Plainwell, Inc.*, 2007 WL 3173972, at *5 (W.D.Mich. Oct. 26, 2007) (notice failed to mention incentive payments but settlement did); and in *Berman v. Entertainment Marketing, Inc.*, 901 F.Supp. 113, 118 (E.D.N.Y. 1995) (no further notice regarding incentive payments to lead plaintiffs was necessary).

With respect to incentive payments in general, such payments are commonly awarded to class representatives by courts following final approval of fair, adequate, and reasonable settlements. *See Rodriquez* at 598-99.

vi. Short Deadlines

In *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982) a settlement was approved in which "[p]rospective class members had some six weeks in which to decide whether or not to accept the settlement."

vii. Overbroad Releases

In *Wal-Mart Stores, Inc., et al. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2005), the United States Court of Appeals for the Second Circuit stated that:

> Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, "[c]lass action settlements, simply will not occur if the parties cannot set definitive limits on defendants' liability." *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254 (2d Cir. 2001), *aff'd in part by an equally divided court and vacated in part*, 539 US 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003).

Id. at 106.

The Court further stated that:

> However, "class action settlements have in the part released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted the parties to the action being settled." *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, *11 (S.D.N.Y. Nov. 26, 2002); *see e.g., In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 143, 160-65 (E.D.N.Y 2000) (approving class settlement with broad releases against non-parties, including insurance carriers, other banks, and Swiss governmental entities); *see also*, 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 12:16, at 318 (4th ed, 2002) ("Newberg") ("A settlement may...seek to discharge parties who have not been served with process and are therefore not before the court."

Id. at 109.

VIII. Objections to Proposed Settlement

In the case at bar, there are three sets of objections, each of which is discussed herein:

A. Objections from Urban & Falk, PLLC

1. Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims

Thomas Urban, Esq., represents five named Plaintiffs, Virdie Allen, Charles and Eileen Agee, and Hilman and Erma Raynes. As stated *supra*, these Plaintiffs were not appointed to serve as Class Representatives. Mr. Urban alleges that he represents more than 1600 class

members in his *Memorandum Identifying the Urban & Falk Objectors* filed on June 11, 2012.[211] (dkt. no. 3135). On June 15, 2012, Class Counsel filed *Class Counsel's Motion to Strike Memorandum Identifying the Urban & Falk Objectors.* (dkt. no. 3162), alleging that Mr. Urban did not represent 1600 clients and his Memorandum should be stricken based upon his failure to comply with the provisions of the Medical Monitoring and Property Class Settlement Notices. [212]

Mr. Urban argues that the Settlements are unfair, unreasonable, and inadequate and specifically raised the following concerns in his written submissions filed on May 31, 2012 in his *Memorandum of the Urban & Falk Plaintiffs in Opposition/ Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3101), *Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3133), and during the Fairness Hearing on June 18, 2012 generally: 1) the size of attorney fees compared to payout of settlement and clear sailing agreement; 2) the lack of travel provided to the out of state Class Members; 3) the lack of incentive payments to Class Members; 4) 90% of the members of the Medical Monitoring Class and the Property Class are ineligible for medical monitoring or property cleanup; 5) the lack of a *cy pres* fund; 6) the Property Class will receive ineffective and inadequate cleaning of their homes; 7) the "triggering events" are illusory and unlikely to occur; 8) Class Counsel and Defendants colluded in reaching the Settlements; 9) the Medical Monitoring Fund fails to utilize experts in dioxin; 10) the Medical Monitoring Fund fails to create a registry of diseases; 11) Class Counsel's conflicts of

[211]In his *Memorandum*, Mr. Urban stated that he has signed contracts with over 1600 Class Members as provided for in Ex. A, although he concedes that Ex. A may not be accurate. However, Mr. Urban reserved the right to speak on their behalf at the Fairness Hearing.

[212] The Court allowed Mr. Urban to speak at the Fairness Hearing on behalf of his alleged 1600 clients.

interest between his personal injury clients, the Medical Monitoring Fund, and the Property Class. (Fairness Hearing Tr. 100-200, June 18, 2012.)

On May 31, 2012, Mr. Urban filed his first written submission, *Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims.* (dkt. no. 3101). On June 11, 2012, Mr. Urban filed a *Memorandum and Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims.* (dkt. no. 3133). On June 13, 2012, the Defendants filed *Defendants' Response to Memorandum and Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims.* (dkt. no. 3148). On June 15, 2012, Class Counsel filed *Class Counsel's Reply to the Memorandum and Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims.* (dkt. no. 3156). Mr. Urban's May 31, 2012, *Memorandum* raises the following concerns:

a. A "*Cy Pres*" Fund Should Be Set Up Rather than Having Money From The Funds Revert Back to Monsanto If Not Used—The Money Put Into The Funds To Compensate Victims Of The Nitro Monsanto Plant Contamination Should Stay in West Virginia to Benefit Those Who Were Harmed.

Mr. Urban asserts that the Settlements should not be approved because they do not provide for a c*y pres* fund because any unused funds revert to the Defendants if unused by the Medical Monitoring and Property Classes. Mr. Urban recommends having any unused Medical Monitoring funds placed into a c*y pres* fund for a cancer ward in Teays Valley and any unused Property Class funds used to set up a scholarship fund for Class Members' children to study environmental sciences at West Virginia University or Marshall University. Mr. Urban argues that the Settlement is unfair, inadequate, and unreasonable because it lacks such a mechanism.

The Defendants argue that a c*y pres* is only appropriate in cases where locating and ascertaining the status of individual class members is prohibitively difficult. *In re Mexico Money Transfer Litig.*, 164 F.Supp. 2d 1002, 1031 (N.D. Ill. 2000) (finding *cy pres* appropriate when there was great difficulty identifying customers of electronic money transfers into Mexico in which defendants failed to disclose rate mark ups). The Settlement specifically rejected the idea of a *cy pres* distribution to a third party.

The Defendants further argue that they have a property interest in any unused funds as they will revert back to them. Furthermore, the reversion of unused funds to the Defendants has been recognized as a protectable property interest. *Klier v. Elf Atochem North America, Inc.*, 658

F.3d 468, 477, (5th Cir. 2011); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989) (holding that it was an abuse of discretion for a court to make a *cy pres* distribution when any party to the class action, including the defendant, has an interest in the unclaimed funds).

They also argue that the Settlements provide the equitable relief sought for all participating Class Members and thus they have received full recovery for their damages and the parties otherwise agree to the reversion. No money will be left unclaimed as this is not a case for monetary damages.

They state that this case was not a difficult case to ascertain the status of all individual class members. The Notice was published in the national media, a website, www.BibbClass.com, which contained the Class Notices, and Registration Forms for the Medical Monitoring Class and the Property Class. Members of the Property Class were sent notice by first class mail to their residence. At the time of the Defendants' filing, a total of 3,596 persons have notified the administrators of their interest in the settlements.

Finally, the Defendants argue that a *cy pres* would have diminished the size of the potential benefits to the class members. The Defendants contend that they would not have agreed to the substantial potential funding of the class settlements without a reversion clause.

Class Counsel concurs with the above arguments and adds that Urban failed to state any reason why the absence of a *cy pres* fund makes the settlement unfair, inadequate, or unreasonable.

b. Only Between 2,000 and 5,000 Out of Up to 80,000 Potential "Medical Monitoring Class Members" Will Receive Any Medical Monitoring Under The Proposed Agreement-This is Too Few Given that Substantial Evidence Exists That Many More Class Members were Contaminated By Various Processes at Monsanto's Nitro Plant.

Mr. Urban objects to the Medical Monitoring Class and argues that it is unfair, inadequate, and unreasonable as the Settlement Class excludes the majority of the Class Members. Mr. Urban contends that approximately 95% of the Class will not receive any Medical Monitoring and forever lose their right to sue Monsanto. (Fairness Hr'g Tr. 136, 144, June 18, 2012.) Substantial evidence exists that processes at the Monsanto Nitro Plant other than the 2,4,5-T process created dioxins that have contaminated members of the Class. Evidence was developed during the personal injury cases that Class Counsel was pursuing after the close of discovery in the medical monitoring case. Mr. Urban argues that this evidence may not have been used at the trial scheduled for January 2012 but would have been admissible in a property damage trial and would likely be admissible if the medical monitoring case were to be re-set for trial in the future. Mr. Urban further argues that Class Counsel has instructed the experts for the Class not to cooperate with any other plaintiff's attorneys for any potential personal injury suit and requested each of them to sign an agreement with Monsanto that extinguishes their ability to share information with the Class. Mr. Urban urges the Court to not approve the Settlement for such a small percentage of Class Members who were allegedly exposed to Monsanto's

contamination given the vast number of Class Members who were exposed. In addition, the Objectors ask the Court to invalidate Class Counsel's letter and agreement to experts and allow them to testify in the future on behalf of Class Members in their potential personal injury or other cases.

The Defendants argue that Mr. Urban's objections are based upon evidence that was long ago abandoned by the experts selected by Class Counsel to testify at the trial of this matter or otherwise excluded by the Court. Conversely, the allocation of the Settlements' funds is based on evidence that would have been presented at trial. Urban's "potential" numbers are based upon Class Counsel's initial estimates of dioxin creation within the Class Area. Class Counsel acknowledged that approximately 5,000 people would fall within the dose group categories developed by Dr. William Sawyer. Moreover, they argue that there would have been not proof offered at trial that the Class consisted of 88,000 Class Members who should receive Medical Monitoring. Additionally, had Class Counsel prevailed, then 88,000 Class Members would not have qualified for Medical Monitoring.

Class Counsel argues that no credible evidence exists for Monsanto's generation of dioxin after 1969, as set forth in Bruce Bell's affidavit. The eligibility criteria was "based upon the expert evidence developed in the case and not arbitrarily chosen at random by counsel." Class Members of both classes were further advised in the Class Certification Notice that benefits may be divided unequally and that some Class Members may not be eligible for relief, while others may, and that no guarantee existed that anyone would receive benefits. *Class Counsel's Reply to the Memorandum (and Supplemental Memorandum) of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Settlement of the Property and Medical Monitoring Classes's [sic]Claims, Ex. A, Bruce Bell Affidavit* (dk.no. 3156).

c. Only 4500 Houses Out Of Up to 12,000 Potential Houses in the Class Area Will Receive Any Clean-Up.

Mr. Urban further asserts that only 4500 houses out of up to 12,000 potential (40 percent) houses in the Class Area will receive any clean-up. The Urban Objectors cite *Amchem Products v. Windsor*, 521 U.S. 591, 627, 117 S. Ct. 2231 (1997), to support their position that one class was traded for the rights of the remainder of the class who will receive no benefits under this Settlement. Class Counsel's Expert, Robert Carr, presented cleanup costs in the amounts between $945 million and $3.82 billion. The Court de-certified the Property Class on June 28, 2011 and denied the Plaintiff's *Motion to Consider* November 3, 2011. (dkt. no. 2704). Despite the Property Class no longer being an issue at trial, Mr. Urban argues that the $9 million dollar settlement value of the property clean-up is paltry and a clear demonstration that the interests of persons who will receive medical monitoring have been placed by Class Counsel above the interests of the Property Class.[213]

Class Counsel argues that according to the evidence developed for trial, only indoor, living-area dust posed a substantial health risk to current residents. Dr. Sawyer did not factor contaminated soil or attic dust into his risk assessment because the health risk posed by residents' exposure to dioxin in soil and attic dust was relatively minimal. (Expert Report of William Sawyer, February 15, 2010; *Plaintiffs' Answers to Limited Discovery as the Fairness, Adequacy, and Reasonableness of the Proposed Settlement*, May 7, 2012, at Response No. 6.)

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[213] As discussed *supra*, the trial in this matter was going to be heard by a jury on one issue only, medical monitoring. The Property Class, as previously defined and litigated, no longer existed for purposes of trial. Class Counsel had filed a Notice of Appeal regarding the de-certification of the Property Class on December 12, 2011 (pending but currently held in abeyance).

Mr. Calwell also argues that the $9 million cleanup proposed for the Property Class is sufficient to remediate indoor, living-area dust throughout the relevant geographic area. Robert Carr's costs were associated with soil remediation, if a jury deemed such remediation was necessary. Dr. Sawyer had opined that the risk posed by exposure to dioxin in residential soil was relatively minimal. The cost of remediating indoor, living-area dust is considerable less than soil remediation. Class Counsel further argues that Mr. Carr reiterates that the remediation methods for indoor, living-area dust proposed in the parties' Settlement are similar to what he previously proposed and are proven to be efficacious.

The Defendants asserted the same arguments as they did *supra,* at 295.

d. The Paltry Cleaning That These Few 4,500 Houses Will Receive has No Proven Efficacy.

Mr. Urban objects to the manner in which the houses will be cleaned as having no proven efficacy for ridding a house of dioxin. The houses should be tested both before and after the cleaning to determine the dioxin levels in the house. Mr. Urban asserts that the Plaintiff's expert proposal called for a clean-up of attic dust and soil, as well as the inside of each house. As the proposed Settlement provides for only cleaning the inside of the house, the house will become re-contaminated within months due to dust that will be tracked in from the outside and from circulating attic dust. Further, the houses should be monitored for several years to determine whether the Proponents are correct that no further clean-up is necessary or whether Class Counsel's expert was correct.

The Defendants and Class Counsel did not specifically address this issue in their respective Responses.

e. Once Class Members Are Diagnosed With Any Illness, They "Win" the Right to Start a New Lawsuit Against Monsanto, Who Make Any Such Lawsuit Economically Unviable.

Mr. Urban argues that money damages are the only way to truly compensate the Class Members who have developed various cancers as a result of Monsanto's contamination. Further, he argues that it makes more sense to have a compensation system for future cancers set up now rather than requiring each and every Class Member who develops these cancers to have to sue Monsanto individually. Class Counsel and Monsanto know that an individual does not have the resources to bring a single personal injury case and personal injury cases do not normally operate for class action treatment. The Urban Objectors assert that the Court should demand that all Class Members receive the same treatment as those clients of the Calwell Practice.

The Defendants essentially argue that the Settlements involve only equitable claims of medical monitoring and alleged property damages. As discussed previously, medical monitoring in West Virginia does not provide for personal injury or monetary damages. Additionally, the Complaint did not seek claims for personal injury or monetary damages. Even if the Plaintiffs would have won at trial, no one would have received any award based on an actual illness or disease. Therefore, this objection is not a rational attempt to challenge the fairness, adequacy, or reasonableness of the Settlements before the Court.

Class Counsel asserts the same arguments as the Defendants above but includes additional arguments of evidence in the public record and a client letter from Mr. Urban to his clients. Class Counsel contends that any Class Member who may develop a dioxin-related

disease in the future will have a greater set of medical data supporting such diagnosis than he/she would have had in the absence of the Medical Monitoring Program. All of the evidence, including expert opinions and environmental sampling, are part of the public record and therefore, another attorney could litigate a future personal injury case on behalf of a Class Member who had been diagnosed with a serious dioxin-related disease.

Class Counsel contends that Mr. Urban did not file any dioxin-related personal injury cases from contamination in Nitro. Moreover, Mr. Urban sent a letter to one of Class Counsel's clients advising that he was not pursuing any potential personal injury cases against Monsanto. Although Mr. Urban does not plan to ever file any dioxin-related personal injury claims on behalf of Nitro area residents, that does not render this litigation unviable. *Class Counsel's Reply to the Memorandum (and Supplemental Memorandum) of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Settlement of the Property and Medical Monitoring Classes's [sic]Claims, Ex. C, Letter from Thomas F. Urban, II, February 20, 2012.* (dkt. no. 3156).

f. The Proposed Settlement Makes Both of the Fund Programs Intentionally Difficult to Use With Short Deadlines. This is Being Done to Make Sure That the Maximum Amount of Money Reverts to Monsanto.

The Urban Objectors urge the Court to reject the Settlement because it is unfriendly to users to specifically discourage participation in both the Medical Monitoring Programs and Property Programs. They specifically argue that both programs are unfair, inadequate or unreasonable in the following manner: no money is being provided for advertising this program

other than the limited Class Notice; no funds for reimbursement of expenses, if incurred; no money is being provided for any type of stipend for the Class Members' time and trouble; there are short timelines for signing up for participation; and there is no opportunity for entry into the program if an "Eligible Class Member" does not sign up in Year 0 for Medical Monitoring. They argue that the Court should insist that any settlement have specific steps to encourage participation in the funds and include both modest incentives and reimbursement for cost incurred in participating in the Settlement.

The Defendants and Class Counsel contend that Mr. Urban fails to provide the Court with any legal or factual argument regarding the allegedly short deadlines. Mr. Urban's objects to the 120 day from the date of the final approval to register for benefits as being too short a timeframe. The detailed notices alerting class members of the registration requirements were provided to class members months ago, meaning that the Class Members will have far more than 120 days to register for benefits. Defendants argue that far shorter deadlines have been upheld and cite *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2nd Cir. 1982) ("Prospective class members had some six weeks in which to decide whether or not to accept the settlement.")

g. The "Triggering Events" which make up $63 Million of the Settlement Are Unlikely to Occur and are Merely an Attempt to Increase the "Reported Value" of the Settlement.

Mr. Urban argues that the "triggering events" are highly unlikely to occur and that they are merely an attempt to increase the reported value of the Settlement in order to justify Class Counsel's fee. The "triggering event" requires that 25% of the people who are tested as part of

the Medical Monitoring Program have blood dioxin levels that are in the top 1-2% in the country in order to "trigger" the additional testing.[214] Urban further argues that Monsanto will never supply any of the $63 million to the Medical Monitoring Fund. Urban urges the Court to insist that any amounts of money that are advertised to be part of the settlement either be actually included in the settlement without any conditions or at least be tied to "triggering events" that have a legitimate chance of occurring.

The Defendants argue that Mr. Urban fails to provide any credible evidence in support of these assertions and fails to acknowledge that, if indeed, the allegations in the Class Action Complaint are true, the Triggering Events are in fact likely to occur. Furthermore, the triggering events benefit settling Class Members because they potentially provide more generous settlement benefits. As the amount of money necessary to compensate settlement class members is unclear, a defendant may refuse to provide greater resources for fear of overcompensating the plaintiffs.

Class Counsel argues the "triggering event" is based on TEQ levels (that is the combined toxicity of the seven PCDDs) and not just the level of the single congener TCDD.[215] The use of the 95th percentile (expressed as TEQ) is a meaningful diagnostic date point to "trigger" further medical surveillance. Additionally, the use of the upper bound of the 95th percentile in the medical community-as a yardstick to determine whether a patient's test result is unusual to the relative population-is generally accepted. The benefit to the Medical Monitoring Class is that its members are not limited to only TCDD levels as the trigger, but get the benefits of the combined levels of seven PCDDs towards the key level. Non-Monsanto dioxins will then be included with

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[214] The "triggering event" requires at least 100 participants' serum samples be drawn and that 25 or more of the participants' serum dioxin levels exceed background levels as set forth in § 6.2 of the Medical Monitoring Class Settlement Agreement.

[215] "This means that the combination of all seven congeners produces a higher lipid concentration number than for simply TCDD alone." Class Counsel's *Response* at 16.

the Monsanto dioxin which make the likelihood of the trigger occurring much greater. The Settlement provides that only 25% of participants' blood results have to exceed the trigger in order for all participants to receive more frequent screenings. If only 25% test at the trigger level, then all participants are treated as exceeding the trigger level. Class Counsel contends that this issue centers on whether the contribution of the 2,3,7,8-TCDD to TEQ in tested individuals is higher than the contribution of 2,3,7,8-TCDD to TEQ in the NHANES population. (Expert Report of Dr. William Sawyer, 4, 10-11; Table at 19 May 11, 2011.) As there were multiple ways to consider the definition of "elevated," extrapolated to the class as a whole, the prospect of presenting of this issue to the jury was daunting.

The Court previously ruled that the blood dioxin levels of the 33 persons tested in litigation could not be extrapolated to the entire Class as a whole.[216] (*Order Granting Plaintiffs' Motion in Liming to Preclude Testimony or Argument Suggesting that the Serum Dioxin Results of the Class Representatives and Others Can be Extrapolated to the Class*, November 3, 2011)(dkt. no. 2701). Class Counsel contends that Mr. Urban does exactly what the Court excluded when he argues that none of the 33 Nitro residents test had blood levels above the trigger threshold. Mr. Urban's experts, Dr. Dahlgren[217] and Mr. Horsak are inconsistent in their

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[216] The Court ruled that one could not draw any conclusions about the blood dioxin levels of Class Members by looking at the blood dioxin levels of the 33 Nitro residents that were sampled in this case.

[217] Mr. Urban presented an affidavit in opposition to the Medical Monitoring Settlement from James Dahlgren, M.D. Dr. Dahlgren has an M.D. degree from the University of California, San Francisco, and a B.A. from UCLA. He is board-certified in Internal Medicine. Dr. Dahlgren apparently worked on this case on behalf of the Plaintiffs in its early stages, but for some reason, was not further used by them. He claims he was still owed fees by Class Counsel. He disagreed with the gap between examinations. He also thought that the Class Members should be seen by a doctor with experience in treating patients exposed to dioxin. He recommended additional testing be part of the protocol, to include spinal CT's, MRI's, etc. He believed that the Medical Monitoring Class Members should be automatically compensated if they develop a dioxin-related disease. He thought that a central registry should be established. He believed the Nitro situation was worse than the 1976 Seveso, Italy plant explosion. He also believed that the blood serum results should be "back extrapolated" to the period of exposure. He also opined that "the focus on TCDD is misplaced."

findings of dioxin on being either too low due to no significant exposure since 1969 or that the remediation plan is inadequate due to the substantial contamination in the homes.[218]

Class Counsel urges the Court to refrain from an inquiry into the merits of the case through Urban's submission of expert reports of James G. Dahlgren, M.D., and Richard A. Parent, Ph.D. Class Counsel retained these experts years ago, prior to Class Certification and their involvement is not relevant to whether this Settlement is fair, adequate, and reasonable and not on the merits of the case. Furthermore, he argues that Mr. Urban's arguments concerning the "triggering event" are an effort to sidetrack the Court into litigating and relitigating the issues over and over again. He urges the Court to limit its review to the evidence before the Parties at the time they negotiated their settlements and avoid turning the fairness hearing into a trial on the merits.

h. The Facts Surrounding this Settlement, Including the Settlement Itself and Certain Other Facts That Will Be Discussed Under Seal, indicate that Collusion was Involved in Development of the Proposed Settlement.

Mr. Urban urges the Court to scrutinize the proposed settlement more carefully under *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011) (citations omitted).[219] Mr. Urban essentially argues three areas that require further scrutiny by the Court.

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[218] *See* IV.B., *supra*.

[219] The U.S. Court of Appeals for the Ninth Circuit has provided a list of "subtle signs" that there may have been collusion in the negotiation of a class action settlement. These signs are:

> (2) [W]hen the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and

The first area concerns the lack of any monetary compensation for Class Members, although the Defendants will receive any unused funds from the Settlement. The next issue concerns Class Counsel releasing defendants other than Monsanto as part of this settlement with the only explanation being that they had been part of the *Carter v. Monsanto Company, et al.*, 00-C-300 civil action, and no explanation as to why Class Members should forfeit their rights to sue these entities.[220] Finally, Mr. Urban asserts that he was privy to conversations regarding when the attorneys' fees were first negotiated and claims that these conversations took place before, during, and after the finalization of the proposed settlement. Mr. Urban argues that the proponents are being less than forthcoming about this issue and that this is further reason to believe that collusion was involved in the present settlement.

The Defendants argue that Mr. Urban attempts to manufacture the appearance of collusion by asserting that: 1) the fact "Class Members will receive no actual money"; 2) the agreement that Class Counsel may seek attorney "fees from this Court"; 3) the fact that unused monies revert to Defendants; and 4) the scope of the Settlements' releases.

The Defendants argue that the Plaintiffs never asked for monetary damages and this case has always been about establishing funds to pay for property cleaning and medical monitoring, the very remedy achieved by the Settlements. Class action settlements universally contain provisions for attorneys' fees. Moreover, it is the Court who determines how much money Class Counsel should receive in attorneys' fees, not the Defendants. The reversion of funds back to the Defendants has been held as proper and appropriate by other Courts. If anything, the reversion

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> (3) [W]hen the parties arrange for fees not awarded to revert to defendants rather than be added to class fund.

In re Bluetooth Headset Products Liability Litigation, 654 F.3d 935, 947 (9th Cir. 2011) (citations omitted).

[220] Urban cites to the Settlement as releasing Monsanto for its actions related to "any and all manufacturing process[es] or activities at the Plant" even though Class Counsel was appointed only to pursue a class action involving Monsanto's 2,4,5-T process. *Class Certification Order January 1, 2008.* (dkt. no. 695).

helps achieve a larger settlement to the Plaintiffs, as the Defendants are more willing to pledge more money knowing that the unused funds might revert back to them.

Defendants also aver that all of the released non-parties were previously parties to this litigation or closely-related litigation. Furthermore, many of the non-parties have previously received judgments in their favor with respect to the claims encompassed within the releases. Broad releases, including those extending to non-parties are commonplace.[221]

Finally, the Defendants contend that Mr. Urban ignores the legal standard applied by courts evaluating claims of collusion. Courts reject assertions of collusion where class action settlements are adjudicated as being fair, reasonable, and adequate. In *Mars Steel Corp., v. Continental Ill. Nat'l Bank and Trust*, 834 F.2d 677, 684 (7th Cir. 1987), the Court noted that, "[r]ather than attempt to prescribe the modalities of negotiation, the district court judge permissibly focused on the end result of the negotiation...The proof of the pudding was indeed in the eating."

Class Counsel asserts essentially the same arguments as the Defendants, as discussed, *supra*. Class Counsel argues in addition, that "clear sailing" agreements are not uncommon and do not, by themselves, provide any evidence of collusion. *See, e.g., In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 553, 96 Cal. Rptr. 3d. 127, 133 (2009) (noting that "clear sailing agreements," whereby defendants agree not to challenge a request for fees up to a certain amount, are "typically include[d]" in class action settlement agreements and are "proper.").

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[221] *See, Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254 (2d. Cir. 2001) *aff'd in part by an equally divided court and vacated in part*, 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed. 2d 106 (2003). *Wal-Mart*, 396 F.3d at 106-09 (citing *In re Lloyd's Am. Trust Fund Litig.*, 2002 WL 31663577, at *11 (S.D.N.Y. Nov. 26, 2002)).

2. Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims

On June 7, 2012, Mr. Urban also filed *Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims.* (dkt. no. 3133) arguing the same areas of concern as his *Memorandum of the Urban & Falk Plaintiffs Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3101) and including report letters from three experts who were retained early in this case, specifically: 1) Randy Horsak, P.E. of (3TM Consulting); 2) James G. Dahlgren, M.D.; and 3) Richard A. Parent, Ph.D. This filing includes the following concerns:

a. The Experts Agree---"Triggering Events" are unlikely to occur!

Mr. Urban argues that the "triggering events" are unlikely to occur and that the Proponents have no scientific evidence to support this assertion. He further relies on Dr. Dahlgren's explanations of the half-life of TCDD being 7.1 years and that it is unlikely that the Class Members will ever have any benefit of the purported $63 million in funds allocated solely if they do occur. The proponents assert that the last production of 2,4,5-T at the plant occurred in 1969. The level of TCDD in the Class Members' blood is significantly lower than it was when they were first exposed to this toxin. Due to the half-life of TCDD and other dioxins, it is quite unlikely that they would meet this threshold in 2012, although the Class Members may

have had toxin levels that would have been in the 95% of the NHANES study during the 1940s-1960s.

The Urban Objectors also rely on Randy Horsak's report which demonstrates that the level of measurable contamination greatly declines with the passage of time. There were only 2 individuals whose blood dioxin level would satisfy the triggering events and both had worked at Monsanto and are ineligible for the Medical Monitoring Plan. Therefore, it is highly unlikely that the 25% of the persons tested as part of the Medical Monitoring protocol would satisfy this requirement and that the "triggering event" would be satisfied.

b. The Medical Monitoring Program is Grossly Flawed and Requires Substantial Revision Before it Can be Considered Fair, Adequate, and Reasonable.

i. The Area for Medical Monitoring should be greatly expanded because substantial evidence exists that many more Class Members were contaminated by various chemicals created at Monsanto's Nitro Plant.

Mr. Horsak's report asserted that there was more widespread impact than is reflected in the area that provides the limits of relief for two Classes. He bases this assertion on his earlier testing of surface soils and indoor dust. He concludes that the medical monitoring program needs to be provided to those in a much larger area than is presently covered by this settlement.

Class Counsel addressed this issue in *Class Counsel's Reply to the Memorandum (and Supplemental Memorandum) of the Urban & Falk Plaintiff's in Opposition/Objection to Proponents' Proposed Settlements of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3156) and his response to this issue was discussed, *supra* at 295.

The Defendants addressed this issue in *Defendants' Response to Memorandum and Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3148) and their response on this issue was discussed, *supra* at 295.

ii. The Medical Monitoring Program itself requires substantial revision-the frequency of examinations it too long and the program requires an expert in dioxin, which is not called for under the proposed settlement.

Drs. Dahlgren and Parent explain that the settlement is unacceptable because of both the frequency and quality of testing.[222] Both experts agree that medical monitoring should involve a medical expert who is familiar with chronic dioxin intoxication.

Class Counsel and the Defendants did not specifically address the frequency and quality of testing in their respective responses.

iii. Compensation for those who develop cancers or other serious illnesses associated with dioxin must be provided.

Drs. Dahlgren and Parent both assert that monetary compensation should be provided in this settlement and that the Class Members are denied their right to compensation or further litigation. They both contend that the medical monitoring only provides Class Members with an opportunity to sue after a physical manifestation occurs but without the benefit of Class Counsel's previous experts.

Class Counsel addressed this issue in *Class Counsel's Reply to the Memorandum (and Supplemental Memorandum) of the Urban & Falk Plaintiff's in Opposition/Objection to*

[222] Both experts assert that the testing should be conducted every 2 years instead of every 5 and that more detailed tests such as, Spiral CTs, MRIs, cancer markers, and immune and endocrine testing are needed.

Proponents' Proposed Settlements of the Property and Medical Monitoring Classes's [sic] Claims (dkt. no. 3156) and his response to this issue was discussed, *supra* at 298.

The Defendants addressed this issue in *Defendants' Response to Memorandum and Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3148) and their response on this issue was discussed, *supra* at 298.

iv. A registry for diseases caused by exposure to dioxin must be created so that the knowledge that will be developed through the Medical Monitoring Program can be used to assist other Class Members.

Drs. Dahlgren and Parent suggest that a program database will facilitate and assist future scientific and medical research regarding toxins at issue as was established in *Perrine*. The doctors argue that it is important to both scientific research and the Class that the medical knowledge is not lost and can be used for future research.

Class Counsel and the Defendants did not specifically address a registry for diseases tin their respective responses.

c. The Property Remediation Program is grossly flawed and requires substantial revision before it can be considered fair, reasonable, and adequate.

i. The Area for Property Remediation should be greatly expanded because substantial evidence exists that many more houses were contaminated by various chemicals created at Monsanto's Nitro Plant.

Mr. Urban argues that widespread contamination exists from dioxins and furans throughout the Nitro area. Mr. Urban cites Mr. Horsak's prior surface soil and indoor dust testing in the Nitro Schools for this proposition. Mr. Urban argues that out of 68 Samples, 66 of

them resulted in findings in excess of the West Virginia Tier 1 limit for dioxin/furan TEQ of 3.9 ppt. All 33 of the indoor dust samples exceeded this level. The samples showed measurements exceeding this level as far as 3.75 miles away from the former Monsanto plant, well beyond the property class area. Mr. Horsak conducted a chemical fingerprinting of the surface soil and indoor dust samples and found that the majority of the samples were residual contamination from the Monsanto Plant in Nitro and not some other source. His estimate was that it would cost $300,000,000 to decontaminate residences and other buildings to the 3.9 ppt target. Mr. Horsak further estimated that it would cost between $958,000,000 and $5.4 billion to remediate contaminated soil in the area to the 3.9 ppt target.

Class Counsel addressed this issue in *Class Counsel's Reply to the Memorandum (and Supplemental Memorandum) of the Urban & Falk Plaintiff's in Opposition/Objection to Proponents' Proposed Settlements of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3156) and his response to this issue was discussed, *supra* at 296.

The Defendants addressed this issue in *Defendants' Response to Memorandum and Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3148) and their response on this issue was discussed, *supra* at 297.

ii. The proposed clean-up does not even properly resolve contamination issues inside the house.

Mr. Horsak expresses concern that the time allowed to decontaminate a house is not reasonable. Furthermore, he contends the methodology will not decontaminate dust vents and ductwork. Mr. Horsak also asserts that the vacuuming and wiping may be inadequate to remove the dioxin-laden dust down to low levels.

Class Counsel and the Defendants did not specifically address a proper resolution of contamination issues inside the properties in their respective responses.

iii. The proposed clean-up needs to have a method for determining its efficacy.

Mr. Urban asserts the Settlement has no methodology for determining the percentage of TCDD eliminated from each house. Therefore, it will be unknown how the efficacy of the house cleaning and Class Members will be unaware of the level of property's decontamination.

Class Counsel and the Defendants did not specifically address a method of determining efficacy in their respective responses.

iv. Decontamination of the attics of the houses and decontamination of the soil is necessary to ensure that the houses do not become re-contaminated.

Mr. Horsak disagrees with the lack of soil and attic dust remediation in the Settlement. According to Horsak, the living space areas have potential for re-contamination from surface soils and the transport of contaminated attic dust into the house. He rejects the assertion that soil clean-up is unnecessary based on his soil sample results.

Class Counsel argues that the evidence developed for trial showed that only indoor, living-area dust posed a substantial health risk to current residents. Class Counsel further argues that Dr. Sawyer, Class Counsel's toxicologist, did not factor contaminated soil or attic dust into his risk assessment because the health risk posed by residents' exposure to dioxin in soil and attic dust was relatively minimal. Therefore, they would not have heard any evidence on attic or soil remediation.

The Defendants did not specifically address this issue in their Response. However, they generally argued in their Response that a trial in this matter would have been based upon the evidence developed by Class Counsel's experts.

3. Second Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's (sic) Claims

On August 20, 2012, Mr. Urban filed his *Second Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's (sic) Claims* (dkt. no. 3253). This memorandum addresses several issues previously argued by Mr. Urban, but specifically addresses collusion, lack of expert reports determining the "fairness, adequacy, and reasonableness" of the proposed settlements, and the Class Administrator.

a. Collusion

Mr. Urban argues that the Objectors have found two "smoking guns" which evidence collusion and that the entire settlement should be rejected because of a lack of adequate representation of counsel as required by West Virginia Rule of Civil Procedure 23(a). Mr. Urban avers that the first "smoking gun" describes an offer that Monsanto made to Class Counsel to settle the claims of both classes on August 25, 2011. That offer contained the following terms:

1. $25 million for Medical Monitoring (over 10 years);
2. No "Triggering Events";

3. $5 million for property clean-up (all provided one year after settlement approval);

4. Mr. Calwells' personal injury clients would split a $3 million lump sum; and

5. Only $6 million for Mr. Calwell for attorneys' fees ($5 million for Medical Monitoring "payable in 2 installments 6 months apart with initial payment in 90 days" and $1 million for Property Damage "funded on anniversary of Settlement approval" and only $1 million in expenses.

Id. at 2.

Mr. Urban contends that the proposed settlement has been substantially reduced from the offer made by Monsanto before mediation in August 2011 and that Mr. Calwell now stands to made up to $33.5 million in fees and expenses in the proposed settlement while he would have only received $8.2 million under the August 2011 offer (an increase of $25.3 million more for Mr. Calwell.)

Mr. Urban alleges that the second "smoking gun" is a letter from Mr. Calwell to Mr. Love on September 23, 2011 rejecting the August 2011 settlement offer as "too low." The letter goes on to state that Class Counsel proposes the negotiation 'bracket' be $125,000,000 to $825,000,000. Mr. Urban further argues that nothing of substance occurred between September 23, 2011 and February 23, 2012 that would cause such a shift in the value of the case to make the property damage case worth only $9 million, other than an offer from Monsanto to provide Mr. Calwell a total of $33.5 million in fees and expenses.

In addition to the two "smoking guns" that Mr. Urban relies upon in his Memorandum, he also cites another case that Mr. Calwell filed against Monsanto, specifically, *Mann v. Monsanto, et. al.*, Civil Action No. 07-C-350. Mr. Urban argues that those documents provide substantial evidence that Monsanto (and other defendants) continued to engage in production that

created dioxin well after 1969. He further argues, as result, the number of class members who are eligible for Medical Monitoring should have been substantially increased. He avers that the proposed settlement will eviscerate the right of these contaminated class members to sue the Defendants and to receive proper testing for the early detection of latent illnesses that are likely to develop. Additionally, Mr. Urban contends that the settlement releases Monsanto for actions related to "any and all manufacturing process[es] or activities at the Plant" even though Class Counsel was only appointed to pursue a class action involving Monsanto's 2,4,5-T process.

b. Other Factors Determining Lack of Fairness, Adequacy, and Reasonableness

Mr. Urban contends that even if the proponents did not engage in collusion, the settlement should still be rejected. Mr. Urban argues that the proponents did not provide a report from a single qualified expert who determined that the proposed settlement is "fair, reasonable, and adequate." Mr. Urban also reiterates previous arguments that the Court will not revisit as they have been set out, *supra*.

c. Class Administrator

Mr. Urban argues that Thomas V. Flaherty, Esq., cannot serve as Class Administrator due to a conflict of interest. Mr. Urban contends that the conflict comes from his firm representing a defendant engaged in a medical monitoring lawsuit with similar claims to the medical monitoring claims in the present case.[223] Mr. Urban claims that the Mr. Flaherty's representation of a manufacturing client that is allegedly contaminating local residents is a substantial conflict of interest. The primary contention is that whether this settlement is approved and how it is

[223] *Ballard, et al., v. Union Carbide Corp., et al.*, No. 2:11-cv-00366 (S.D.W.Va. Feb. 24, 2012).

administered may have an effect on how future medical monitoring claims as in the *Ballard* case, are resolved and administered.

4. Class Counsel's Response to Second Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims

On August 28, 2012, Class Counsel filed *Class Counsel's Response to Second Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims* (dkt. no. 3267). Class Counsel argues three points, namely that expert evidence was presented, that Mr. Urban's claims of collusion are unfounded, and that Thomas V. Flaherty, Esq., does not have a disqualifying conflict. Class Counsel argues that experts are not required by law to say that a proposed settlement is 'fair, adequate, and reasonable' but did in fact, submit three separate expert affidavits which addressed important scientific and technical aspect of the settlement. Class Counsel argues that Dr. Werntz, Mr. Carr, and Dr. Bell all found that the settlement was substantially similar or supported their earlier reports. Specifically, Dr. Werntz reviewed the MMCSA and compared it to the medical monitoring plan he developed for this litigation. His affidavit states that the upper bound of the 95th percentile to determine the triggering event and increased frequency (if the triggering event should occur) was medically appropriate for the eligible participants. Mr. Carr's affidavit noted that the remediation plan in PCSA is substantially similar to his remediation plan for indoor, living-area dust. Dr. Bell

asserts that there is no practical way to show that any other process created 2,3,7,8-TCDD or any other dioxin in any significant quantity at the Nitro facility after 1969.

Class Counsel contends that Mr. Urban's alleged "smoking guns" as to collusion are an offer of settlement from the Defendants dated August 25, 2011, and Class Counsel's response dated September 23, 2011. Class Counsel argues that the MMCSA provides a greater amount of funding for frequent testing, over a longer period of time once the triggering event occurs. Class Counsel further argues that the triggering event has real value and that the $63 million dollars secured by the settlement does more to fulfill the goals of litigation, than does the comparatively small increase in the non-contingent funding of four million dollars advocated as a "better" settlement term by Mr. Urban.

Class Counsel argues that the PCSA is for $9 million dollars utilized over three years due to the number of homes cleaned and the amount of time each cleaning requires. Class Counsel further argues that the fact that he obtained a greater amount than that offered in August 2011 cuts against Mr. Urban's claims of collusion.

Class Counsel argues that Mr. Urban fails to mention that the personal injury cases were mediated globally by order of this Court. Additionally, the settlement terms and amount of funding for the various settlements increased across the board from August 2011 settlement offer to the current settlement. Class Counsel counters Mr. Urban's argument that "[n]othing of substance occurred between September 23, 2011 and February 23, 2012..." with the fact that jury selection had occurred for several weeks and that jury selection can impact settlement negotiations. Class Counsel also notes that several Court rulings were made since August 2011 that significantly impacted the litigation and the presentation of evidence at trial.

Also, Class Counsel argues that his expert (Dr. Bell) has stated through his affidavit that it would have been extraordinarily difficult to prove post-1969 environmental contamination, that the documents themselves do not contain any detection of tetra-level dioxins, and do not contain any data regarding the quantities of dioxins created which could be used to model emissions.

Class Counsel also directs the Court to his *Petition for Award of Attorneys' Fees and Litigation Expenses*, filed March 26, 2012, (dkt. no. 3068) and Class Counsel's *Reply to Objectors' Response to Petition for Award of Attorneys' Fees and Litigation Expenses*, filed June 15, 2012, (dkt. no. 3160), which rebut these arguments regarding Mr. Urban's accusations of impropriety as they related to attorneys' fees and costs.

Class Counsel argues that Mr. Flaherty does not have a disqualifying conflict because Rule 1.7 of the West Virginia Rules of Professional Conduct places the onus of determining a conflict on the lawyer. Class Counsel relies on the Comments to Rule 1.7 which state that opposing counsel may raise the question of conflict, however, the Comments more importantly note, in reference to opposing counsel raising a conflict, "[s]uch an objection should be viewed with caution, however, for it can be misused as a technique for harassment." WVRPC Rule 1.7, Comments, Conflict Charged by an Opposing Party.

5. Defendants' Motion to Strike or, in the Alternative, Response to Second Supplemental Objection of the Urban & Falk Objectors to Settlement Approval

On August 28, 2012, the Defendants filed *Defendants' Motion to Strike or, in the Alternative, Response to Second Supplemental Objection of the Urban & Falk Objectors to*

Settlement Approval. (dkt. no. 3260). The Defendants argue that Mr. Urban's Memo should be struck by the Court as being untimely filed and provide three reasons to support their assertion. The Defendants first argue that the Objections deadline was on June 7, 2012 and Mr. Urban has had more than ample opportunity to file any Objections prior to August 20, 2012. Additionally, the Defendants argue that Mr. Urban's objections were well known to him prior to the June 7, 2012 deadline and that he fails to explain why he did not assert them in either of his previous memoranda he filed prior to the fairness hearing. Moreover, none of his grounds are based on events that occurred after the fairness hearing. Finally, the Defendants assert that Mr. Urban is in violation of the Court's final briefing schedule with respect to the review of MMCSA and PCSA and thwarts the orderly process established by the Court, thus rendering the deadlines as nullities.

The Defendants argue that every assertion in the Second Supplemental Objection should be rejected for two reasons. The first reason is that Mr. Flaherty should not be disqualified from serving as class administrator because Mr. Urban cites no fact or legal authority requiring disqualification. Additionally to this point, the Defendants argue that *Ballard* involves wholly different parties and chemical compounds. Under Mr. Urban's reasoning, Mr. Flaherty would be disqualified from mediating or administering settlements in any cases involving medical monitoring, products liability, negligence, or deliberate intent. The second reason that Mr. Urban's assertion should be rejected is set forth in the Defendants' and Class Counsel's response to the proposed findings of fact and conclusions of law filed by Urban.

On August 28, 2012, the Defendants and Class Counsel filed *Proponents' Response to the Urban Objectors Proposed Findings of Fact.* (dkt. no. 3262). The Proponents argue several reasons that Mr. Urban's Proposed Findings should be rejected in their entirety because they are

devoid of evidentiary support and rife with erroneous and deceptive characterizations of law. They aver that Mr. Urban failed to provide any scientific evidence or citations to any scientific evidence found in the record and are nothing more than averments in an unverified, unrelated complaint. The Proponents further argue that the vacatur of the order decertifying the Property Class was not erroneous. Mr. Urban's treatment of "collusion" should be rejected because he mischaracterizes the legal standard applicable to collusion and has an erroneous analysis of the facts. Finally, they argue that Mr. Urban's criticisms of the Property Settlement lack merit.

B. Objections from Ruth McQuade, Esq.,

On June 11, 2012, Ruth McQuade, Esq., filed *Objection to Class Action Settlement and Attorney's Fee Request* (dkt. no. 3136) representing Class Member Jane Murdock, urging the Court to deny the proposed Medical Monitoring and Property Class Settlements. On June 14, 2012, the Defendants filed *"Defendants' Response to Objector Jane Murdock's Objection to Class Action Settlement and Attorneys' Fee Request."* (dkt. no. 3152). Ms. McQuade filed a *Notice of Appearance* on June 15, 2012 (dkt. no. 3140) for Class Members Patricia Holstein and Nel Cox. Ms. McQuade also filed a *Motion by Nel Cox to Permit Late Adoption of Murdock Objectors* (dkt. no. 3142) and *Motion by Patricia Holstein to Permit Late Adoption of Murdock Objectors* (dkt. no. 3141). On June 15, 2012, Class Counsel filed *Class Counsel's Preliminary Response and Motion to Strike to Objector Jane Murdock's "Objection to Class Action Settlement and Attorneys' Fee Request* (dkt. no. 3154). Class Counsel filed *Class Counsel's Supplemental Response to Objector Jane Murdock's "Objection to Class Action Settlement and Attorneys' Fee Request"* on June 18, 2012 (dkt. no. 3166). In her written submissions, she adopted the Urban & Falk objections previously filed. Ms. McQuade also argues the following:

1. The Lead Plaintiff and Class Counsel Were Subject to a Conflict of Interest in Agreeing to Release the Claims of Class Members in Over 75% of the Class Area for No Consideration.

Ms. McQuade argues that the Class Members within the Medical Monitoring Classes were treated differently than the remaining majority of the Class Area ("the Uncompensated Sub-Class") due to Class Counsel's conflict of interest. She contends that no one represented the Uncompensated Sub-Class and that Class Counsel traded the claims of the Sub-Class for an increased recovery by the Medical Monitoring Class, Class Counsel's attorneys' fees, and undisclosed service awards that Class Counsel intends to pay to his clients out of his fee. The Objectors assert that Class Counsel and the Lead Plaintiffs colluded with the Defendants to produce a settlement that favors each of the those parties at the expense of the unrepresented Uncompensated Sub-Class. They additionally argue that all of the named Plaintiffs reside or resided or owned property within the Medical Monitoring Class and that they had an incentive to draw the lines of the Medical Monitoring Class so as to exclude as many members as possible to maximize their own recovery.

Ms. McQuade also argues that in *Dewey v. Volkswagen*, 681 F.3d 170 (3rd Cir. 2012), the settlement created an $8 million reimbursement fund that was available only to certain subgroups of the class, while the rest of the class members could only file claims against any residual funds. Ms. McQuade argues that the Third Circuit rejected the settlement for inadequate representation of the disfavored subgroup. Ms. McQuade likens *Dewey* to the instant case and argues that the Lead Plaintiffs and Class Counsel drew the Class circle so that it encompassed

their property or place of residence, and left over 75% of the Class Area outside of that circle. Furthermore, she argues that the Lead Plaintiffs here did not even provide that the larger area could make claims for medical monitoring if there were leftover funds in the Medical Monitoring Fund, but instead that those funds revert to the Defendants. Ms. McQuade attributes this to collusion on the part of Class Counsel and the Defendants to produce a settlement that favors each of those parties at the expense of the unrepresented Uncompensated Sub-Class.

The Defendants argue Ms. McQuade's reliance on *Dewey* is misplaced because it did not present an "almost identical settlement." In *Dewey*, there were two groups of class members (1) a "reimbursement group" who received the right to reimbursement for certain qualifying damages; and (2) a "residual group" who could make goodwill changes against the fund once the "reimbursement group" finished making claims. In the instant case, there is but one class as defined by the Court's class certification orders. The Defendants further contend that what Ms. McQuade calls an "Uncompensated Sub-Class" is more accurately characterized as a group of persons who had seven years to proffer colorable evidence of harm, but failed to do so. Finally, the Defendants argue that the relief must follow the evidence and that where there is no evidence there should be no relief.

Similarly, Class Counsel argues that Ms. McQuade's reliance on *Dewey* is misplaced. Class Counsel cites that the division between the "reimbursement group" and the "residual group" was the work of the lawyers in that case and not supported by the evidence in the record. Class Counsel further argues that the parties have exhaustively litigated the merits of the case for all class members. Additionally, he argues that the expert witnesses determined the extent of the dioxin contamination and the health risks resulting from such contamination in the Class Area,

not the lawyers. Finally, he argues that the allocation of settlement benefits among the *Bibb* members was based upon evidence that was developed for trial.

2. The Proposed Settlement is Unlikely to Deliver More Than $15 Million to the Settlement Class Members.

Ms. McQuade argues that the Notice and Petition for Award of Attorneys' Fees refer to the $30 million as if it were a guaranteed minimum payment that Monsanto will make, regardless of how many of Class Members ultimately participate in either the Medical Monitoring Class or Property Class. The McQuade Objectors argue that the true value of the Settlements cannot be determined or estimated until all of the claims are made, or at least until the 120-day Registration Period has been completed, and compare it to a "claims-made" settlement. Only the class members who register to participate during the 120-day period following final approval of the settlement will be eligible for medical monitoring in any of the subsequent years. Therefore, a low registration rate will all but guarantee that little of the available funds will ever be paid on behalf of the Class.

Finally, Ms. McQuade argues that the attrition rate of the Class Members will increase due to death, lost interest, or moving out of the area. Therefore, a reversion will occur and the settlement won't be anything close to $21 million. Additionally, the present value of the $21 million dollars over the course of 30 years is only worth $1.5 million today at an average rate of interest at 2.5%. Thus, the Settlement in present value is only around $10 million.

The Defendants argue that Ms. McQuade fails to offer any credible evidence in support of her assertions and fails to acknowledge that, if indeed the allegations are in the Class Action Complaint are true, the Triggering Events are in fact likely to occur. Therefore, by arguing that

that the Triggering Events are unlikely to occur, Ms. McQuade suggests that she never believed in the Plaintiffs' case from the outset.

Additionally, the Defendants argue that the "Triggering Event" provides a benefit to the settling class members because they potentially provide more generous settlement benefits. The Defendants further argue that where the amount of money necessary to compensate the settlement class members is unclear, the unavailability of triggering events might result in a settling defendant's refusal to provide greater monetary resources for fear that a settlement class might be overcompensated. Thus, the triggering events are a rational way to balance the Parties' competing concerns while providing substantial equitable relief to the class if Plaintiffs' contentions concerning dioxin exposure are true.

Class Counsel did not specifically address this issue in his Response.

3. The Payment of "Service" Awards to the Lead Plaintiffs From Class Counsel's Attorneys' Fees and Expenses, Without Disclosure to the Class or to the Court, Violates Due Process, Class Action Procedural Law, and Probably the Rules of Professional Conduct.

Ms. McQuade objects to the Settlement because of allegedly unspecified incentive payments to the Class Representatives. She asserts that the service awards have not been 1) disclosed to the class; 2) has not been disclosed to the Court; 3) will not be approved by the Court; 4) may be a wholly unreasonable and arbitrary amount; and 5) will be paid to non-lawyers from Class Counsel's attorneys' fees, thus violating the rule against splitting fees with a non-

lawyer. Additionally, the plan to pay service awards at all is completely omitted from the Class Notice.

On June 4, 2012, Class Counsel filed a *Motion for Incentive Payments for Named Class Representatives* (dkt. no. 3120). Class Counsel sought permission from the Court to approve incentive payments of Twenty-Five Thousand Dollars ($25,000) to each of the Class Representatives.

The Defendants argue that this objection ignores the fact that Class Counsel did make a motion for incentive payments and did, in fact, move for court approval of the service awards and that no such objection provides any basis to disapprove the proposed Settlements. Furthermore, the Defendants argue that the payment of any service awards to class representatives is squarely under the control and supervision of the Court. As such, if she objects to the proposed service awards, then she should file a response to the Motion. As these incentive payments come from Class Counsel's attorneys' fees, the Defendants did not object.

Class Counsel did not specifically address this issue in his Response.

4. The Class Notice Fails to Satisfy Due Process.

Ms. McQuade argues that the Notice was highly misleading because it fails to disclose service fees awards, the purportedly "guaranteed" settlement amount of $30 million dollars is not guaranteed but will revert to Monsanto, and the fact that the Medical Monitoring Settlement will be paid out of over thirty years significantly reduces its value.

The Defendants argue that this Court carefully considered the content and manner of Class Notices and concluded that they were accurate, informative, objective, satisfied Due Process, and provided the class members with all the information necessary to make an informed

decision. The Defendants contend that there is no requirement that all details of a proposed class settlement be included in the notice provided as long as the terms are easily available and the key terms are described in the body of the notice. MCL, *supra*, § 21.312. The Defendants also provide a general discussion of notice requirements which has been discussed, *supra*.

Class Counsel did not specifically address this issue in his Response.

5. The Attorneys' Fees Requested Are Excessive Compared to the Probable Present Value of the Settlement.

Ms. McQuade argues that the requested attorneys' fees of $22.5 million for both Settlements are grossly excessive. Additionally, she argues that Class Counsel's fee could be as high as 70% of the overall paid out in the settlement. McQuade requests that the Court defer ruling on the Class Counsel's Petition for Attorneys' Fees until the initial Registration Period has closed, at which time it will be possible to estimate the maximum amount of money that could be paid out as part of the Medical Monitoring Plan.

The Defendants argue that this is not a coupon settlement where the real winners are the attorneys for the class and the class members received nominal consideration. The Defendants further argue that Ms. McQuade assumes that none of the Medical Monitoring Program's Triggering Events will occur without citation to any evidence or other authority.

Class Counsel did not specifically address this issue in his Response.

6. The Structuring of the Settlement as Two Separate Payments, One for the Class Fund and One for Fees, Has Harmed Objector and Class Members.

Ms. McQuade argues that the carving out of the $25 million dollars for attorneys' fees has harmed the Class Members, despite it being paid out separately from the Funds.[224] Moreover, her contention is that Monsanto would have "gladly increased the class fund to $43.5 million for the Medical Monitoring class, so long as Class Counsel had agreed to petition for his fees out that total." The Objectors contend that the difference between the $22.5 million and the amount actually awarded to Class Counsel as fees must become part of the Medical Monitoring Fund for the benefit of all class members in the Class Area, and that it not revert to Monsanto under any circumstances.

The Defendants argue that Ms. McQuade cites to baseless assumptions regarding the Settlements. The Defendants contend that the Settlements are structured properly and that the reversion of funds was a "deal breaker". The Defendants would not have agreed to "pay more" and certainly would not have agreed to forego reversion of unused funds given the maximum payments they agreed to. The Defendants cite *McKinnie v. J.P. Morgan Chase Bank, N.A.*, 678 F.Supp. 2d 806, 813 (E.D. Wis. 2009), where "[a] defendant may agree to a higher maximum settlement amount-which allows more claimants to be fully compensated for their damages if a large number of claims are filed-in return for possible reversion of a portion of unclaimed funds." Accordingly, if the Defendants did not have reversionary terms, then no settlement would have been reached at all.

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[224] The Court is contemporaneously entering its *Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payment*, with this Order.

Class Counsel did not specifically address this issue in his Response.

C. Individual Objections

The Court received and reviewed all of the individual objections[225] which were filed in the Putnam County Circuit Clerk's Office. The Court also allowed the individual objectors the opportunity to be heard during the Fairness Hearing on June 18, 2012. The individual objectors assert many of the reasons discussed, *supra* but there are three additional areas that the Court will specifically review:

1) Individual Class Members who objected to the Medical Monitoring Program because it failed to monetarily compensate their deceased family members' personal injuries.[226]

2) Class Members who claimed their age and their limited ability to drive to the Medical Monitoring location would affect their participation. [227]

3) Commercial property owners who wanted monetary compensation for damage to their real property.[228]

On June 14, 2012, Class Counsel filed *Class Counsels' Omnibus Response to Various Lay Objections.* (dkt. no. 3151). Class Counsel contends that the objections fall into the following categories: "1) misunderstandings of the Settlement Agreements; 2) confusion

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[225] Karen Kirkendoll, George Jacob, Linda Cowley, Clifford Cawley, Fran Kesler, James W. Morrison, Gordon Schronce, Barbara G. Yarbrough, Randolph W. Yarbrough, Michelle Cowley, Connie Burke Smith, James A. Carnes, Fred Murrock, Margaret Castle, Minnie Case, Rose C. Brant, Dennis W. Withrow, Robert L. Smith, Sharon Chaney, William L. Roberts, Francoise Nienke, Connie A. Stone, Karen Sales Childers, Jerry Jeffries, Karen E. Lamb, Michael L. Kelly, Robert A. McClanahan, Wanda L. Jeffries Steorts, Kevin MsDaniel, Lisa Williams, Auvil Whited, Larry O. Frazier/Robin L. Mallett/Kelsea L. Mallett, Pat Higginbotham, Patricia Lovejoy, Richard Sanders, Robert Smith, Bernice I. Clark, Gloria Hughes, Mary L. Barnette, Ellen L. Mann, and Helena Johnson.

[226] Connie Burke Smith on behalf of Robert Burke –May 5, 2012, at 2-3; James A. Carnes-May 14, 2012, at 1; Clifford Cawley-April 24, 2012, at 1; Jerry Jefferies –June 1, 2012, at 1; Dennis W. Withrow-May 22, 2012, at 1,3.

[227] Francoise Nienke –May 28, 2012, 1; (Fairness Hr'g Tr. 82-83 June 18, 2012.)

[228] Karen Kirkendoll's filings addressed commercial property and amounts of monetary compensation that she felt her property was worth.

between the Solutia bankruptcy proceedings and the *Bibb* case; 3) potential claims from former employees; and 4) clients seeking monetary damages based on personal injury theories." *Id.* at 2.

Class Counsel argues that in Paragraph 8.1(d) of the MMCSA "[c]lass members reserve the right to pursue any and all claims which they may assert against the Defendants for any claim other than that for medical monitoring, including but not limited to any claim for which personal injury may arise." MMCSA at 17.

Class Counsel also argues that certain objectors raised concerns regarding the administration of the medical monitoring program and property remediation programs. The objectors raised concerns that the programs collectively would not be abided by, and that class members would at some point need to seek additional court intervention to enforce the Settlement terms. Class Counsel counters this concern with a discussion of the role of the Administrator, Thomas V. Flaherty, Esq., and also states that the MMCSA prescribes and sets forth a thirty (30) year medical monitoring program which is adequately funded through its pendency. Finally, Class Counsel avers that he anticipates no possibility of further litigation if the settlement is approved.

Class Counsel also addresses the Solutia bankruptcy proceedings and the *Bibb* litigation. Class Counsel filed approximately 4000 claim forms in the Solutia proceeding on behalf of Nitro area residents and/or property owners so that the Bibb litigation would not be pulled through the Solutia bankruptcy case and could continue to proceed in Putnam County. The 4,000 claim forms filed are B10 forms and estimated the total amount of their claims to be one million ($1,000,000.00) dollars. Because the claims were unsecured contingent claims the one million dollar "estimate" represented not a proven value of the claim, but instead an amount which was estimated each of the claims would not exceed. Class Counsel states that "this figure

[$1,000,000.00] referenced in several of the objections appears to come from this [bankruptcy] proceeding beginning in 2004."

Class Counsel also explains that the exclusion of former employees is a function of West Virginia Code § 23-2-6, and not the actions of Class Counsel and the Defendants. This Code section grants immunity to employers who pay into the worker's compensation fund from suits founded in tort, aside from lawsuits sounding in deliberate intent. The Defendants provided the Court with certification of their good standing with the worker's compensation system fund during the relevant timeframe. Therefore, the only remedy for employees to seek redress from their employers is through the worker's compensation system.

Class Counsel addresses the Objectors' concern that the Settlement does not provide monetary compensation for personal injuries. Personal injuries that are perceived to have been attributed to exposure to dioxin are not foreclosed, and these Objectors may pursue their claims in the form of a personal injury case. The only claims that are released in *Bibb* are the claims for medical monitoring and property damages against the Defendants and the already pending personal injury files. Class Counsel also avers that none of the personal injury cases or the *Bibb* file have been sealed should the Settlement be approved. Therefore, there is nothing to stop an enterprising attorney from bringing these potential personal injury cases, except for the time and resolve to review the case files.

IX. Discussion

In this section, the Court will analyze whether these settlements should be approved. To this end, the Court has carefully reviewed the evidence, and other relevant matters of record in this action discussed *supra*, in the light of its fiduciary obligation to protect absent class

members, with the clear understanding that the burden is on the proponents to establish the fairness, adequacy, and reasonableness of the settlements. In Section A, the Court will focus on the factors set out *supra,* to determine whether the proposed settlements are fair, adequate, and reasonable. Thereafter, in Section B, the Court will review the objections of Mr. Urban, Ms. McQuade, and the individual objectors. Section C contains the Court's conclusions.

Before beginning its analysis, it is obvious that there are several key factors that could be repeated as grounds for consideration under most of the settlement factors and objections to the settlement. They are:

1. At the time this case was settled, during the voir dire of the medical monitoring trial, the property class had been decertified. This decertification was on appeal to the West Virginia Supreme Court of Appeals, and absent a reversal and remand with orders to this Court to reinstitute the Property Class, the only relief available for property owners in the Class Area was either the remedy provided by this settlement, or that potentially obtained after they filed and prevailed on individual property damage cases, which were each upheld on appeal. Each such individual claim faced a potential Statute of Limitations defense. It also faced the potential issue of collateral estoppel, depending on the verdict rendered by the jury in the medical monitoring trial.
2. The original estimate of the amount of 2, 3, 7, 8-TCDD produced, which was the basis of the boundary of the original class area, with all of the concomitant claims of there being up to 88,000 people and 12,000 homes potentially affected by exposure to it, were greatly overstated as the result of an error by the plaintiffs' original "mass balance" expert. When this error was discovered and corrected, the amount of 2, 3, 7, 8-TCDD alleged to have been produced went down by almost 70%. With that reduction, the area potentially

affected decreased dramatically, thus substantially reducing the potential number of persons and residences affected.

3. The testimony of Robert Carr, the plaintiff's real estate remediation expert, had been ruled inadmissible at trial. This was the basis for the decertification of the plaintiff's property class. By his own admission, Mr. Carr's opinions were only 5 to 10% complete, and were by his testimony, accurate only to -50%/100%. Thus, his estimate of the cost to remediate property to a risk level of 1 in 100,000 (or 1×10^{-5}), the standard agreed to by the plaintiffs' toxicologists, was $315,000,000, with a low/high of $157,500,000 to $630,000,000. This estimate was so nebulous that Judge Spaulding ruled it inadmissible.
4. At the request of Class Counsel, and not supported by any qualified expert testimony, Mr. Carr unilaterally provided an estimate for property remediation of a risk level of 1 in 1,000,000, or 1×10^{-6}. No qualified expert opined that this level of remediation was appropriate. This decision raised the property remediation cost to $1,909,000,000. With the same -50%/100% margin of error, the low/high range mushroomed to the much-cited figures of $955,000,000 to $3.8 billion as the damage figure. Only plaintiff's counsel and objectors' counsel have ever cited these figures as the appropriate cleanup cost, at different times, and for different purposes.

A. An Analysis of the Fairness, Adequacy, and Reasonableness of the Proposed Settlements Under the Factors Set Out in VII. C., Supra:

1. The Posture of the Case at the Time of Settlement was Proposed

This action had been pending for over seven (7) years at the time settlement was proposed. During those years, it had been the subject of a bankruptcy proceeding; two removals by the Defendants to the United States District Court for the Southern District of West Virginia, with subsequent remands; and a Petition for a Writ of Prohibition on the issue of class certification filed with the West Virginia Supreme Court of Appeals. Scores of motions were filed and heard at many lengthy hearings. Most of these hearings resulted in orders, many of which were complex. There are currently 3,271 lines on the Docket sheet.[229]

On the day that the Court was informed of the settlement, the appeal of the Property Class Decertification filed by Class Counsel was pending at the West Virginia Supreme Court of Appeals, with an accompanying Motion for Stay. Concurrently, Class Counsel's Motion for a Writ of Prohibition against the Court (and discussed *supra)*, filed with an additional request for a stay, had just been received at the Supreme Court. This Court still had to rule on the *Plaintiffs' Supplemental Submission in Support of Portions of "Plaintiffs' Motion in Limine to Include Certain Documents and Evidence of Monsanto Company's "Other Acts" that Pertains to Documents that Refer to "Aroclor" and/or PCBs* (dkt. no. 2849), and the *Plaintiffs' Motion in Limine to Preclude Defendants, During Opening Arguments, from Identifying Specific Alternate*

[229] See Exs. 2 and 3 to this Order.

Sources of Dioxins/Furans in the Class Area, (dkt. no. 2902) and numerous objections to the use of deposition transcripts and exhibits. Almost two weeks of voir dire had been conducted, with a large number of jurors still subject to examination before the final venire of 28 was secured. Lastly, the Court still had to hear the contempt petition brought by the Defendants against Class Counsel.

Both sides informed the Court that they would make lengthy opening statements. The Circuit Clerk had erected a large metal shelf to hold those exhibits introduced into evidence during the trial. The courtroom had additional audiovisual equipment installed by both parties. The West Virginia Supreme Court of Appeals established a live video feed to the old courtroom in the Putnam County Courthouse for the public to watch the trial in the event that the courtroom reached capacity. Each side had rented office space within a short distance of the Judicial Annex, which served as their "forward operating bases."

Unlike those situations in which potential Class Actions are filed and almost simultaneously certified for settlement purposes only, this action was hotly contested and was vigorously litigated by all parties throughout its entire life. As mentioned *supra*, this litigation was racked with personal animosity between counsel, and also between counsel and several witnesses. The list of motions and the rulings thereon attached to this order, and the history of the litigation set out above, are ample evidence of the thorough and complete manner in which this litigation was conducted. No quarter was asked, and none was given, by either side on any issue. For these reasons, the Court finds and concludes that this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

2. The Extent of Discovery That Has Been Conducted

As mentioned above, the Circuit Clerk's file in this action has 3,271 lines entered on the docket sheet. Certificates of Service indicate that there were numerous sets of interrogatories filed, multiple depositions noticed and taken, and massive production of documents by both sides. Two full rounds of discovery were conducted: the first involved the issue of whether the Class should be certified; and the second focused on the merits of each party's case. This discovery included taking the depositions of experts from Colorado to Florida. Many experts were deposed over several days. These depositions generated hundreds of pages of transcripts, many of which this Court has reviewed. Many persons who were offered as experts were deposed, but then ultimately not listed as witnesses. Multiple expert reports were prepared. Certainly, each party fully and completely recognized the strengths and weaknesses of their opponent's case and their own. As stated *supra*, this is not a case in which a lawsuit was filed contemporaneously with a request for Class Certification for approval of a settlement. In this action, the parties had the benefit of seven years of litigation and an enormous volume of discovery to judge both the merits of the case and its associated risks. Anything that was knowable was known. Finally, for Mr. Calwell and Mr. Love personally, this action was the third phase of a legal "Thirty Years War" over Monsanto's 2, 4, 5-T operations at Nitro. For these reasons, the Court finds and concludes that this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

3. The Circumstances Surrounding the Negotiations

This factor represents a major component of the objections filed by Mr. Urban and Ms. McQuade as to the fairness, adequacy, and reasonableness of these settlements. The Court

observes that at each stage of the proceedings since it gave preliminary approval to the settlements, it has allowed more evidence of the settlement negotiations to be made public.[230] The Court has reviewed all of the objections, keeping in mind its fiduciary obligation to the Class. These objections go to the heart of the circumstances surrounding the negotiations, and are best discussed in regard to each separate objection raised by objector's counsel concerning them.

This Court understands that it is the objector's assertion that Class Counsel had a conflict in mediating the Class action at the same time that he mediated the personal injury actions. The Court knows that since its involvement in this action there have been two formal mediations conducted pursuant to this Court's order. The first mediation was conducted by Thomas V. Flaherty, Esq., on October 31, 2011 through November 2, 2011. The second mediation was conducted by the Honorable Alan Moats and the Honorable Booker Stephens, on December 28, 2011. Moreover, the *Urban v. Humphreys* complaint cited *supra*, indicates that there was at least one attempt to settle this action at an earlier stage.[231] Further, Mr. Urban has filed certain documents which are now public record setting out various settlement proposals that were exchanged between the parties in August and September, 2011, which were not the result of Court-mandated settlement negotiations, in support of his portion that the settlement was the result of collusion.[232]

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[230] At this point, the only areas that remain confidential are the actual mediation sessions. (dkt. no. 3214).

[231] *See* Exhibit A to *Class Counsel's Response to Second Supplemental Memorandum of the Urban and Falk Plaintiff's in Opposition (Objection to Proponent's Proposed Settlement of the Property and Medical Monitoring Classes's (sic) Claims*, ¶16. (dkt. no. 3267).

[232] *Second Supplemental Memorandum of the Urban and Falk Plaintiff's in Opposition (Objection to Proponent's Proposed Settlement of the Property and Medical Monitoring Classes's (sic) Claims.* (dkt. no. 3253).

This Court ordered the parties to conduct global mediation, to include those personal injury cases which Class counsel filed in the Circuit Court of Putnam County, West Virginia, and which parallel this action, because it strongly believed that there was a substantial likelihood that whatever verdict was reached on the medical monitoring claim could potentially determine the outcome of all other matters between the parties arising from claims involving Monsanto's production of 2, 4, 5-T, based upon the doctrine of issue preclusion/collateral estoppel. Specifically, the jury's answer to the question of whether the tortious activity of the Defendant significantly exposed the Class to a proven hazardous substance could have had a preclusive effect on all of the other cases on the issue of liability.

The parties had the benefit of almost two weeks of jury selection, and the picture of which jurors would decide the issue was coming into focus. The Court believes that the parties understood just how high the stakes were at this trial, whether or not the property damage class was recertified. The Court had specifically ordered, to the discomfort of both sides, that all liability issues were going to be tried. This decision was based on Judge Spaulding's ruling in *Order Denying Plaintiffs' Motion for Reconsideration of the June 28, 2011, Order Excluding the Opinions of Plaintiffs' Expert Witness, Robert J. Carr and Granting in Part Defendants' Combined Motion and Memorandum of Law Seeking Dispositive Relief as to All Claims of the Property Class*. (dkt. no. 2704). Therein, the Court ruled that "because the plaintiffs could not meet their burden as to an element of the Property Class claim, the Court decertifies the property class. The Court notes, however, that any pertinent part of the Property Class claim that is relevant to the Medical Monitoring Claim is still admissible. In other words, if evidence of the Property Class claim goes directly to an element in the Medical Monitoring Claim, it will be admissible." *Id.*

The Plaintiff's evidence of various diseases which it claimed were related to 2, 3, 7, 8-TCDD had been limited to the twelve diseases for which Dr. Werntz recommended medical monitoring. Each of these factors had to weigh in to each side's calculations of the probable outcome. As such, they constitute part of the circumstances surrounding these negotiations. The Court also finds that these factors constituted significant changes in the state of the case between the settlement negotiations of August and September of 2011, and the settlement reached in January, 2012.[233]

The Court fully understands the assertions made by objectors about the settlement negotiations, but finds that they represent the normal "give and take" that occurs in settlement negotiations between parties. The Court also finds that the objector's implication that the Class was "sold out" to benefit Class Counsel take as given that this case presented minimal risk to the Plaintiffs, that the number of individuals who could qualify for medical monitoring were as large as originally asserted by Class Counsel, and that the property damage really was as enormous as was originally claimed.[234] When the reality of what the evidence would most likely been is compared with the ultimate result achieved in settlement, the claim that the class was "sold out" is remote. The question is: What did the Plaintiffs have to sell? For these reasons, and those set out, *infra,* the Court finds that this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

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[233] *Infra.*

[234] The Court also understands that attorney's fees may have been discussed during the general settlement negotiations, and not after the settlements were reached. Additionally, objectors have also raised the issue of the "clear sailing" agreement as evidence of collusion. These issues are discussed, *infra.*

4. The Experience of Counsel in the Area of Class Action Litigation

Class counsel's *Petition for Attorney's Fees* provides a summary of his experience in its finding herein. Additionally, in its order concerning attorney's fees, the Court has listed a number of cases handled by Class Counsel. Further, the Court is aware that Class Counsel represented multiple Plaintiffs in the recently concluded Overweight Trucks litigation which was pending before the Mass Litigation Panel. *Litigation Involving Cases Alleging Nuisance And Damage From Overweight Trucks,* Lincoln County Civ. Action No. 04-C-187.[235] Therefore, the Court finds that Class Counsel has great experience in handling class actions and complex litigation and this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

5. The Relative Strength of the Plaintiffs' Case on the Merits

Factors 5 and 6 require the most lengthy analysis because they involve a review of the evidentiary matters mentioned, *supra* IV. In conducting this analysis, the Court does not intend to rule on the merits of either parties' case, but instead to point out a number of issues that each side faced as they presented their respective cases to the jury. Section 5 will only address the plaintiffs' evidence, while Section 6 will address the defendants' and information obtained from neutral sources.

At the outset, the Court notes that the Plaintiffs' claims are based upon conduct that occurred between 65 and 44 years in the past. Given the passage of decades, evidence directly

[235] The Court knows of these cases by virtue of its service as a member of the Mass Litigation Panel.

supporting or refuting the Class Representatives' claims was unavailable when this action was filed in 2004. As a result, the Plaintiffs were forced to resort to highly complex modeling techniques to calculate the amount of 2,3,7,8-TCDD that might have been emitted from the Old Monsanto plant and where those emissions might have traveled within the Class Area. The medical monitoring and property claims literally relied upon the expert opinions of more than a dozen experts. As a result, the jury's rejection of even one expert's opinions could have resulted in the failure of the property and/or medical monitoring claims in their entirety. Moreover, by practical necessity, the Plaintiffs were also forced to rely upon regulatory risk assessment methodologies to identify the "dose groups" that were central to Class Counsel's plan for proving liability for medical monitoring.

Throughout this litigation, and even post-settlement, there have been assertions that there are potentially 88,000 members in this Class.[236] Estimates of real property damage ranging from $954 million to $3.8 billion have been asserted. Further, the Class Affected Area is substantially larger than the proposed settlement area.[237] These claims are the basis for the represented Objector's assertions that Class Counsel "sold out" the Class Members for his own benefit. However, based upon a review of the Plaintiff's case in its best light, the Court finds that the Plaintiff's original claims about the geographic size of the Class area, the number of people and properties potentially affected, and the damage allegedly done to the Plaintiff's real estate by the Defendant's acts were significantly overstated.

Early on the Class Area grew, then dramatically shrank to an area much more closely reflecting the proposed Settlement area. The original allegation that the Class encompassed an

[236] These assertions were originally made by Class Counsel in various settings, but since settlement, have been made by the objectors.
[237] *See* Ex. 1 to this Order.

area within a five mile radius of Monsanto's Nitro plant, and the subsequent amendments to the Class Area ultimately depicted on Exhibit 1 attached to the Order of September 3, 2008, (dkt. no. 939),[238] were based upon an admittedly erroneous massive over-calculation of the amount of 2, 3, 7, 8-TCDD produced from 1948 to 1969. Robert Pape's original estimate that 6,917 pounds of 2, 3, 7, 8-TCDD were produced by the Defendants in the 2, 4, 5-T process was ultimately acknowledged by both Dr. Bell and Mr. Forrester to be an enormous over-calculation.[239] By the Plaintiff's final calculations approximately 1,628 pounds of 2, 3, 7, 8-TCDD waste were produced, of which approximately 954 pounds were allegedly burned onsite and in landfills over the relevant 22 years in question. Of this amount, according to the Plaintiff's experts, approximately 477 pounds became airborne and thus subject to either inhalation by Class Members or deposition on their real property.

At the beginning of this action, the Plaintiff's claims were based on the theories that 1) the Class area was contaminated by 2, 3, 7, 8-TCDD escaping from the 2, 4, 5-T production process, and 2) the contaminant was allegedly blown from the surface of the former plant site. Later, the focus shifted to the contamination being spread by air as a result of the defendants' burning 2, 3, 7, 8-TCDD contaminated waste. This required air modeling to be performed. The original model assumed that the majority of the waste was burned on the plant site in two coal-fired boilers with 90 foot high stacks. The Plaintiff's then changed the theory to the Defendants burning the waste at a tee pee burner on site, and at various landfills offsite. The final modeling was based on burning onsite in the World War One building and at the tee pee burner, and offsite at landfills scattered around Nitro. Different terrain and meteorological data were used in each

[238] Ex. 6 to this Order.

[239] They even agreed on how this mistake was made.

air model. Moreover, the air model used is designed to ensure that waste-emitting facilities comply with air quality standards set by the Federal and State government. As such, it builds in conservative bias based on the mandate to err on the side of protecting persons and property.

Over time, different values were used to create areas of significant exposure causing increased risk to humans. The original Class Area was based on an isopleth with an air concentration boundary of 2, 3, 7, 8-TCDD at 0.000082ug/m^3 being significant. The final model was based on an isopleth of 2, 3, 7, 8-TCDD at 0.000020 ug/m^3 representing the danger concentration level. The original isopleth was based on an admittedly overly cautious risk level to include the maximum area that could have potentially affected. The Plaintiff's claim that the overwhelming exposure to 2, 3, 7, 8-TCDD came through the potential inhalation of that compound by Class Members between 1948 and 1969. The final areas of risk by inhalation are depicted in Auberle Exhibits 5.1 and 5.2, *infra.*

This also represents another area of conflict within the Plaintiff's case, namely the appropriate risk factor to be used to indicate significant exposure. This factor ranged from 1 in 10,000, or 1 x 10^{-4}, used in the ATSDR, to 1 in 100,000, or 1 x 10^{-5}, which was the ultimate risk level determined to be appropriate by the consensus of Plaintiff's medical and toxicological experts after their meetings of early 2010, to 1 in 1,000,000, or 1 x 10^{-6}, which was Mr. Carr's original action level, and which he readopted as the appropriate risk level at the request of Plaintiff's counsel so that he could calculate the cost of remediating the real property to that level. This risk level generated the $955 million to $3.8 billion property damage estimates offered by Mr. Carr. He admitted that no Plaintiff's expert would opine that this was the appropriate risk level. Dr. Sawyer also claimed this to be the risk level, before agreeing on 1 x 10^{-5} as appropriate. There were also problems, described by Dr. Sawyer, in attempting to

calculate on a relative basis, the exposures described in Flowers Figure 15 to Mr. Auberle's isopleth because one measured air and the other dust, with separate and distinct methodologies for each.

Additionally, the Plaintiffs claim that 2, 3, 7, 8-TCDD was deposited upon the Class Area during this period. They offer maps generated by Dr. William Flowers showing the potential areas affected by this alleged contamination. In tracing the history of the development of Dr. Flowers' maps, it appears that Dr. Flowers relied in large part upon the affidavit of Dr. Kirk Brown to establish his sampling plan. Dr. Brown's affidavit was based on Mr. Horsak's testing. However, when Dr. Sawyer offered his opinions as to the areas in which Plaintiffs could be placed at significant risk by exposure to 2, 3, 7, 8-TCDD in soil and house dust, he discounted the early maps (which must have been Mr. Horsak's) and instead relied upon the work of Dr. Flowers and Mr. Auberle to indicate those areas in which Class Members so exposed would require medical monitoring as a result of their increased risk. He specifically stated that his determination of who was at risk was not based on the original Class Affected Area Map.[240]

As a result of the reduction of the original Class Area to the final areas depicted in Auberle Exhibits 5.1, 5.2 and 5.3, and Flowers Figure 15, the Plaintiffs determined that their original claim that up to 88,000 people could potentially be affected was substantially overstated. When Dr. Sawyer created his final dose groups, which set out the requirements necessary to constitute significant exposure requiring medical monitoring, Dr. Randall Jackson estimated that only 5,019 people could actually meet their criteria and thus potentially qualify for medical monitoring.

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[240] *See* Ex. 6 to this Order.

Addressing the sufficiency of the proposed property remediation Class settlement, bearing in mind the statements at the beginning of this section, the Court has examined it to determine if it is fair, adequate, and reasonable as though the Class was still certified. In that regard, the Court observes that there was no evidence available for the cost of remediation of commercial property, because Class Counsel did not ask Mr. Carr to develop it. Further, it is apparent that the screening and action levels for commercial property are much higher than those required for residential and school property.

As for those schools in closest proximity to the plant, specifically Nitro High School, Nitro Elementary School, and the Nitro Community Center, the results of Mr. Horsak's testing were reviewed by the ATSDR and the West Virginia DHHR and were found not to present a health hazard to the students and staff. No remediation was recommended. The USEPA concurred in this finding, *supra.*

A great deal of information was generated about the alleged contamination of houses in the Class area, but some of the data was generated from samples taken in attics. There is a disagreement between the Plaintiffs' own experts as to whether attic sampling was appropriate. Further, the evidence from the attics that was collected by Mr. Horsak was ultimately not the basis for Dr. Sawyer's creation of the dose groups.[241] Instead, he based his dose groups on the findings of Auberle and Flowers. He considered house dust to be the risk. Also, while exposure is an important consideration in assessing risk it must be coupled with contact by potential Class Members with 2, 3, 7, 8-TCDD in a dose sufficient to cause health concerns in humans.

Even assuming that the Carr evidence had not been struck, the Court believes that it would have been the subject of much debate by a jury. Objectors and others raise the fact that

[241] Dr. Sawyer stated that this information was relevant to property remediation.

Mr. Carr testified concerning a scenario in which the proposed property remediation would cost $1.909 billion with a margin of error of 50%/ + 100%. These margins generate the figures of $955 million to $3.8 billion cited by Objector's counsel as the value of the property claim which has been surrendered. Mr. Carr recognized that his estimate was only 5 to 10% complete. He admitted that there were many inconsistencies in his findings, among them his decision to place 1,837 square foot houses on vacant lots, then requiring that they be cleaned. There were also instances in which he found every home in an entire area should be demolished, based only on a few points of alleged contamination found in that area. As for the soil, Dr. Sawyer stated on several occasions that the soil levels were inconsequential, based on the amount of time that had passed since the deposit of 2, 3, 7, 8-TCDD and given its half-life. Soil cleanup represented the overwhelming portion of the cost of Mr. Carr's remediation plan.

Mr. Carr also opined that hillsides and vacant land should be remediated where there was little chance of human contact, even though this opinion was in conflict with EPA documents. Under the Carr remediation plan there were areas where houses would be demolished, but the soil not remediated; or where the soil would be remediated, but the houses not demolished; along with other such inconsistencies. Further, the estimate that there were 12,000 houses in the Class Area was based on the original Class Area depicted in Exhibit 1 and not on the final areas established in Auberle Exhibits 5.1, 5.2, 5.3 and Flowers Figure 15.[242]

In a similar vein, the Class also faced questions on whether 3.9 ng/kg and, or 4.5 ng/kg represented remediation or investigation levels. There was also testimony about using benchmarks of 41 ng/kg and 90 ng/kg as cleanup values. Dr. Werntz also stated that there was

[242] The Court also notes that Auberle Exhibit 5.3 was generated by Mr. Auberle in an attempt to match the findings made by Dr. Flowers on his remediation maps. However, Dr. Sawyer discounted this effort, because there is not an EPA method available to directly calculate deposition with human dose. *See* Exs. 9-12 attached to this Order.

no clear West Virginia cleanup level. Mr. Carr stated that he was not aware of any dioxin remediation projects where the screening level was the cleanup goal. Dr. Sawyer did not believe that the screening level equaled significant risk.

Controversy also surrounded the testing choices made by the plaintiff. There was a dispute over which test was the more appropriate between GC/MS and CALUX. [243] GC/MS is more expensive, but gives a breakdown by dioxin/furan congener, i.e. it can identify the levels of 2, 3, 7, 8-TCDD and other dioxins. CALUX is quicker and cheaper, but only gives a total TEQ reading of all dioxins. CALUX is not used by Mr. Carr, and is not the FDA approved test. A comparison performed by the plaintiff demonstrated that the readings from CALUX were 30% higher than GC/MS. Mr. Horsak's samples were tested by GC/MS, while Dr. Flower's samples were tested by CALUX. Dr. Sawyer stated that there was information that CALUX readings were 9.4 times higher than GC/MS. Dr. Wade preferred the GC/MS method over CALUX.

The objectors criticize the medical monitoring plan. However, the plaintiffs had plans developed by Drs. Carpenter and Sawyer, but chose to offer the plan prepared by Dr. Werntz. The plan ultimately agreed to in the settlement closely approximates that prepared by Dr. Werntz and was approved by him in his affidavit. Had the case been tried, if the plaintiffs had prevailed, then the Court, setting in equity, would most likely have adopted Dr. Werntz's plan, as it was the only one presented to the jury.

The Medical Monitoring plan also had an area of evidentiary conflict internal to the Plaintiffs' case, namely the importance of blood serum evidence and the level of 2,3,7,8-TCDD present in the Class Members' blood. The Plaintiff originally claimed in their Complaint and early pleadings that it was elevated in Class Members. Drs. Olson and Werntz maintained that

[243] *See* note 109.

position throughout this action. However, Dr. Sawyer changed his position from 2007, when he found striking evidence of congeners in the Plaintiffs' blood to 2010, when it was less significant.

Lastly, with the exception of Randall Jackson, each of the Plaintiff's expert had to be accepted by the jury for the Plaintiff to prevail at trial. By way of example, and certainly not all-inclusive, the air modeling was dependent on the mass balance calculation and on all of the other inputs; this testimony was the basis for the creation of inhalation dose groups, which helped to define who were the eligible Class members; if this testimony was not accepted, then the medical monitoring plan would be an academic exercise, and nothing more.

Objectors argue that huge numbers of people and large tracts of the class area were abandoned at the last minute by Class Counsel in reaching these settlements. However, from the day the Class was certified, particularly from the publication of the Class notice and thereafter, the Court and the parties realized that as the evidence developed, many people and residences would ultimately not qualify for the relief sought in the Complaint. The fact that the final settlement area approximates the area supported by the ultimate evidence should be no surprise to anyone.

Therefore, the Court finds and concludes that this factor weighs in favor of finding that the settlements are fair, adequate and reasonable.

6. The Existence of any Difficulties of Proof or Strong Defenses the Plaintiffs are Likely to Encounter if the Case Goes to Trial

The defense had numerous experts ready to contest almost every aspect of the Plaintiff's case. The sole exception to this statement was Defendant's expert, Ray Forrester, who basically agreed with Plaintiff's expert Dr. Bell on the amount of 2, 3, 7, 8-TCDD produced by Monsanto in the 2, 4, 5-T process. However, he disagreed with Dr. Bell's opinion that the waste was burned, instead opining that the vast bulk of it was disposed of in the sewers.[244]

In fact, the Defense summarized their strengths as follows:

- Serum dioxin tests of Class Members showed normal dioxin levels;
- Testing of soil in the Class Area showed dioxin levels that are "inconsequential";
- Testing of dust in Class Area residences showed average levels substantially below the United States Environmental Protection Agency ("USEPA") Soil Guideline of 1000 ppt;
- The presence of numerous other potential sources of dioxin in the Class Area;
- Congener profiles of dioxins showed that dioxins in the Class Area are not from Old Monsanto's former plant;
- Modeling by Class Counsel's own experts that demonstrated that the Plant operations could have contributed not more than .03 ppt in dioxin concentrations to the surrounding area, thousands of times lower than the USEPA Soil Guideline of 1000 ppt;
- Scientific literature that demonstrates that virtually all dioxin found in humans comes from food and not from environmental sources such as air, soil, and dust;
- Investigations performed by the US DHHS, the USEPA, and the West Virginia Department of Health and Human Resources that found that dioxin levels found in Nitro schools and public buildings were safe and did not pose any health hazard;

[244] Mr. Forrester rejected Monsanto's own evidence from its records and employee depositions that the waste was burned.

- Official statistics compiled by the US CDC and the West Virginia Department of Health and Human Resources that demonstrate that the rates of diseases Plaintiffs claim to be associated with dioxin exposure (including cancer) are the same as or lower in Putnam and Kanawha Counties (where the Class Area is located) than other West Virginia counties;

- Workers at the Plant were subject to several health studies over many decades, including a study sponsored by the union, and those studies showed no unusual health problems except for a skin condition called chloracne; and

- Defendant Monsanto Company's operation of the Plant and its waste disposal practices were safe and consistent with the standards and practices of the time (i.e., 1948-69).

In the first place, Mr. Arrington and Dr. Smith raised serious questions about the Auberle-Reeser air modeling, *supra*. Mr. Arrington brought a special credibility to the defense, as he was born and raised in Nitro, and graduated from Nitro High School. He did an exhaustive review of each aspect of the air modeling done by Mr. Auberle and Dr. Reeser, pointing out inconsistencies and insufficiencies. He also compared their methodology with the procedures and guidance issued by the USEPA and the WVEPA, stating that there were numerous conceptual and application errors.

He attacked the sufficiency of the data. Some of these attacks were as simple as his claim that the plaintiffs assumed that it almost never rained in their model, and that the air was calm over 40% of the time. Basic questions were also raised about how much material was really burned, and other critical components of the model. He argued that much of the plaintiffs' model was based on assumptions. One of the critical areas was applying the calculations of how dioxin was burned in an incinerator to open burning.

Several defense experts questioned the risk methodology used by the plaintiffs to establish risk and develop a medical monitoring plan. Defense experts Starr, Lamb, and Guzelian all leveled criticism at using EPA risk assessment models to create risk groups. Dr. Starr discussed the debate within the scientific community over whether this was an appropriate

choice. Dr. Guzelian's position was that the model excluded risk, but did not say what the risk was. Dr. Smith believed that the air model could have overestimated the air concentrations by 150% to 400%.

Assuming the property class still existed, Mr. Carr faced internal issues in his own testimony before Mr. Goldman, Mr. Forrester, and Dr. Ginevan testified. Dr. Flowers used the Brown Affidavit which was based on Mr. Horsak's data to set up his testing zone, but the ATSDR and later Dr. Sawyer himself did not rely on that data. The methodology and quality control of Mr. Horsak's testing were questioned by the West Virginia Department of Health of Human Resources and the USEPA.

Donald Patterson, a leading expert in the field of 2, 3, 7, 8-TCDD contamination and its effect on humans, was called to rebut the Plaintiff's exposure evidence. His NHANES data was cited by Dr. Sawyer in an early deposition as being authoritative on exposure levels. Dr. Patterson believed that the Nitro findings were within the US norm. Drs. Maldonado, Lamb, Ginevan, Guzelian, and Starr were prepared to counter the opinions of Drs. Olson, Carpenter, Sawyer and Werntz on the issues of the danger of 2, 3, 7, 8-TCDD to humans, and on the necessity and scope of the medical monitoring program offered by the Plaintiffs.

The defense toxicological and medical experts all contested whether the risk levels used by the plaintiff's experts were even correct. Mr. Forrester set the cleaning levels for residential soil real estate at 1000ng/kg and 5,000 to 20,000 ng/kg for commercial real estate, stating that Times Beach was remediated to these levels. Dr. Ginevan thought the risk level would be as low as 1×10^{-4}, and no higher than 1×10^{-5}.

One of the things that both sides agreed upon was that exposure to 2, 3, 7, 8-TCDD causes chloracne, (referenced to by Dr. Werntz as a type of dermatitis). Dr. Carpenter also

agreed with this finding, as did Defense experts Maldonado, Lamb, Guzelian, and Ginevan. Clearly, in the early stages of production, Monsanto workers developed chloracne. More importantly, as a result of the 1949 autoclave incident, over a hundred people were diagnosed with it. In 1976, after the incident at Seveso, Italy, dozens of people in the surrounding town developed chloracne when there was a release of 80 pounds of 2,3,7,8-TCDD from the factory. However, other than workers at the Monsanto plant the Court does not know of any evidence of chloracne occurring in the Nitro area that would have been presented in evidence by the Plaintiffs.

The Defendants presented several witnesses who questioned the use of CALUX as opposed to GC/MS. Chief among them was Dr. Patterson, who opined that according to the USEPA, CALUX gives results which are 514% higher than GC/MS.[245] Dr. Patterson also believed that measuring environmental media, then using the levels to model human dose levels does not work well. He believed that internal testing, i.e. blood evidence, is a better means to test for exposure than external, i.e. environmental measuring and modeling. Dr. Guzelian also believed that blood levels were critical to confirming exposure. He also noticed that there was no association between the levels of blood in class representatives and their distance from the plant. He did not believe people were at risk until their readings were one (1) part per billion. He also believed that the Class Representatives had normal blood levels. Dr. Ginevan believed that the blood levels of all non-employees of Monsanto were within background levels.

Several defense experts raised questions about of Mr. Carr's methodology. Mr. Forrester questioned whether Mr. Carr complied with the appropriate guidelines in developing his plan.

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[245] Dr. Patterson referred to GC/MS as "the gold standard" for testing. *Amended Report Summary of Opinions Re: The Claims of Bibb et al. v. Monsanto et al.* at 11. (dkt. no. 1793).

Mr. Goldman attacked his interpretation of Land Use Code 100 as the basis of determining residential real estate needing home remediation. Goldman pointed out that in his sample 95% of the lots were inaccurately characterized.

There were other miscellaneous areas raised by the Defendants. Drs. Starr and Ginevan questioned Dr. Wade's identification of Monsanto as the source of contamination. Several defense witnesses stated that no one ever compared Dr. Bells' mass balance and Mr. Auberle's prediction of deposition with Dr. Flowers' field data. There was also criticism of the plaintiffs' experts categorizing Nitro as rural as opposed to an urban site. Dr. Ginevan specifically raised this concern. Dr. Flowers' sampling pattern and plan were also questioned by Dr. Ginevan.

Almost forgotten in the analysis is that the defense lost many important motions on challenges to experts and other evidence. These objectives were carefully preserved. Chief among them was an issue of potentially Constitutional proportion, specifically the Court's ruling on the use of individual evidence. This question could have been problematic for the Plaintiffs on appeal.

In addition to the issues raised by the Defendant's experts, the Plaintiffs faced serious obstacles as a result of the activities of neutral parties on both the general question of 2, 3,7, 8-TCDD exposure and the specific question of its effect in the Nitro area and that portion of the Kanawha Valley. Dr. Patterson was a key member of the team which developed and administered the NHANES program. The findings from NHANES did not support the Plaintiff's claim that they were significantly exposed to 2, 3, 7, 8-TCDD, when the results of blood samples taken from Class Members were compared to NHANES data. The Kanawha Valley Endometriosis Study and the Kanawha Valley Serum level studies also hurt the Plaintiff's claim

of significant exposure of the Class population to 2, 3, 7, 8-TCDD. The ATSDR findings are discussed, *infra*.[246]

For all these reasons, the Court finds that this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

7. The Anticipated Duration and Expense of Additional Litigation

Based upon its review of the file and its observation of the speed and manner in which this case was being tried before the settlement was announced, the Court believes that the medical monitoring trial could have taken four (4) to six (6) months before a verdict could potentially have be reached. Thereafter, there would certainly have been appeals to the West Virginia Supreme Court of Appeals, and potentially to the United States Supreme Court. Additionally, the issue of decertification of the property Class had yet to be resolved. Further, another issue, depending on the final verdict of the medical monitoring trial, was whether it would be sent back for a new trial on the issue of the availability of punitive damages in medical monitoring causes of action. Throughout this action, the Plaintiffs carefully preserved their position that they should be recoverable as a ground for appeal.[247]

In the alternative, absent re-certification of the property Class, those persons who are recovering from this property settlement would have been forced to file separate actions, whose viability may very well have been affected by collateral estoppel and the Statute of Limitations. Even if they were not so affected, these cases faced years of delay for trial and appeal.

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[246] One very interesting point is that NHANES demonstrates that POP/dioxin readings increase with age.

[247] This Court was privileged to serve on the West Virginia Supreme Court of Appeals for the *Perrine* decision, but it recognizes that the majority 3-2 vote on that issue relied on the votes of this Court and another Circuit Court judge, serving in place of two Justices who disqualified themselves from considering the appeal. Two currently serving Justices strongly dissented to this ruling.

With this settlement, remediation of effected houses in the realistic Class Area can start immediately. Additionally, with the immediate settlement of the medical monitoring claims, those persons who may suffer illness or disease as a result of their exposure to 2, 3, 7, 8-TCDD, (and who appear to be far less numerous than originally believed) gain the benefit of immediate medical monitoring. The timely detection of these diseases is a valuable consideration.

Finally, the Court finds that the history of this case demonstrates that this was litigation "to the death" on every question, no matter how insignificant or collateral to the main issues, which would have only intensified as the case was tried to verdict and followed its post-trial course. The Plaintiffs spent millions of dollars to develop the case for trial. The Court cannot estimate what the cost of trial would have been, let alone the cost of appeal. Regardless of the verdict, this case would have almost certainly been appealed. For these reasons, the Court finds that this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

8. The Solvency of the Defendants and the Likelihood of Recovering on a Litigated Judgment

This factor is not an issue. The bigger problem is whether class members would have lived to see an ultimately favorable conclusion of their action, absent these settlements. This factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

9. The Degree of Opposition to the Settlement

The Court finds that the original claim that 88,000 people were exposed and 12,000 homes in the Class Area were contaminated was substantially overstated and that the appropriate number of persons eligible to receive medical monitoring is approximately 5,019. For that reason the number of objections filed will be based on that figure. Forty-four (44) individuals

filed *pro se* objections to these settlements. Additionally, Mr. Urban claims that he represents approximately 1,600 objectors. Although he produced a list of his clients, he stated that his list may not be up to date. He asks the Court to accept that he must still represent them and that they object because he contacted each "at their last known address and explained the terms of the proposed settlements." Several of the objectors attached letters from Mr. Urban, informing them that they must object in writing. The letter also contained an "opt out from the objection" provision. He gave his clients the opportunity to contact him and "opt out" of the objection, but only one client contacted him, to state his continued objection to the settlement. Apparently, 26 of the *pro* se objectors were on Mr. Urban's client list, and several appeared at the fairness hearing.[248] Therefore, the Court finds that Mr. Urban represented at least 26 objectors at the time of the fairness hearing, among whom were several of the original named parties. As to Mr. Urban's objectors, the Court finds that there are not as many as he claims, but does note that Mr. Urban was very much involved in this action at its beginning. Moreover, on their face his objections raised concerns that reinforced this Court's decision to conduct an exhaustive independent analysis of as much of the evidence as possible to satisfy itself of the fairness, adequacy and reasonableness of the settlements beyond that which appears to be customary in class action settlement approval proceedings.

The Court finds that Ms. McQuade represented three (3) individuals at the time of the fairness hearing. The specific objections raised by both the represented and individual objectors are also addressed, *infra.* Thus, if Mr. Urban's claim that he represents 1,600 people is correct, this would constitute an objection by over 30% of the Class. However, for the reasons stated

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[248] *See Proponents' Proposed Findings of Fact and Conclusions of Law in Support of Final Approval of Class Settlements* (dkt. no. 3238). *See also, Class Counsel's Omnibus Response to Lay Objections* (dkt. no. 3151) regarding letters from Urban to client.

above, the Court believes that less than 100 of the 5,000 +/- potential Class Members actually object to these settlements. The Court also finds that the West Virginia Attorney General's Office concluded their inquiry into Monsanto's activities in the Nitro area upon learning of the settlements. (dkt. no. 3171). For these reasons this Court finds that this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

10. Other Factors which are Unique to This Action

In addition to the nine (9) factors proposed by the Fourth Circuit and Judge Bedell, the Court finds that there are other factors unique to this action which should be considered:

a. The Historical Success of Medical Monitoring Action in West Virginia

Medical monitoring was created as a cause of action by the West Virginia Supreme Court of Appeals in 1999. A review of the history of medical monitoring litigation since then indicates that Plaintiffs pursuing this remedy have, with one very notable exception, not been very successful at the trial or appellate level. The Court knows of only one case where the Plaintiffs achieved a favorable jury verdict on medical monitoring, specifically *Perrine*. Its history is particularly revealing. The Plaintiffs obtained a verdict of $391 million. On appeal, the West Virginia Supreme Court of Appeals reduced the verdict to $281 million, removed punitive damages as a recoverable item in medical monitoring cases, and remanded the case back for trial on the sole issue of whether the Statute of Limitations had run on the Plaintiff's claims. Before the trial began on that issue, the case was settled for a lump sum of $70 million, to be used for real property remediation and the payment of attorney's fees and costs. Additionally, the *Perrine* settlement provided for a thirty (30) year "pay as you go" medical monitoring plan,

which Judge Bedell valued at $50 million. Thus, the only Plaintiff's jury verdict for medical monitoring ever upheld on appeal was settled for 42 cents on the dollar when the sole issue to be tried on remand was whether the Statute of Limitations had run.

In Re Tobacco Litigation (medical monitoring cases) 215 W. Va. 476, 600 S.E.2d 188 (W. Va. 2004) and *Dillon et. al. Massey, et. al.,* Raleigh County Civil Action No.05-C-781-K, both resulted in defense verdicts after jury trials with *In Re Tobacco* being upheld on appeal.[249] A medical monitoring case from Logan County, *Acord v. Colane, et. al.* was dismissed by the Circuit Court of Logan County on a motion for summary judgment. This action was upheld by the West Virginia Supreme Court of Appeals in *Acord v. Colane, et. al.* 228 W. Va. 291, 719 SE2d 761.[250]

Finally, medical monitoring cases in West Virginia became less attractive as a result of the holding outlined in syllabus point 5 of *Perrine*. Punitive damages may not be awarded on a cause of action for medical monitoring.

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[249] The Court is unaware of any appeal filed from *Dillon* and as such, that defense jury verdict remains unchanged.

[250] The *Acord* case is very similar to the case at bar. This class action lawsuit from Logan County was brought on behalf of the current and former students and staff of Omar Elementary School, who claimed that they were at increased risk of contracting cancer because the site had been used as a dump for residential and commercial waste before it was acquired by the school board. They asserted claims for Medical Monitoring based on negligence, strict liability, and public nuisance. The ATSDR and the DHHR investigated the site, concluding that there was "no apparent health hazard for the present from the exposures likely to occur at this site..." and that "the site poses an indeterminate public health hazard in the past because of lack of data for the past." It also stated that "no public health recommendations are needed to keep people from being exposed to harmful amounts of chemicals found at this site." Ultimately, the trial court granted summary judgment on the medical monitoring claims because of their inability to satisfy the third element necessary to sustain a claim for medical monitoring, specifically to prove the exposure of the Class "through the tortious conduct of the defendant." This action was upheld by the West Virginia Supreme Court of Appeals. Interestingly, the West Virginia Supreme Court of Appeals also noted in a footnote, "it is noted that the exposure element represented another roadblock in her prosecution of this claim in light of the 2005 DHHR report concluding that there was no present health hazard and that no public health recommendations were needed to keep people from being exposed to harmful amounts of chemicals found at the site." *Id.* at fn. 9.

b. The Historical Success of Actions Against Monsanto on Claims Arising from Their 2,4,5-T Operation

The Court finds that those Plaintiffs who have brought claims against Monsanto based on its production of 2, 4, 5-T at the Nitro site have been uniformly unsuccessful. After long trials, both *Conner and Amos* in the 1960's and *Boggess, et. al.* in the 1980's resulted in defense verdicts for Monsanto. Each case revolved in whole or in part around contamination or exposure of property and people to 2, 3, 7, 8-TCDD, whether from its escape in production or in waste as alleged in *Conner and Amos,* with subsequent damage to real estate, or to Monsanto employees working at the plant as alleged in *Boggess, et. al.*, resulting in personal injury.[251] Further, the *Carter v. Monsanto* case was ultimately dismissed by Class Counsel after the Supreme Court declined to establish a cause of action in West Virginia for real property monitoring.

The Court finds that this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

c. The Public Interest

The Court finds that matters arising from the production of 2, 3, 7, 8-TCDD in Nitro have been pending, in one form or another, from the 1980's. These actions have raised concern and uncertainty in the Nitro community. Both the State of West Virginia and Putnam County have expended resources to resolve these matters. The Court has conducted its' review in this manner to prepare an order that would explain this action and the Court's decision in as detailed a manner as possible for the citizens of Nitro and of Putnam and Kanawha counties. The Court believes that it is in everyone's interest, including the public's, that this matter be resolved.

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[251] One plaintiff prevailed on a claim of exposure to PAB. *See* I.G.2, *supra.*

During the pendency of this action, an aura of uncertainty has existed in Nitro. These settlements allow the citizens of Nitro and the surrounding area to turn the page on this chapter of their history. No one could force the residents to cooperate with counsel in preparing this action, nor can they be forced to participate in the settlements. However, these settlements are in the public interest because a potentially hazardous situation can be addressed. This factor weighs in favor of finding that the settlements are fair, adequate and reasonable.

d. Ease of Claims Processing

The Court is very satisfied that the claims processing plan developed by the Class Administrator will adequately ensure that as many individuals as possible can participate in each part of the proposed relief. The Court will remain involved in this matter to the extent necessary to quickly resolve any disputes concerning the execution of the plan. Moreover, the Court agrees with the Class Administrator's position that the settlement agreements should be liberally construed in favor of potential claimants. The Court notes that Mr. Flaherty plans to establish a claims office in Nitro which will be open for extended periods during the registration period. He will provide transportation for those persons who have transportation issues to Thomas Memorial Hospital, which is within ten (10) miles of Nitro. There should be minimal difficulty for Class Members to get there. Thomas Memorial Hospital is a well-respected health care provider, capable of providing the necessary facilities and staff to effectively execute the medical monitoring plan on a timely and competent basis.

As to the proposed real estate remediation, the Court is satisfied that the amount of time planned to complete the project is sufficient to clean the residences, so long as the proposed timeline is kept. The Court will conduct periodic status reviews of the progress of each plan, and

the results of any testing, and will stay actively involved to ensure that any person seeking property remediation will receive it.

The Court also finds that the Class Administrator's law firm has an outstanding reputation for skill, diligence, and integrity, and believes that his professional experience in the legal community, coupled with the sound judgment he has exercised on behalf of the citizens of West Virginia in his stewardship at both Brickstreet Mutual Insurance Company and West Virginia University, make him fully qualified to assume this obligation.

e. Governmental Involvement

The Court finds that various governmental agencies have been contacted by the Plaintiffs in an attempt to have them address the problems alleged by them to have occurred in the Nitro community as a result of Monsanto's alleged actions. The Court finds that these agencies have required remediation efforts at the actual Monsanto plant site, but that they have all declined to order any remediation or cleanup in the Class Area offsite, particularly in the immediate Nitro area. The Court specifically notes that the earliest evidence developed by the Plaintiffs, specifically the attic samples generated by Mr. Horsak and presented to the ATSDR and the USEPA, were expressly rejected by them for the reasons set out in their report, *supra* IV. B. Further, the Kanawha County School Board publically stated that there was no health risk to the children at these locations. In assessing the potential effect of governmental involvement, one needs look no further than the West Virginia Supreme Court's comment in note 9 of *Acord. See* note 250, *supra.* The fact that the Plaintiff was able to obtain settlements on behalf of the parties without the benefit of governmental involvement merits consideration by this court. Therefore, this factor weighs in favor of finding that the settlements are fair, adequate, and reasonable.

B. Objections to the Proposed Settlement

In the following section, the Court will address each objection raised by Mr. Urban, Ms. McQuade and the *pro se* litigants:

1. Objections from Urban & Falk, PLLC

a. Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims

i. A "Cy Pres" Fund Should Be Set Up Rather than Having Money From The Funds Revert Back to Monsanto If Not Used—The Money Put Into The Funds To Compensate Victims Of The Nitro Monsanto Plant Contamination Should Stay in West Virginia to Benefit Those Who Were Harmed.

This clause was not in the settlement agreements tendered by the parties. The Court can either accept or reject the entire settlement, but may not reform it. The Court finds that there are no funds available for *cy pres* in a Medical Monitoring cause of action. Medical monitoring is a form of equitable relief and is based on a "pay as you go" model. Therefore, medical monitoring funds are only paid by Monsanto to the Class Administrator as the costs are incurred. Funds to a certain amount will be made available to pay these charges. Even if a jury had returned a verdict in favor of the Plaintiffs, then the Court, sitting in equity, would have established a medical monitoring program and required the defendants to fund it on a "pay as you go" basis.[252]

[252] The Court notes that in *Perrine*, the Medical Monitoring Fund is also "pay as you go", with the unused funds reverting to the defendants. *Perrine, et al. v. E.I. du Pont de Nemours and Company, Final Order Approving Settlement*, January 4, 2011 at 15. (Harrison County civil action no. 04-C-296-2).

Further, as punitive damages are no longer available as a remedy in a medical monitoring cause of action, there is no other source of funds available for potential *cy pres* distribution.

As for the property settlement, the Court finds that the parties also chose to go with a "pay as you go" model, and therefore, the Court cannot interfere with that negotiated term without rejecting the entire settlement. The Court is mindful that, absent this settlement, there is no relief readily available to property members, as discussed *supra.*

While *cy pres* is a very appealing concept in this case, the Court does not believe that rejecting this settlement in the hope of getting a *cy pres* term during renewed settlement negotiations is worth the gamble. Finally, there is merit to the argument that defendants will agree to greater funding of the settlements, if there is a possibility that unused funds will revert to them. This term encourages greater amounts to be made available for medical monitoring and real estate remediation costs.

For the reasons stated above, the Court does not believe that this would be a correct exercise of its authority as a fiduciary for the Class, given the matters discussed throughout this Order. Therefore, this objection is overruled.

ii. Only Between 2,000 and 5,000 Out of Up to 80,000 Potential "Medical Monitoring Class Members" Will Receive Any Medical Monitoring Under The Proposed Agreement-This is Too Few Given that Substantial Evidence Exists That Many More Class Members were Contaminated By Various Processes at Monsanto's Nitro Plant.

As mentioned *supra*, the original estimate of 88,000 potential Class members was substantially overstated and was not borne out by the Plaintiff's ultimate evidence. This possibility was anticipated by both the parties and Judge Spaulding in various rulings, beginning with the original Class Notice, that all persons in the Class Area may ultimately not be entitled to

medical monitoring relief, based on the development of the evidence. This warning was repeated throughout the Court's orders. This concern is fully discussed, *supra.* At most 5,019 people could qualify for medical monitoring by the Plaintiff's own estimate. Therefore, this objection is overruled.

iii. Only 4,500 Houses Out Of Up To 12,000 Potential Houses In The Class Area Will Receive Any Clean-Up.

No relief was available to property owners, unless the Property Class was recertified by the West Virginia Supreme Court of Appeals or individual claims were filed. Both the size of the Class Area and the amount of homes potentially affected were vastly overstated, and upon refinement of the evidence, the number of homes potentially receiving remediation represents a far greater percentage of those Class Members who were actually entitled to claim benefits. For this reason, the objection is overruled.

iv. The Paltry Cleaning That These Few 4,500 Houses Will Receive Has No Proven Efficacy.

The Court again reminds all parties that there is no property remediation Class at this point, absent a settlement. The Court finds that the cleaning program offered by Mr. Carr was based on a cleanup program for lead paint and not for dioxin. The Court is concerned that there is no final/closure testing. However, given its other findings, the Court does not believe that the absence of follow-up testing is a sufficient reason to reject the settlement. Moreover, the Court notes that even if the parties obtained a verdict, homeowners could not be forced to participate in this plan. From the outset of this action, potential Class members would not cooperate with Class Counsel, even to the extent of denying access to their homes or property for the collection of soil or dust samples. The Court also finds that Robert Carr, Plaintiff's property remediation

expert, has filed an Affidavit finding the cleanup procedure to be appropriate, and substantially similar to his plan. Therefore, this objection is overruled.

v. Once Class Members are Diagnosed with any Illness, They "Win" The Right to Start a New Lawsuit Against Monsanto, Who Make any Such Lawsuit Economically Unviable.

Under West Virginia law, a cause of action for medical monitoring does not include special or compensatory damages. Should a medically monitored person develop a condition which may be causally linked to the proven hazardous substance in issue, then that individual has the right to file a tort lawsuit against the Defendant for compensatory damages. Each such plaintiff must then prove his or her causation and damage, in their individual case. Punitive damages are also recoverable by that claimant. Therefore, the parties to this settlement got exactly what they sought in their Complaint, and what West Virginia law allows them to recover.

From reviewing the law concerning the appeal of class action settlements, the Court is aware that there have been settlements where the settlement relief included a matrix for agreed settlement amounts for various conditions, as an alternative to the filing of another action.[253] However, Class Counsel never sought personal injury compensation incidental or in addition to the medical monitoring claim. He sought only an equitable remedy for the medical monitoring class.

The Court understands the objection to the "silencing" of experts. However, under West Virginia law, parties may include settlement terms restricting access to expert testimony as a

[253] *Bowling v. Pfizer*, 143 F.R.D., 141 (S.D. Ohio 1992) in which a class action filed for tort damages and medical monitoring was settled with a provision that allowed claimants to seek payments under a matrix by arbitration with guaranteed high-low recoveries, or proceed with common law tort litigation. *Id.* at 150.

condition of their settlement. In this action, the Court finds that the silence was bargained for by the parties. Therefore, this objection is overruled.

vi. The Proposed Settlement Makes Both of the Fund Programs Intentionally Difficult to Use With Short Deadlines. This is Being Done to Make Sure That the Maximum Amount of Money Reverts to Monsanto.

Class members in *Perrine* had a registration period of 180 days, or six (6) months to sign up for relief. In its review of these proposed Settlements in February 2012, the Court recommended that the time frame be increased to 120 days. While this timeframe is shorter than that in *Perrine*, it is longer than other timeframes that have been found appropriate in other actions. The Court understands that 3,596 people have already expressed interest in the programs before the registration period initially begins. Moreover, the Court is satisfied that the Class Administrator's efforts to increase the participation rate of Class Members in the settlement processes will encourage participation. Additionally, there are incentives built into the payment of attorney's fees, set out in that order, which should also increase the participation of potential Class Members. Neither Urban nor Murdock have cited any legal or factual evidence demonstrating that the 120-day registration period will deter any Class Member from participating in the medical monitoring or property cleanup programs. As for the objection concerning the lack of payments to Class Members for participation and the failure of the plan to provide relief for nonesidents, the Court does not believe these objections are sufficient to reject these settlements. Any payments for participation would reduce the sums available for medical monitoring and cleanup. Further, it would be very difficult to develop a medical monitoring plan for nonresidents that was not difficult to administer and/or inordinately expensive. Therefore, this objection is overruled.

vii. The "Triggering Events" which make up $63 Million of the Settlement Are Unlikely to Occur and are Merely an Attempt to Increase the "Reported Value" of the Settlement.

The Court finds that there is a split between the experts on each side of this action as to the importance of serum blood evidence. The Court has mentioned, *supra,* that the essence of settlement is compromise. If 2, 3, 7, 8-TCDD is present in Class member's blood in amounts which indicate that they have been significantly exposed and if a sufficient number of persons participate then that exposure should be quickly discovered. The Court notes that the 95% percentile upper confidence level used to establish the basis of the triggering event is based on NHANES criteria which the Court finds to be appropriate. Additionally, the Court has reviewed Dr. Werntz's Affidavit on the use of blood evidence. Neither Drs. Parent nor Dahlgren have participated in this matter since 2007, and each states that they have not kept up with the litigation.

Although the Plaintiffs went through several experts who presented medical monitoring proposals, they ultimately decided to use Dr. Werntz's plan. He also designed the medical monitoring plan adopted in *Perrine*. For Dr. Werntz, the level of dioxin in the class member's blood is the critical determining factor as to the frequency of when tests should be performed. The higher the reading, the more frequent the testing.

On the defense side, Dr. Donald Patterson, a key participant in conducting NHANES, shared the same opinion, and quantified the levels of dioxin in the general population of the U. S. at a statistically significant level. These levels increases with age. Therefore, there is a rational scientific basis for the triggering event which is supported by both the designer of the Plaintiff's medical monitoring plan, and the main defense witness. The Court understands that Dr. Sawyer

disagrees on the significance of the blood evidence. The Court must rule on whether the settlement should be approved, not on which expert is correct. The Court also observes that the samples will be measured and compared to the standards set out in the Chemosphere table by counting all seven dioxin congeners, and not just 2,3,7,8-TCDD. Therefore, the Plaintiffs will get the benefit of the reading for all dioxin congeners, not just Monsanto's 2, 3, 7, 8-TCDD.

Before giving preliminary approval, the Court required each side to have representation in determining whether a triggering event had occurred. The Court has also adopted a methodology in the attorney's fees order that should maximize the participation of medical monitoring clients and insure that the triggering event has a greatly increased chance to occur, if the eligible class members have been significantly exposed to any dioxin, not just 2, 3, 7, 8-TCDD.

The evidence of significant exposure was highly disputed and contested. The triggering event is a fair, reasonable, and adequate compromise. If Class Counsel, his experts, and his evidence, are correct, the eligible Class Members will receive an additional $63 million in medical monitoring funds. If Defendants, their experts, and their evidence, are correct, this additional money will revert back to the Defendants since the eligible Class Members' serum blood samples will not have demonstrated any significant exposure to dioxin, which is an indispensable element of a medical monitoring claim. This objection is overruled.

viii. Collusion

The Objector's counsel has raised the serious allegation that these settlements were the result of collusion between Proponent's counsel.[254] They assert that the agreements pay Class Counsel a larger fee than he originally sought in exchange for the Class receiving relief of illusory value. This includes the provision of a clear sailing agreement. Additionally, they claim

[254] Ms. McQuade joined in Mr. Urban's objections.

that the attorney's fees were negotiated at the same time as the Class settlement, which would be improper. They also believe that Class Counsel had a conflict in negotiating settlements of the classes and his personal injury clients at the same time. They argue that the releases were overbroad. Finally, they assert that the reversionary provision is evidence of collusion.

The Court has carefully considered the allegations of objectors and the proponent's replies. The Court spent a great deal of time personally reviewing the evidence in light of this assertion to determine for itself whether these settlements are a sham – negotiated for the benefit of counsel – or have as a basis in fact and are fair, adequate, and reasonable. In analyzing this claim, the Court begins with the understanding that there is a presumption in favor of settlements being fair, adequate, and reasonable if they are reached in arms-length negotiation between experienced and capable counsel after meaningful discovery. There is no question that all counsel involved in the settlement negotiations are experienced and capable. Further, the discovery in this case was both thorough and complete. The only element left at issue is whether the negotiations were at arms-length. With that in mind, the Court now analyzes that question.

In the first place, the Plaintiffs' settlement demands were clearly made based on the higher values ascribed to these claims. The Court believes that this was a negotiation tactic by the Plaintiff. Class Counsel could only reduce his demand once settlement negotiations began in earnest, so the high demand does not concern the court. Further, while these demands were made in August or September of 2011, and most of the major rulings had been made, there was still some uncertainty on several major questions, not the least of which was the ultimate makeup of the jury.

It is true that the agreement contains a "clear sailing" clause, and the reviews on these are mixed. However, the newer general consensus is to allow them as they represent a chance for defendants to quantify their costs.

The Court understands the concern that these are global settlements. However, the Court would be hard-pressed to fault the proponents for settling these claims in this fashion based on the Court's insistence that there be global mediation. This Court ordered global mediation for several reasons:

a. These matters had been pending for seven (7) years.

b. The parties faced years of further litigation if the cases were resolved by trial.

c. There was no relief on the horizon for the decertified property class, absent settlement, remand by the West Virginia Supreme Court of Appeals, or the filing of individual lawsuits, by each property class member.

d. More likely than not, the verdict in the medical monitoring case would have affected the remaining cases.

e. The pressures of trial, with all its costs, were squarely on the parties.

f. These factors in this litigation would most likely never align like this again.

The reversionary provision does merit review. However, the only claim actually remaining and viable for trial, namely the medical monitoring, had no real possibility of any funds remaining available for the application of *cy pres.* Assuming that the plaintiffs prevailed, the Court would have ordered the medical monitoring costs to be on a "pay as you go" basis. Thus, bills for medical monitoring would be paid as they were incurred, with no residuary funds available for *cy pres.* As there are no punitive damages (available for medical monitoring), no such funds would have been available.

As for the property class, it only received relief through settlement and the parties crafted it in a manner agreeable to them. Given the alternatives, this Court cannot, and will not, substitute its judgment for that of the proponents.

There is no guarantee that counsel will receive the fees he seeks, and the Court's accompanying order on attorney's fees explains its reasoning.

The Court also understands the public policy concerns about *cy pres* v. reverter. Defendants, usually corporations, do have an incentive to make more money available for settlement if they know that it will actually be spent for the claimants, and if not revert back to them.

Additionally, the Court does have concern with the appearance of the attorneys' fees being negotiated at the same time as the other provisions of the settlement as the August and September, 2011 letters imply. Proponents' counsel has assured the Court that in their final negotiations, this was not done. *See Plaintiffs' Answer to Limited Discovery as to the Fairness, Adequacy, and Reasonableness of the Proposed Settlement* (dkt, not. 3084) and *Defendants' Answer to Limited Objector's Discovery Permitted by the Court* (dkt. no. 3082). The case law indicates that there should be more evidence to contest this allegation than their assertions. However, this case law generally deals with settlement only classes, where class certification and settlement occur simultaneously, without the benefit of extensive litigation. In weighing all these factors, this objection does not give the Court a sufficient basis to reject the settlements. The Plaintiffs sought medical monitoring, and they received a plan similar to that proposed by Dr. Werntz and approved by him. They also received cleanup in a manner approved by their expert, Mr. Carr. For the purposes of review, the Court will assume the worst, that they were so negotiated. This concern, while real, is subsumed by the reality of the actual state of the

evidence as it was about to be presented to a jury, and what potential recovery that evidence would support, even if the property claim had not been decertified. In weighing all the factors, this objection does not give the Court a sufficient basis to reject the settlements.

The Court also finds that here is no merit to the claim that the releases were overbroad. All of the parties released were either in this action, and already dismissed, or were in *Carter*, which was based on the same factual predicate, Monsanto's 2,4,5-T operation in Nitro, WV. As Dr. Bell indicated, there was no evidence available for other contamination.

Finally, unlike the settlement only cases discussed above, which are presented as a "turn key" to the Court, this litigation was hotly contested at every stage, long on bitterness and anger, and unfortunately short on courtesy and civility. Based on all of the circumstances discussed throughout this order, this objection is overruled.

b. Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's [sic] Claims

i. The Experts Agree---"Triggering Events" are unlikely to occur!

The Court has discussed this objection, *supra* and finds no reason to change its decision based on the additional reports provided by counsel. The Plaintiffs' original arguments were that Class Members would have elevated blood serum levels because of their exposure to 2,3,7,8-TCDD. The affidavits filed by objectors' counsel are all from experts who have not been involved in this litigation for several years. After consulting with and getting proposed medical monitoring plans from several experts, including Dr. Dahlgren, the Plaintiffs ultimately chose to

use the plan created by Dr. Werntz. He approved the medical monitoring settlement, specifically, the triggering event. For these reasons, and those mentioned, *supra*, this objection is overruled.

ii. The Medical Monitoring Program is Grossly Flawed and Requires Substantial Revision Before it Can be Considered Fair, Adequate, and Reasonable.

a. The Area for Medical Monitoring should be greatly expanded because substantial evidence exists that many more Class Members were contaminated by various chemicals created at Monsanto's Nitro Plant.

The Court again observes that the medical monitoring plan was challenged by individuals offered by Mr. Urban who have not been involved in this action for years. This is particularly relevant given that since their involvement, all parties concede that the estimate of 2, 3, 7, 8-TCDD produced and potentially spread in the Class Area was grossly overstated. The Court is satisfied that the medical monitoring plan approximates that proposed by Dr. Werntz and again finds Dr. Werntz's Affidavit to be persuasive. Additionally, the Court finds that it had ruled that evidence of any diseases apart from those specifically set out for monitoring by Dr. Werntz would not have been considered by the jury for any purpose. This again requires the Court to look at the status of the evidence as existed on January 17, 2012, when the jury would have only heard evidence of the twelve (12) diseases for which monitoring was specifically requested by Dr. Werntz, that would have been applicable to the maximum of 5,019 people whom Dr. Jackson believed would meet the dose groups criteria established by Dr. Sawyer.

The Court has discussed the reasons why the area shrank in size, *supra*. Further, Dr. Wade specifically did not find evidence of pentachlorophenol in his report. Although the Plaintiffs' Complaint generally discussed dioxin, the evidence adduced by them pointed to

2,3,7,8-TCDD as the culprit. Once again, the evidence did not match the allegations. For all of these reasons and those mentioned, *supra*, this objection is overruled.

b. The Medical Monitoring Program itself requires substantial revision-the frequency of examinations is too long and the program requires an expert in dioxin, which is not called for under the proposed settlement.

The plan adopted in the proposed medical monitoring settlement has the same interval for testing as that proposed by Dr. Werntz. Further, while using medical personnel experienced in dioxin may make the settlement better, the agreements' silence on this issue does not make it fall below the standard required for approval. It appears that there would be a greater need for medical professionals experienced in dioxin exposure during treatment of any detected diseases. This is not a remedy of medical monitoring. Therefore, this objection is overruled.

c. Compensation for those who develop cancers or other serious illnesses associated with dioxin must be provided.

This issue has been thoroughly discussed, *supra*, and the objection is overruled.

d. A registry for diseases caused by exposure to dioxin must be created so that the knowledge that will be developed through the Medical Monitoring Program can be used to assist other Class Members.

If the Court were crafting this Settlement, it would seriously consider the creation of a database/registry, as addressed by Judge Bedell in *Perrine*. However, in this action, the parties did not provide for a database/registry. The Court does not believe that this decision is a basis to disapprove the Settlement. Therefore, this objection is overruled.

iii. The Property Remediation Program is grossly flawed and requires substantial revision before it can be considered fair, reasonable, and adequate.

The first part of the Court's analysis is that at the time of settlement no property class existed. The Court finds as previously mentioned that even if the property case went to trial the estimates of remediation damage roughly in the billion to multi-billion dollar area are highly questionable and would have been met with vigorous opposition. The vast bulk of the damage went to soil cleanup, which was not really in issue. The Court has already discussed the Plaintiffs' and Defendants' real estate damage evidence. Mr. Carr has opined in his Affidavit that the actual cleanup proposed by Foth will basically accomplish the same cleanup in two steps that he suggested be accomplished in three steps. The Court cannot adjust the terms of the settlement and it must stand or fall in its entirety. Therefore, this objection is overruled.

a. The Area for Property Remediation should be greatly expanded because substantial evidence exists that many more houses were contaminated by various chemicals created at Monsanto's Nitro Plant.

This objection is overruled for the reasons stated, *supra*.

b. The proposed clean-up does not even properly resolve contamination issues inside the house.

This objection is overruled for the reasons stated, *supra*.

c. The proposed clean-up needs to have a method for determining its efficacy.

The Court notes that the model used by Mr. Carr to develop his proposed cleanup plan included a closure test. If the Court had the power to amend the Settlement, this would make sense. However, for all of the reasons set out *supra*, particularly given the status of the property

damage claim at the time of the settlement, the Court cannot find that this is sufficient reason to reject the settlement. Therefore, this objection is overruled.

d. Decontamination of the attics of the houses and decontamination of the soil is necessary to ensure that the houses do not become re-contaminated.

The Court has discussed these objections, *supra*. There was contradicting evidence on what the attic evidence indicated, and also whether it was truly a risk, given the lack of an exposure path. The soil readings were also described as, for the most part, inconsequential by Dr. Sawyer. The attic readings were not the basis for the Sawyer dose groups. Therefore, this objection is overruled.

c. Second Supplemental Memorandum of the Urban & Falk Plaintiffs in Opposition/Objection to Proponents' Proposed Settlement of the Property and Medical Monitoring Classes's (sic) Claims

i. Collusion

This objection has been thoroughly discussed and is overruled.

ii. Other Factors Regarding the Fairness, Adequacy, and Reasonableness

These factors are a restatement of the other issues raised, and each has been discussed, *supra*. Therefore, this objection is overruled.

iii. Class Administrator

The Court finds that there is no conflict for Mr. Flaherty to serve as Class Administrator. The mere fact that his law firm is currently defending an unrelated defendant in an unrelated medical monitoring action involving different activities in a different forum does not disqualify

him from serving as Class Administrator in this action any more than it would disqualify him from bringing a medical monitoring claim on behalf of a plaintiff against an unrelated defendant, or mediating medical monitoring cases. The Court was impressed with the administrative plan set up by Mr. Flaherty and believes that he will fairly and competently administer the settlements. This objection is overruled.

2. Objections from Ruth McQuade, Esq.,

a. The Lead Plaintiff and Class Counsel Were Subject to a Conflict of Interest in Agreeing to Release the Claims of Class Members in Over 75% of the Class Area for No Consideration.

The Court reiterates its previous finding that although there were allegations that approximately 88,000 people could potentially be members of the medical monitoring class, all parties understood that by the time of trial, the number of persons who would actually be eligible for medical monitoring would be fewer as a result of the development of the evidence. The Plaintiff's demographic expert concluded that approximately 5,000 people could actually meet all the criteria established by Dr. Sawyer to qualify for Dr. Werntz's medical monitoring program. The same limitation applies to the number of homes that could be subject to cleanup. As the original estimate of the class size was based on an isopleth that was not adopted by the experts as probative, i.e. .00082 ug/m^3, the ultimate area actually affected is represented by Auberle Exhibits 5.1, 5.2, 5.3 and Flowers Figure 15, and is appreciably smaller than that originally projected by Mr. Auberle on the basis of the flawed estimate of 2, 3, 7, 8-TCDD waste produced and burned. Therefore, the large number of Class Members and properties initially

projected was not supported by the evidence. This potential development was clearly recognized by the Court and all parties. Further, Class Members were fully informed that they might not qualify for benefits, even if the case was won by the Plaintiffs at trial. Their recovery, if any, was dependent on the evidence. Therefore, this objection is overruled.

b. The Proposed Settlement is Unlikely to Deliver More Than $15 Million to the Settlement Class Members.

The settlement agreements provide a readily ascertainable figure-$30,000,000-which is available without question to those persons who qualify for either or both programs. The additional $63,000,000 potentially payable by the occurrence of the triggering event has been thoroughly discussed. The amount actually paid out is not the determining factor rather, it is the total pool created that is critical.[255] The bulk of the funds are payable under the medical monitoring settlement, which is basically that proposed by Dr. Werntz over a 30 year period. Therefore, this objection is overruled.

c. The Payment of "Service" Awards to the Lead Plaintiffs From Class Counsel's Attorneys' Fees and Expenses, Without Disclosure to the Class or to the Court, Violates Due Process, Class Action Procedural Law, and Probably the Rules of Professional Conduct.

Murdock objects to the Settlements because of allegedly unspecified incentive payments to the Class Representatives. The MMCSA and PCSA, however, both contain provisions which

[255] This is fully discussed in the Court's *Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments*, entered contemporaneously with this Order.

state that "[a]ny service awards for the . . . Class Representatives will be paid from attorneys' fees and expenses."

The Medical Monitoring Notice provided the following information regarding an award for attorneys' fees:

> Class Counsel will ask the Court for an award of attorneys' fees and reimbursement of expenses, which the Court will consider at the Fairness Hearing in Section 12. The amount of attorneys' fees and costs awarded to Class Counsel by the Court are separate and apart from any benefits made available to the Medical Monitoring Class and will not affect in any way the settlement benefits to which you are entitled. Class Counsel has petitioned the Court for an award of fees up to $20,250,000 and for reimbursement of direct case costs of up to $5,000,000. Defendants have agreed to pay up to those amounts should the Court find the request for fees and costs fair and reasonable. Class Counsel's petition for fees and costs and the justifications supporting the request may be reviewed at www.BibbClass.com.

MMCSA Ex. B ¶ 11.

The Property Class Notice provided similar notification regarding Class Counsel's request for attorneys' fees. PCSA Ex. B ¶ 11.

The settlement notices were disseminated to the Class Members on April 5, 2012. They directed Class Members to the www.BibbClass.com website, which contains links to the Settlements and Class Counsel's Petition for Fees.

The Court concludes that absent Class Members were provided with constructive notice of the incentive payments that have been proposed for the Class Representatives. The Settlements themselves expressly contemplate incentive payments to the Class Representatives that will be paid out of Class Counsel's fee award. (MMCSA § 11.1; PCSA § 11.1.) The Medical Monitoring Settlement ¶11.1 specifically states "[a]ny service award for the Medical

Monitoring Class Representatives will be paid from attorneys' fees and expenses awarded to Class Counsel by the Court." Similarly, the Property Class Settlement ¶11.1 also states "[a]ny service award for the Property Class Representatives will be paid from attorneys' fees and expenses awarded to Class Counsel by the Court." The settlement notice materials alerted Class Members that the Settlements themselves could be downloaded from the settlement website and that the records in the Court's official files could be reviewed at the Court during normal business hours. (MMCSA § 11.2, Ex. B ¶¶ 10, 15; PCSA § 11.2, Ex. B ¶¶ 10, 15.) In short, the Court finds that the members of the Classes were provided with constructive notice of the proposed incentive payments.

The McQuade Objectors also argue that the Court was not put on notice. However, on June 4, 2012, Class Counsel filed a *Motion for Incentive Payments for Named Class Representatives* (dkt. no. 3120). In this motion, Class Counsel asked the Court to approve incentive payments to each of the Class Representatives. These incentive payments would be paid from any attorneys' fees awarded to Class Counsel by the Court. Class Counsel seeks permission to pay each of the eight Class Representatives $25,000 each. *Id.* at 4.

Significantly, each Class Representative supplied an affidavit describing his or her contributions to the litigation. In this litigation, the evidence before the Court demonstrates that the Class Representatives provided substantial support to Class Counsel over the last eight years, including: (1) providing multiple blood samples for serum dioxin testing; (2) sitting for depositions; (3) opening of their homes and properties to Class Counsel's consultants for purposes of environmental sampling; (4) providing of confidential medical records to Class Counsel and Defendants; and (5) lending of their names, and reputations in the community, to this action.

The Court understands the implication of objectors that the Class Representatives "sold out" for incentive pay, but unlike the normal personal injury case where the Plaintiff's authority is binding, in this case the absent Class Members are protected by the independent review of the Court exercising its fiduciary obligation to ensure that the settlement is fair, adequate and reasonable. The settlement is not bound by the opinions of the Class Representatives.

Accordingly, the Court and the Class member were on notice of any potential service fee award for the Class Representatives. As the service fee awards are paid out of the attorneys' fees, the determination of incentive fees awards will be addressed in separate Order regarding Class Counsel's attorneys' fees. [256] Therefore, this objection is overruled.

d. The Class Notice Fails to Satisfy Due Process.

One of the original areas of concern to the Court before preliminary approval was granted were the Proposed Class Notices. To address these concerns, the Court made the proponents change the Notices to obtain that approval. Thereafter, with these changes, the Court approved the Notice forms. Further, the Court is satisfied that the Notices of Settlement were properly disseminated. The Court is contemporaneously entering its *Order Finding that the Notice Requirements Set Forth in the Court's Order Preliminarily Approving Class Settlements Have Been Satisfied* which specifically addresses these findings. Therefore, this objection is overruled.

[256] The Court finds that Judge Bedell approved the payment of incentive fees from Class Counsel's attorneys' fees in *Perrine*. *See Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments* at 32. Jan. 21, 2011. *See also, Motion for Incentive Payments for Named Class Representatives* (dkt. no. 3120).

e. The Attorneys' Fees Requested Are Excessive Compared to the Probable Present Value of the Settlement.

As to the disproportionate fees assertion, the Court disagrees with counsel's characterization of the facts and of the law. An attorneys' fee award may be based on the amount of money made available to settling class members, as opposed to the actual amount of money claimed by class members. This is more fully discussed in the Court's *Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments*, entered contemporaneously with this Order. Therefore, this objection is overruled.

f. The Structuring of the Settlement as Two Separate Payments, One for the Class Fund and One for Fees, Has Harmed Objector and Class Members.

Murdock objects to the crafting of the settlement into one fund for these settlements and another fund for attorneys' fees, arguing that the only thing of importance to the Defendant was the total cost of the settlement, and not how it was distributed. However, the Court finds that the property and medical monitoring settlements each obtained the basic relief that Class Counsel sought and that was supported by the evidence. Each plan was reviewed and approved by the Plaintiffs' respective experts, Mr. Carr and Dr. Werntz. Further, the amount of attorneys' fees payable to Class Counsel is in the sole discretion of the Court, and has been fully addressed in the *Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments*. Therefore, this objection is overruled.

3. Individual Objections

The Court finds that individual objections were filed by approximately 44 people. However, these objections fall into three (3) broad categories:

a. No Commercial Property Cleanup

Owners of commercial property objected to this Settlement. However, the Court excluded commercial property owners on June 1, 2011, in its *Order Granting Motion for Summary Judgment as to Claims of Property Class Members Owning Non-Residential, Non-School Properties and Striking 3/11 Affidavit and Proposed Testimony of Robert J. Carr* (dkt. no. 1940). The order specifically dismissed with prejudice all of the Property Class Members who owned non-residential, non-school properties. Accordingly, any objection that involved commercial property in any manner cannot be considered. Therefore, objections involving commercial property are overruled.

b. No Damages for Pain and Suffering, Medical Bills, Etc

This assertion has been fully discussed, *supra*.

The Court finds that the Plaintiffs herein specifically requested medical monitoring relief and did not file wrongful death or personal injury claims. (Complaint ¶195; Def. Interrogatory Resp. 14; Pls. Interrogatory Resp. 14). The elements that must be established for medical monitoring under *Bower* have been discussed, *supra.*[257]

As a matter of law, the members of the Medical Monitoring Class are not entitled to pain and suffering, compensatory damages, or punitive damages in medical monitoring actions.

[257] Although the Class Members are receiving what they sought, they still have a right to pursue claims "that may arise" based upon manifested diseases allegedly attributable to dioxin exposure. Medical monitoring does not provide for monetary compensation, but instead, provides an equitable tort remedy that allows an individual to receive diagnostic testing to screen for future diseases. *Bower*, 206 W. Va. At 140, 522 S.E.2d at 431.

Medical monitoring is a form of equitable relief that provides for the early detection of diseases. It is not the remedy provided by law for an individual party to seek relief for personal injury. This requires proof of causation, damages, etc. Each party has his or her own individual right to file a lawsuit for their personal injuries to include these damages if and when they are diagnosed with a condition which can be shown to have been proximately caused by their exposure to 2, 3, 7, 8-TCDD and resulting their damages. Therefore, this objection is overruled.

c. Difficulties in Getting to the Medical Monitoring Testing Site

The Class Administrator, Thomas Flaherty, Esq., explained that transportation assistance would be provided to any Class Member who resides in the Class Area and who needs assistance getting to the medical monitoring location. The test site is within ten miles of Nitro, and transportation should not be an issue. The Court has also addressed the difficulty of establishing medical monitoring sites out of West Virginia. This objection is overruled.

d. Individual Objections to Attorneys' Fees Awards

The Court has contemporaneously filed its *Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments*, which discusses this question. This objection is overruled.

C. Conclusions

The Court finds that settlements "must stand or fall in [their] entirety" *Hanlon v. Chrysler Corp.*, 150 F.3d 1101, 1026 (9th Cir. 1998). Any objection that asserts that the settlements could have been better must be rejected because the question is not whether the actual settlements could have been better, but whether the actual Settlements are fair, adequate, and reasonable, not

whether they might have been "prettier, smarter, or snazzier." *See Id.* at 1027. In other words, the Court cannot parcel out particular aspects of a settlement, while approving other areas it finds appealing. This is truly an "all or nothing" approval despite counsel for objector's arguments that the Court can demand that particular aspects be changed.

For all the reasons described, *supra,* the Court finds that the proposed settlements are fair, adequate, and reasonable. Each and every objection is expressly overruled. [258]

X. Ruling

Therefore, for all of the reasons stated above, the Court FINDS that the proposed settlements are fair, adequate, and reasonable, and they are hereby ORDERED, ADJUDGED, and DECREED as approved and in the best interest of the parties.

Accordingly, it is further ORDERED that:

1. The Petition seeking approval of the Settlements is granted.
2. Thomas V. Flaherty, Esq., is hereby appointed as Class Administrator, and he shall perform his duties in the manner ordered by the Court. The Court specifically finds that his proposed settlement administrative plan is adequate to execute the provisions of these agreements, and his detailed proposed plan is Ordered to be filed at the status hearing scheduled hereafter. His compensation shall be approved by the Court in an amount not to exceed the agreed upon amount between the parties and him. *See infra* ¶ 13.
3. The Defendants are ordered to pay those sums which they are obligated to pay by these agreements to a Federally-insured financial institution as selected by the Class

[258] The Court expresses its sincere thanks to Crystal Flanigan, Esq., and Matthew Chapman, Esq., for their diligent and extraordinary efforts throughout the course of this litigation.

Administrator and approved by the Court. This selection will be determined at the status hearing scheduled hereafter. *See infra* ¶ 13.

4. The Defendants are ordered to pay such sums as are necessary throughout the life of these plans, consistent with their terms and subject to the further order of the Court.

5. The Court has addressed Class Counsel's petition for attorney's fees and costs in its *Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments*, entered contemporaneously with this Order.

6. There being no language in the agreement on point, but mindful of the provisions of W. Va. Code § 52-1-17(c)(2), the Court orders the Circuit Clerk of Putnam County, West Virginia, to prepare a taxation of costs which will be paid equally by the parties within 60 days of the date of the entry of this order. This payment will not be made from the Class Settlement funds.

7. This is a full and final settlement of all claims of the Plaintiff Classes in this action, and all claims of the Plaintiff Classes arising in this action are dismissed, with prejudice, against all Defendants, and the Defendants are hereby released from any and all liability associated with this litigation, provided that the Defendants fulfill any and all obligations ordered herein.

8. The Motion of James Humphreys to withdraw as counsel is moot, in that he was not appointed as Class Counsel, and therefore such action is unnecessary.

9. The objections to this settlement filed by all persons in this action, whether represented by counsel or *pro se*, are overruled on each and every ground for the reasons set forth, *supra*.

10. The Defendants' request for sanctions in their *Motion for Issuance of a Rule to Show Cause Why W. Stuart Calwell, Jr., Should Not be Held in Contempt of the Orders of This Court* (dkt. no. 2893) filed on January 3, 2012, is dismissed as moot.

11. Without affecting the finality of this Final Judgment as to the parties, the Court hereby retains exclusive jurisdiction over this action, and every aspect of the interpretation, implementation and information of the Settlements, until the Settlements have been consummated and each and every act agreed to be performed by the Parties thereby shall have been performed, and thereafter for all other purposes necessary to interpret and enforce the terms of the Settlements, the Orders of this Court, and in aid of this Court's jurisdiction and to protect and effectuate its judgment.

12. The Proponents shall cause this Order to be posted on the Class website as soon as possible, but shall advise any person visiting it that it is stayed for 30 days pending appeals by any interested parties.

13. The Court hereby sets a status conference on March 13, 2013, at 10:00 a.m., in the courtroom of the Honorable Joseph Reeder, in the Putnam County Judicial Annex to discuss implementation of the settlement agreements and to receive the information requested above. All parties, their counsel, and the Class Administrator shall attend such hearing, to include lead counsel and all other attorneys or staff who will subsequently have a role in executing these settlements.

14. The Proponents have complied with the Notice requirements, and the Court has addressed the same in its *Order Finding that the Notice Requirements Set Forth in the*

Court's Order Preliminarily Approving Class Settlements Have Been Satisfied, filed contemporaneously with this Order.

15. This Order is stayed for thirty (30) days from the date of its entry to allow any and all persons who have objections or exceptions to these rulings to seek relief from the West Virginia Supreme Court of Appeals as per the West Virginia Rules of Civil Procedure and Rule 5(b) of the West Virginia Rules of Appellate Procedure, and subject to their requirements.

16. The Clerk of the Circuit Court of Putnam County, West Virginia, shall provide copies of this Order to:

The Honorable O.C. "Hobby" Spaulding
P.O. Box 906
Winfield, WV 25213

W. Stuart Calwell, Jr., Esq.
The Calwell Practice, PLLC
Law and Arts Center West
500 Randolph Street
Charleston, WV 25302

James F. Humphreys, Esq.
United Center, Suite 800
500 Virginia Street, East
Charleston, WV 25301

Charles M. Love, III, Esq.
Bowles, Rice, McDavid, Graff & Love
600 Quarrier St.
Charleston, WV 25301

Thomas Goutman, Esq.
White and Williams, LLP
1650 Market Street, Suite 1800
One Liberty Place
Philadelphia, PA 19103-7395

Thomas Urban, Esq.
The Law Firm of Urban & Falk
2867 S. Abingdon Street
Arlington, VA 22206

Thomas V. Flaherty, Esq.,
Class Administrator
Flaherty, Sensabaugh & Bonasso, PLLC
P.O. Box 3843
Charleston, WV 25338-3843

Ruth McQuade, Esq.
63 Juniper Circle
Shepherdstown, WV 25443-4277

Joanna I. Tabit, Esq.,
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588

The Clerk of the Circuit Court of Putnam County, West Virginia, is also directed to provide the *pro se* Objectors with written notice that this Order has been entered, and that they may inspect a copy in his office during normal business hours, or view it on the Class website, www.BibbClass.com.

Entered this the 23rd day of January, 2013.

Derek C. Swope

DEREK C. SWOPE, CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:
I, Ronnie W. Matthews, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court.
Given under my hand and the seal of said Court
this 25 day of January, 2013
Ronnie W. Matthews, Clerk
Circuit Court
Putnam County, W.Va.

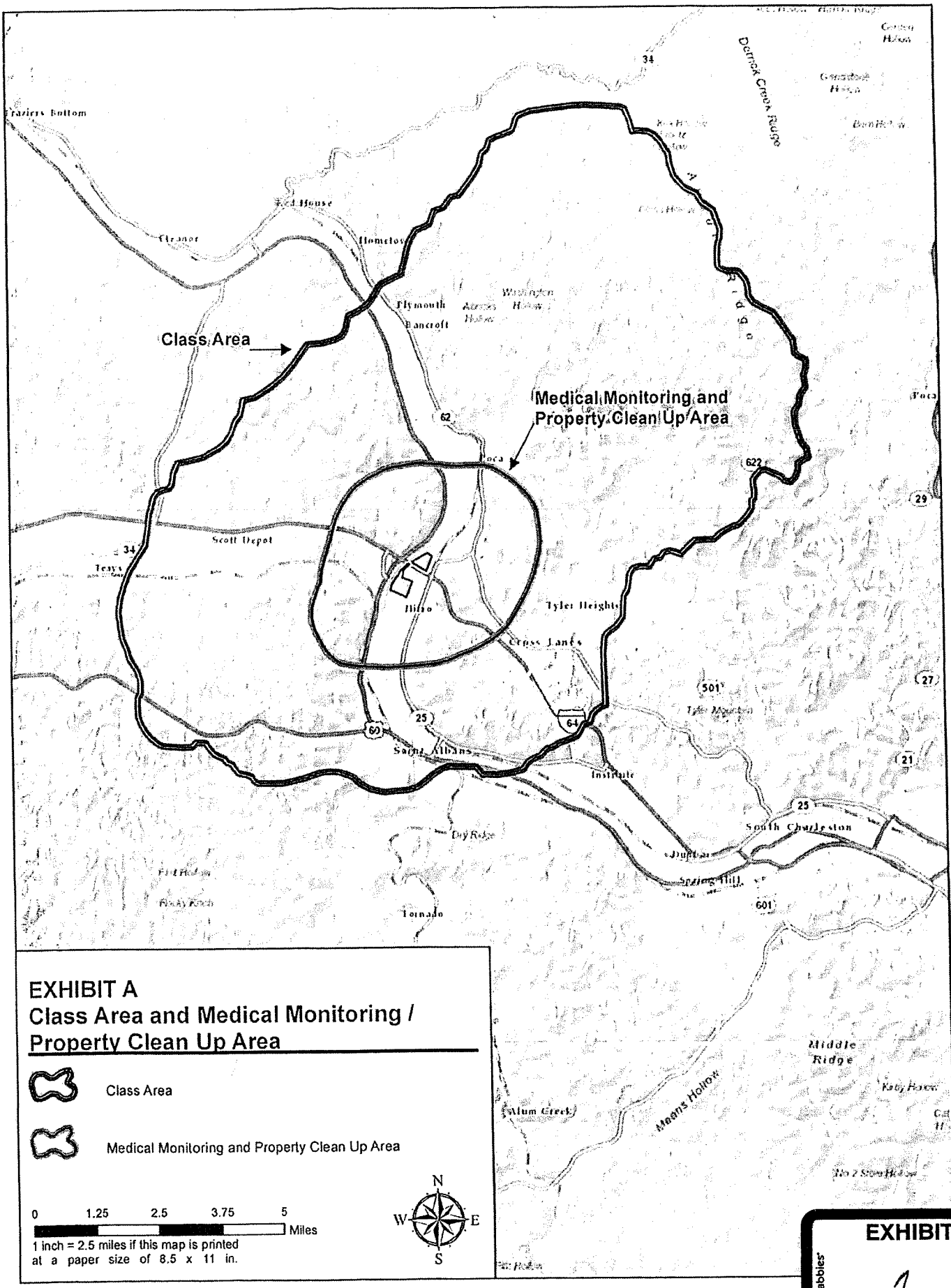

EXHIBIT A
Class Area and Medical Monitoring / Property Clean Up Area

Class Area

Medical Monitoring and Property Clean Up Area

0 1.25 2.5 3.75 5 Miles

1 inch = 2.5 miles if this map is printed at a paper size of 8.5 x 11 in.

N W E S

EXHIBIT

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IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

ZINA G. BIBB, DONALD R. and
WANDA M. RHODES, HERBERT W.
and NORMA J. DIXON, CHARLES S. and
BETTY TYSON, and VICKIE BAILEY,

Plaintiffs

v.

MONSANTO COMPANY and
PHARMACIA CORP.,

Defendants.

INDEX OF MOTIONS

No.	Description	Party	Date
1.	Defendants Joint Motion to Dismiss and Memorandum in Support	Defendants	3/22/05
2.	Separate Rule 12(b)(6) Motion to Dismiss	Akzo Nobel	3/22/05
3.	Memorandum in opposition to the Akzo's Motion to Dismiss	Plaintiffs	5/19/05
4.	Response to Defendants' Joint Motion to Dismiss	Plaintiffs	5/19/05
5.	Reply in Support of Their Separate Motion to Dismiss	Akzo Nobel	5/25/05
6.	Motion to Admit Mark E. Enright Pro Hac Vice; Verified Statement; & Order	Akzo Nobel	5/25/05
7.	Joint Reply to Plaintiff's Response to the Joint Motion to Dismiss	Defendants	5/31/05
8.	Motion to Remand and to Recover Costs and Attorney Fees & Memo in Support	Plaintiff	8/17/05
9.	Defendants Response in Opposition to Plaintiffs' Motion to Remand and to Recover Costs and Attorneys Fees	Monsanto & Pharmacia	8/30/05
10.	Reply to Defendants Response in Opposition to Plaintiffs' Motion to Remand & To Recover Costs & Attorneys Fees	Plaintiffs	9/7/05
11.	Motion to Strike Monsanto Company & Pharmacia's Proposed Memo and Order Denying Plaintiffs' Motion to Remand and to Recover Costs and Attorney Fees and	Plaintiff	10/13/05

EXHIBIT
tabbies
2

	for leave to submit a Proposed Order Granting Plaintiffs Motion to Remand and Recover Costs and Attorneys Fees		
12.	Memorandum Opinion and Order remanding case and awarding attorney fees	COURT - USDC	11/2/05
13.	Motion for Reconsideration of the Court's Memo Opinion and Order Entered 11/2/05 Granting Plaintiffs Request for Attorney Fees and Memo in Support	Monsanto and Apogee Coal	12/12/05
14.	Opposition to Defendants' Motion for Reconsideration of the Court's Memo Opinion and Order Entered 11/2/05 Granting the Plaintiffs' Request for Attorney Fees and Proposed Order	Plaintiff	12/29/05
15.	Reply to Plaintiffs' Opposition to Defendants' Motion for Reconsideration of the Court's Memo Opinion and Order Entered 11/2/05 Granting Plaintiffs Request for Attorneys Fees	Monsanto and Apogee Coal	1/6/06
16.	Memorandum Opinion and Order on award of attorney fees	COURT - USDC	1/25/06
17.	Notice of Motion (5/19/06), Motion for Summary Judgment and Memo in Support against Pharmacia	Flexsys	4/5/06
18.	Plaintiff's Opposition to Motion for Entry of Order Fixing Discovery and Briefing on Class Certification and Plaintiffs Proposed Scheduling Order for Class Certification	Plaintiffs	4/10/06
19.	Rule 56(b) Motion for Summary Judgment	Akzo	4/14/06
20.	Motion for Summary Judgment on New Monsanto and Memo in Support	Monsanto	4/18/06
21.	Motion to Consolidate Carter and Allen Actions and to Reconsider Order Setting a Separate Class Certification Hearing Date in Carter Action	Plaintiffs	4/20/06
22.	Response to Motion for Summary Judgment of Defendants and Cross-claimants Flexsys America LP and Flexsys America Co.	Pharmacia Corp.	5/1/06
23.	Memorandum in Opposition to Akzo Defendants' Rule 56(b) Motion for Summary Judgment and seeking to amend complaint as to Akzo defendants	Plaintiff	5/4/06
24.	Reply to Response of Pharmacia Corp.'s Motion for Summary Judgment	Flexsys	5/9/06
25.	Reply memo in Support of Rule 56(b) Motion for Summary Judgment	Akzo	5/12/06
26.	Response in Opposition to Motion for Summary Judgment on behalf of Monsanto Company	Plaintiff	5/17/06
27.	Supplement to Response in Opposition to Motion for Summary Judgment on behalf of Monsanto Company	Plaintiff	5/22/06

28.	Motion for Class Certification	Plaintiffs	6/2/06
29.	Motion for Protective Order in Response to Plaintiffs' Second Amended Notice of Video Deposition of Defendants Pursuant to Rules 30(b)(7), 30(b)(6) and Rule 34 Request for Production	Monsanto and Flexsys	6/23/06
30.	Plaintiffs' Opposition to Defendants' Motion for Protective Order	Plaintiff	6/27/06
31.	Defendants Motion for Protective Order as to databases and corp depos hearing	Defendants	6/28/06
32.	Motion to compel and motion for sanctions against Monsanto Company	Plaintiffs	8/9/06
33.	Corrected Memo in Support of Motion to Compel and Motion for Sanctions Against Monsanto Company	Plaintiffs	8/10/06
34.	Response to Plaintiffs' Motion to Compel	Monsanto	8/28/06
35.	Motion to Compel and Motion for Sanctions against Monsanto and Pharmacia and proposed Order	Plaintiffs	10/12/06
36.	Plaintiffs' Petition for Attorneys Fees and Costs due to Improper Removal to Federal Court (USDC)	Plaintiffs	10/16/06
37.	Objections to Plaintiffs' Petition for Attorneys' Fees and Costs (USDC)	Defendants	10/26/06
38.	Motion to Quash Plaintiffs' Second Amended Notice of Video Deposition of Pharmacia Corporation Pursuant to Rule 30(b)(7) and Rule 34 Requests for Production	Pharmacia	11/10/06
39.	Response to Defendants' Objections to Plaintiffs' Petition for Attorneys' Fees and Costs Due to Improper Removal to Federal Court	Plaintiffs – USDC	11/20/06
40.	Motion to Quash Plaintiffs' Notice of Video Deposition of the Akzo Defendants Pursuant to WV Rules of Civil Procedure 30(b)(7) , 30(b)(6) and Rule 34 Requests for Production of Documents and for Protective Order	Akzo Defendants	12/18/06
41.	Suppl. Motion to Compel and Motion for Sanctions Against Monsanto Company and Pharmacia Corporation	Plaintiffs	12/18/06
42.	Memorandum in support of plaintiffs motion to compel and motion for sanctions against defendants Monsanto and Pharmacia	Plaintiffs	1/2/07
43.	Motion to Quash Plaintiffs' Notice of Video Deposition of Monsanto and Rule 34 Request for Production and for Protective Order	Monsanto	1/2/07
44.	Response to Plaintiffs' Motion to Compel and Motion for Sanctions and Plaintiffs' Suppl. Motion to Compel and Motion for Sanctions Against Defendants	Monsanto & Pharmacia	1/5/07
45.	Motion to Take Depositions of Additional Putative Class Members who have submitted sampling data related to this action, with points of authority	Monsanto Company	1/16/07

46.	Response in Opposition to Monsanto's Motion to Take Depositions of Additional Putative Class Members Who Have Submitted Sampling Data Related to This Action	Plaintiffs	1/26/07
47.	Reply to Plaintiffs' Response in Opposition to Monsanto Company's Motion to take Depositions of Additional Putative Class Members Who Have Submitted Sampling Data Related to This Action	Monsanto Company	2/1/07
48.	Memo in Support of Plaintiffs Motion to Compel Against All Defendants regarding Insurance Coverage	Plaintiffs	2/27/07
49.	Motion to Compel Against Defendants Monsanto, Pharmacia, Flexsys and Memo in Support regarding privilege documents	Plaintiffs	2/28/07
50.	Response to Plaintiffs' Motion to Compel Against All Defendants Regarding Insurance Issues and Related Motion to Quash and Motion for Protective Order	Defendants	3/2/07
51.	Motion for Admission Pro Hac Vice of S. Brooks West, II and Statement of Local Attorney	Plaintiffs	3/30/07
52.	Response to Plaintiffs' Motion to Compel Against Defendants Monsanto, Pharmacia and Flexsys Defendants	Monsanto, Pharmacia and Flexsys Defendants	3/30/07
53.	Motion to Substitution Counsel – Giffin and Lovejoy for Urban	Plaintiffs	6/1/07
54.	Motion for admission pro hac vice of Urban and Mason and proposed Order	Plaintiffs – Taylor, Urban, Mason	7/12/07
55.	Memo Opinion and Order Granting Defendants' Motion for Designation of Plaintiffs' Lead Counsel (appointing lead counsel)	COURT	7/23/07
56.	Motion to Clarify Role of Lead Counsel	Urban & Falk	8/15/07*
57.	Defendants Opposition and Motion for Protective Order in Response to Plaintiffs' Notices of Depositions of Monsanto and Pharmacia	Monsanto and Pharmacia	8/21/07
58.	Lead Counsel's Motion to Strike Rule 30(b)(7) Deposition Notice Served on Defendants by Urban & Falk	Plaintiffs	8/21/07
59.	Notice of Hearing and Defendants Suppl. Opposition to Plaintiffs' Cross-Notices of Depositions and Attendant Motion for Protective Order	Monsanto	8/22/07
60.	Plaintiffs Amended Motion for Class Certification with attachment	Plaintiffs	8/24/07
61.	Response of Lead Counsel to Urban/Falk Motion to Clarify Role of Lead Counsel	Plaintiffs	9/10/07

62.	Opposition to Defendants' Motion for Protective Order Regarding Plaintiffs' Notices of Deposition to Defendants Monsanto Company and Pharmacia Corp.	Plaintiffs – Urban	9/11/07
63.	Opposition to Lead Counsel's Motion to Strike Rule 30(b)(7) Deposition Notices for Monsanto and Pharmacia	Plaintiffs – Urban	9/11/07
64.	Motion for Pre-Class Certification	Monsanto	9/13/07
65.	Motion for Court to Take Judicial Notice of Fact – ATSDR Health Consultation of Dust in Schools dated April 18, 2007	Monsanto	9/13/07
66.	Motion to Supplemental Record (references to Forreser)	Plaintiffs - Calwell	9/20/07
67.	Motion to Continue Class Certification Hearing and to Open Expert Discovery Related to Plaintiffs New Definition of Class Affected Area	Monsanto	9/26/07
68.	Opposition to Lead Counsel's Motion to Supplement Record	Urban & Falk	10/1/07
69.	Memo of Law in Support of Plaintiff's Motion for Class Certification with exhibits	Calwell	10/1/07
70.	Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification and Suppl. Table of Authorities	Monsanto	10/15/07
71.	Response in Opposition to Defendants' Motion to Continue Class Certification Hearing and to Open Expert Discovery Related to Plaintiffs New Definition of Class Affected Area	Calwell	10/19/07
72.	Motion in Limine to Exclude Expert Testimony of Defendants Expert Douglas Splitstone	Calwell	10/19/07
73.	Response in Opposition to Defendants' Motion to Take Judicial Notice of Fact and Plaintiffs Motion in Limine to Exclude ATSDR Report	Calwell	10/19/07
74.	Defendants Pre-Class Certification Conference Memorandum	Monsanto	10/22/07
75.	Motion in Limine to Exclude Plaintiffs Expert, William Sawyer	Monsanto	10/22/07
76.	Motion in Limine to Exclude Plaintiffs Expert, William Auberle	Monsanto	10/22/07
77.	Reply to Defendants Memo in Opposition to Class Certification	Calwell	10/22/07
78.	Pre-trial Memorandum in Support for Class Certification	Calwell	10/24/07
79.	Response to Defendants' Motion in Limine to Exclude William Auberle and William Sawyer	Calwell	10/24/07

80.	Response to Lead Counsel's Memo in Support of Plaintiffs' Motion for Class Certification on Behalf Of Named plaintiffs Allen, Agee, Raynes and other potential class members	Urban/Falk	10/25/07
81.	Pre-hearing memorandum for class certification hearing and Exhibit List	Monsanto	10/26/07
82.	Proposed Stipulations	Calwell	10/26/07
83.	Suppl. Response in Opposition to Defendants Motion to Exclude William Auberle and William Sawyer	Calwell	10/26/07
84.	Motion in Limine to Exclude Testimony of Philip S. Guzelian Regarding Air Modeling	Plaintiffs	10/30/07
85.	Plaintiffs Proposed Findings, Conclusions and Order With Respect to Class Certification and Statement of Closing Argument	Plaintiffs	12/10/07
86.	Notice of Filing, Proposed Order Denying Plaintiffs Motion for Class Certification and Related Findings of Fact and Conclusions of Law and Memo in Support and Appendix of Cases and Exhibits	Defendants	12/10/07
87.	Motion to Alter or Amend the Judgment or in the alternative for certification to the WV Supreme Court on behalf of Allen, Agees, Raynes and Memo of Law	Plaintiff – Urban	1/21/08
88.	Notice of Hearing, Motion to Compel and Proposed Order (appraisals)	Monsanto	1/29/08
89.	Notice of Hearing, Motion to Compel and Proposed Order (expert material)	Monsanto	1/31/08
90.	Plaintiffs' Response to Motion to Compel re: appraisals	Plaintiffs	2/4/08
91.	Plaintiffs' Response to Motion to Compel re: expert (Auberle and Sawyer) documents	Plaintiffs	2/5 & 6/08
92.	Proposal for Class Notice	Plaintiffs	2/6/08
93.	Motions for summary judgment on Statute of Limitations and risks assoc. with dioxins - ruling hearing		2/9/08
94.	Response to Class Counsel's Proposal for Class Notice on behalf of Certain Plaintiffs	Plaintiffs – Urban	3/14/08
95.	Response to Motion to Alter or Amend the Judgment or in the Alternative for Certification to the WV Supreme Court	Plaintiffs-Humphreys	3/14/08
96.	Suppl. Responses with Warner Reesor material per Motion to Compel	Plaintiff	3/14/08
97.	Motion for Leave to File Appendix in Excess of 75 pages, Memo listing the names of persons upon whom to issue the rule to show cause, if granted and Petition for Writ and Appendix & Verification	Monsanto	3/12/08
98.	Urban Motion to Alter or Amend hearing	Plaintiff – Urban	4/4/08

99.	Plaintiffs' Response to Petition to WV Supreme Court for A Writ of Prohibition & Plaintiffs' Motion for Leave to File Response and Exhibits In Excess of Seventy-Five Pages	Plaintiff	04/29/08
100.	Motion for An Expedited Hearing and For An Order Requiring the Defendants to Provide Class Counsel Immediate Access to the Heizer Creek Landfill for Purposes of Taking Soil Samples, Affidavit of Class Counsel	Plaintiff	05/19/08
101.	Response to Class Counsel's Proposal for Class Notice on Behalf of Certain Plaintiffs	Plaintiff – Urban	05/20/08
102.	Motion to Decertify and Dismiss claims of certain medical monitoring subclasses based on the absence of a class representative with standing	Monsanto Company	6/3/08
103.	Motion to Decertify and/or Dismiss Plaintiffs' Claim for Either Remediation of Property or Diminution in value as both claims made together are duplicative	Monsanto Company	6/3/08
104.	Motion to Decertify Classes or Alternatively Amend Both Class Definitions for failure to specify a date on which the composition of the class is fixed and the clarify exhibit 1	Monsanto Company	6/3/08
105.	Motion to Decertify Medical Monitoring Class, or alternatively, amend class definition based on overly broad class period and dose group	Monsanto Company	6/3/08
106.	Response by Class Counsel to Urban and Falk's Objection to Proposal for Class Notice and Motion for Sanctions and Attorney Fees Incurred in Responding	Plaintiff	6/11/08
107.	Motion to Clarify Issues for Court's Status and Scheduling Conference on 6/18/08	Monsanto	6/12/08
108.	Response in Opposition to Defendants Motion to Decertify Classes or Alternatively Amend Both Classes Definition for Failure to Specify a Date Which the Composition of the Class Is Fixed	Plaintiff	7/2/08
109.	Response in Opposition to Defendants Motion to Decertify Medical Monitoring Class or Alternatively amend Class Definition Based on Overly Broad Class Period and Dose Group	Plaintiff	7/2/08
110.	Response in Opposition to Defendants Motion to Decertify and Dismiss Claims of Certain Medical Monitoring Subclasses Based on the Absence of a Class Representative	Plaintiff	7/2/08
111.	Response in Opposition to the Motion to Decertify and/or Dismiss the Plaintiffs Claim for Either Remediation of Property or Diminution in Value as Both Claims Made Together Are Duplicative	Plaintiff	7/2/08

112.	Reply Memo in Support of Defendants' Motion to Decertify Classes or Alternatively, Amend Both Class Definitions for Failure to Specify A Date on Which the Composition of the Class is Fixed and to Clarify Exhibit 1	Monsanto	7/16/08
113.	Reply Memo in Support of Defendants' Motion to Decertify Medical Monitoring Class, or Alternatively Amend Class Definition Based on Overly Broad Class Period and Dose Group and Motion to Strike Untimely Proffer of Undisclosed Indoor Dust sampling Evidence	Monsanto	7/16/08
114.	Reply in Support of Motion to Decertify and/or Dismiss Plaintiffs' Claim for Either Remediation of Property or Diminution in Value, as Both Claims Made Together are Duplicative	Monsanto	7/16/08
115.	Reply in Plaintiffs' Response in Opposition to Defendants' Motion to Decertify and/or Dismiss Plaintiffs' Claim of Certain Medical Monitoring Subclasses Based on the Absence of a Class Representative With Standing	Monsanto	7/16/08
116.	Plaintiffs' Response in Opposition to Defendants' Motion to Quash Plaintiffs' Notice of Depositions of Paul Hunt, et al. and for Protective Order	Plaintiff	7/18/08
117.	General Objection to Plaintiffs' Requests for Admission and Motion for Protective Order Restricting Plaintiffs' Premature, Excessive Use of Requests for Admissions	Monsanto	7/23/08
118.	Motion for Permission to Take Depositions of the Following Former Monsanto Employees for Purposes of Perpetuating Their Testimony: McClanahan, Bailey, Isaacs, Bailey, Daily	Plaintiffs	7/28/08
119.	Response in Opposition to Monsanto Company's Motion for Protective Order (Objection to Requests for Admissions)	Plaintiffs	8/7/08
120.	Reply to Plaintiffs' Response to Monsanto Company's General Objection to Plaintiffs' Requests for Admission and Motion for Protective Order	Monsanto	8/13/08
121.	Motions on Apogee Discovery, Carter Class Rep and Class Notice hearing		8/20/08
122.	Plaintiffs' Suppl. Response in Opposition to Defendants' Motion to Decertify Medical Monitoring Class or Alternatively Amend Class Definition Based on Overly Broad Class Period and Dose Group with additional sampling data	Plaintiff	8/27/08
123.	Motion for Rule 16 Conference to Amend Pleadings to Conform to the Parties Theories of the Case, Clarify and Simplify Issues in Dispute, Establish a Trial Plan and Reconsider Class Certification	Monsanto	9/11/08

124.	Notice of Conflict and Motion to Continue Hearing of 10/9/08	Plaintiffs	10/8/08
125.	Motion to Utilize 11/6/08 Hearing Date as a Rule 16 Conference	Monsanto	10/28/08
126.	Order Denying Defendants' General Objections to Plaintiffs Request for Admissions and Motion for Protective Order Restricting Plaintiffs Premature, Excessive Use of Requests for Admissions	COURT	10/28/08
127.	Response in Oppositions to Defendants' Motion for Rule 16 Conference to Amend Pleadings to Conform to the Parties Theories of the Case, Clarify and Simplify Issues in Dispute, Establish a Trial Plan and Reconsider Class Certification	Plaintiff	10/31/08
128.	Notice of Removal, Notice of Filing of Notice of Removal, Rule 7.1 Statement, Letter to Judge requesting transfer	Monsanto – USDC	11/21/08
129.	Motion to Remand and Memo in Support Due to Untimely Removal and to Recover Costs and Attorney Fees	Plaintiffs	11/25/08
130.	Motion to Stay Transfer of this Case and Other Parallel Litigations Pending The Court's Consideration of Plaintiffs' Motion to Remand	Plaintiffs	11/25/08
131.	Memo in Opposition to Plaintiffs' Motion to Stay Transfer of this Case and Other Parallel Litigations Pending the Court's Consideration of Plaintiffs' Motion to Remand	Monsanto	11/26/08
132.	Response in Opposition to Monsanto's Request that the Court Stay all Proceedings in this Matter, Including Ruling on Plaintiffs' Motion for Remand	Plaintiff	12/2/08
133.	Reply to Defendants Memo in Opposition to Plaintiffs' Motion to Stay Transfer of this Case and Other Parallel Litigations Pending the Court's Consideration of Plaintiffs' Motion to Remand	Plaintiff	12/5/08
134.	Exhibits in Support of Motion to Remand Cases Sue to Untimely Removal and to recover Costs and Attorney Fees	Plaintiff	12/5/08
135.	Memo of Law in Opposition to Plaintiffs' Motion to Remand Due to Untimely Removal and to Recover Costs and Attorney Fees	Monsanto	12/8/08
136.	Memo in Reply to Plaintiffs' Opposition to Monsanto's Request that the Court Stay All Proceedings in This Matter Including Ruling on Plaintiffs Motion for Remand	Monsanto	12/8/08
137.	Notice of Filing Memo in Support of Monsanto's Motion to Transfer Cases Alleging Injury from Exposure to Agent Orange in Nitro, WV to MDL	Monsanto	12/8/08

138.	Certification of Charles M. Love in Support of Monsanto's Opposition to Plaintiffs' Motion to Remand Due To Untimely Removal and to Recover Costs and Attorney Fees	Monsanto	12/8/08
139.	Reply to Monsanto's Memo of Law in Opposition to Plaintiffs' Motion to Remand Due to Untimely Removal and to Recover Costs and Attorney Fees	Plaintiffs	12/10/08
140.	Suppl. To their Prior Response to Defendants' Motion for Rule 16 Conference	Plaintiffs	1/9/09
141.	Supplement to Motion for Rule 16 Conference	Monsanto	1/20/09
142.	Response in Opposition to Plaintiffs' Proposed Class Action Trial Plan	Monsanto	1/20/09
143.	Plaintiffs' Reply to Defendants' Response in Opposition to Plaintiffs' Proposed Class Action Trial Plan	Plaintiffs	1/21/09
144.	Sur-reply to Plaintiffs Reply to Defendants Response in Opposition to Plaintiffs' Proposed Class Action Trial Plan	Monsanto	1/22/09
145.	Suppl. Reply to Defendants' Response in Opposition to Plaintiffs' Proposed Class Action Trial Plan	Plaintiffs	1/23/09
146.	Suppl. Sur-reply to Plaintiffs' Suppl. Reply to Defendants' Response in Opposition to Plaintiffs' Proposed Class Action Trial Plan	Monsanto	1/28/09
147.	Motion for Plaintiffs' Counsel to Provide Names and Addresses of all Individuals They Represent With Clams in this Litigation	Defendants	2/17/09
148.	Response in Opposition to Defendants' Motion for Plaintiffs' Counsel to Provide Names and Addresses of All Individuals and Cross Motion	Plaintiff – Calwell	3/4/09
149.	Motion for Order Prohibiting the Urban & Falk Firm from Directly Communicating with Class Members without prior Court Approval and for sanctions	Plaintiff – Calwell	3/5/09
150.	Reply to Plaintiffs' Response in Opposition to Defendants' Motion for Plaintiffs' Counsel to Provide Names and Addresses of All Individuals They Represent with Claims in This Litigation	Defendants	3/10/09
151.	Opposition of the Law Firm Urban & Falk to Lead Counsel's Motion for Order Prohibiting them from Directly Communicating with Class Members and Counter-Motion for Sanctions Against Class Counsel	Plaintiffs - Urban & Falk	3/11/09
152.	Opposition to Lead Counsel's Motion for Order Prohibiting Urban& Falk from Directly Communicating with Class Members	Plaintiffs – Urban & Falk	3/11/09
153.	Response to Defendants' Motion for Plaintiffs' Counsel to Provide Names and Addresses of All Individuals they Represent with Claims in this Litigation	Plaintiffs – Urban & Falk	3/16/09

154.	Response to the Opposition of Urban & Falk to Lead Counsel's Motion for Protective Order and Counter Motion for Sanctions	Plaintiffs	3/16/09
155.	Motion to Preclude Plaintiffs From Introducing New Environmental Sampling Results	Monsanto	4/3/09
156.	Motion for Protective Order Concerning Plaintiffs' Untimely Environmental Testing Project	Monsanto	4/3/09
157.	Suppl. Motion for Entry of order requiring the Urban & Falk Law Firm to send a corrective letter	Plaintiffs	7/15/09
158.	Response of the Urban & Falk Law Firm to the Calwell Practice Supplemental Motion for Entry of order requiring the Urban & Falk Law Firm to send a corrective letter	Urban & Falk	7/27/09
159.	Response to Class Counsel's Motion for Entry of order requiring the Urban & Falk Law Firm to send a corrective letter	Defendants	7/31/09
160.	Class Counsel's Motion for Scheduling Conference	Plaintiffs	8/24/09
161.	Response to Class Counsel's Motion for Scheduling Conference	Defendants	8/28/09
162.	Reply to Defendants' Response to Class Counsel's Motion for Scheduling Conference	Plaintiffs	9/15/09
163.	Class Counsel's Motion for Reconsideration of the Court's March 3, 2009 Order Limiting the Definition of the Medical Monitoring Class	Plaintiffs	11/5/09
164.	Motion for Entry of Case Management Order	Defendants	11/12/09
165.	Class Counsel's Correction and Amendment of Class Counsel's Motion for Reconsideration of the Court's March 3, 2009 Order Limiting the Definition of Medical Monitoring Class	Plaintiffs	11/12/09
166.	Amended Motion for Entry of Case Management Order	Defendants	11/13/09
167.	Response to Defendants' Motion for Entry of Case Management Order	Plaintiffs	11/25/09
168.	Motion for Permission to Conduct Limited Additional Indoor Dust Sampling for Limited Purpose of Evaluating Damage Claims	Plaintiffs	12/1/09
169.	Reply Regarding Motion for Entry of Case Management Order	Defendants	12/1/09
170.	Motion for CMO hearing		12/2/09
171.	Notice of Hearing on Motion for Permission to Conduct Limited Additional Indoor Dust Sampling (12/17)	Plaintiffs	12/7/09
172.	Disclosure Regarding Plan for Class Notification	Plaintiffs	12/11/09
173.	Response to Plaintiffs' Motion for Permission to Conduct Limited Additional Indoor Dust Sampling	Defendants	12/14/09
174.	Motion for Additional Testing hearing		12/17/09

175.	Defendant's Response to Plaintiffs' Disclosure Regarding Plan for Class Notification with revised class notices	Defendant	1/25/10
176.	Defendants' Response to the Class Representatives' Motion to Amend the Medical Monitoring Class Definition	Defendant	1/25/10
177.	Class Representatives' Reply to Defendants' Response to Class Representatives' Motion to Amend the Medical Monitoring Class Definition	Plaintiff	2/19/10
178.	Class Representatives' Reply to Defendants' Response to Class Representatives' Motion to Amend the Medical Monitoring Class Definition	Plaintiff	2/19/10
179.	Motion to Amend Class Certification hearing		3/2/10
180.	Proposed Findings of Fact and Conclusions of Law Relating to Motion to Amend the Medical Monitoring Class Definition	Monsanto	3/4/10
181.	Plaintiffs' Response & Objection to Defendants' Proposed Findings of Fact and Conclusions of Law Relating to Motion to Amend the Medical Monitoring Class Definition	Plaintiffs	3/9/10
182.	Reply to Plaintiffs' Response & Objection to Defendants' Proposed Findings of Fact and Conclusions of Law Relating to Motion to Amend the Medical Monitoring Class	Defendants	3/11/10
183.	Motion for Rule 35 IME	Defendants	4/12/10
184.	Response in Opposition to Defendants' Motion for Rule 35 IME	Plaintiffs	4/19/10
185.	Reply to Plaintiffs' Response to Defendants' Motion for Rule 35 Independent Medical Examination	Defendant	4/30/10
186.	Surreply to Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Rule 35 Independent Medical Evaluation	Plaintiffs	5/4/10
187.	Defendants' Motion for Rule 35 hearing		5/5/10
188.	Response to Plaintiffs' Surreply Regarding Defendants' Motion for Rule 35 Independent Medical Examination of Class Representatives	Defendants	5/7/10
189.	Plaintiffs' Reply To Defendants' Response To Plaintiffs' Surreply Regarding Defendants Motion For Rule 35 Independent Medical Examinations Of Class Representatives	Plaintiffs	5/14/10
190.	Motion to Enforce Gag Order	Defendants	6/18/10
191.	Motion to Exclude or Limit expert Testimony of Randall Jackson	Defendants	6/18/10