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IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No. 04-C-465
Derek C. Swope, Judge

MONSANTO COMPANY, *a Delaware corporation, with its principal place of business in the State of Missouri;* PHARMACIA CORPORATION, *a Delaware corporation, with its principal place of business in the State of Missouri;*

Defendants.

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

Four issues are before the Court. Two of these issues are separate yet interrelated motions filed by Class Counsel, W. Stuart Calwell, Jr., Esq., of the Calwell Practice, PLLC. The first is the *Petition for Award of Attorneys' Fees and Litigation Expenses* (hereinafter "*Petition for Fees and Expenses*") filed on March 27, 2012. (dkt. no. 3068). The second is the *Motion for Incentive Payments for Named Class Representatives* (hereinafter "*Motion for Incentive Payments*") filed on June 4, 2012. (dkt. no. 3120).

The other two issues revolve around attorneys' liens. The first is an attorney's lien filed by James F. Humphreys, Esq., of James F. Humphreys & Associates, LC against his former

clients, Virdie Allen, Hillman Raynes, Erma Raynes, Charles Agee, and Eileen Agee. *Notice of Attorney's Lien* Sept. 13, 2007 (dkt. no.602). The second is an attorney's lien filed by the estate of James Harvey Falk, Jr., by counsel, Joanna I. Tabit, Esq., of Steptoe & Johnson PLLC against Thomas F. Urban, II, Esq.,[1] of Urban & Falk, PLLC. *Notice of Attorney's Lien* Jan. 27, 2012 (dkt. no. 2967).

In the *Petition for Fees and Expenses,* Class Counsel asks the Court to approve $29,500,000 in attorneys' fees and expenses; specifically, $22,500,000 in attorneys' fees and $7,000,000 in litigation expenses. The Defendants have agreed to pay up to $29,500,000 in attorneys' fees and expenses from a fund separate from the proposed settlement. Therefore, any award of attorneys' fees and litigation expenses does not come from the funds established for the Medical Monitoring and Property Damage Classes.

In regards to this *Motion*, the Court has received the following additional pleadings: *Class Counsels' Supplement and Correction to Exhibit 1 to Petition for Award of Attorneys' Fees and Litigation Expenses* filed on June 4, 2012 (dkt. no. 3116); *Objectors' Response to Class Counsel's Petition for Award of Attorneys' Fees and Litigation Expenses* filed on June 6, 2012 (dkt. no. 3130 & 3138); *Objection to Class Action Settlement and Attorneys' Fee Request* filed on June 11, 2012 (dkt. no. 3136); *Defendants' Response to Objector Jane Murdock's Objection to Class Action Settlement and Attorneys' Fee Request* filed on June 14, 2012 (dkt. no. 3152); *Class Counsel's Preliminary Response and Motion to Strike Objector Jane Murdock's "Objection to Class Action Settlement and Attorneys' Fee Request"* filed on June 15, 2012 (dkt. no. 3154); *Reply to Objectors' Response to Petition for Award of Attorneys' Fees and Litigation Expenses* filed on June 15, 2012 (dkt. no. 3160); *Reply to Class Counsel's Supplemental*

[1] Mr. Urban alleges that he represents more than 1600 class members in his *Memorandum Identifying the Urban & Falk Objectors* filed on June 11, 2012. (dkt. no. 3135).

Response and Defendants' Response to Murdock Objection filed on June 18, 2012 (dkt. no. 3164); and *Class Counsel's Supplemental Response to Objector Jane Murdock's "Objection to Class Action Settlement and Attorneys' Fee Request"* filed on June 18, 2012 (dkt. no. 3166).

There were also several *pro se* objectors who objected to the award of attorneys' fees for various different reasons. These objectors' objections and the date they filed them are as follows: G. Jacob, *et. al.*, filed on April 12, 2012 (dkt. no. 3073); Linda D. Cowley filed on April 16, 2012 (dkt. no. 3074); Fran Kesler filed on May 2, 2012 (dkt. no. 3081); James W. Morrison filed on May 7, 2012 (dkt. no. 3083); Minnie Case filed on May 22, 2012 (dkt. no. 3095); Dennis W. Withrow filed on May 22, 2012 (dkt. no. 3097); Robert L. Smith filed on May 23, 2012 (dkt. no. 3098); Connie A. Stone filed on June 1, 2012 (dkt. 3106); Jerry Jeffries filed on June 1, 2012 (dkt. no. 3108); Robert A. McClanahan filed on June 1, 2012 (dkt.no. 3112), Patricia Lovejoy filed on June 1, 2012 (dkt. no. 3114); Pat Higginbottom filed on June 1, 2012 (dkt. no. 3115); Larry O. Frazier, *et. al.*, filed on June 5, 2012 (dkt. no. 3121); Anvil Whited filed on June 5, 2012 (dkt. no. 3123); and Kevin McDaniel filed on June 5, 2012 (dkt. no. 3125);

In the *Motion for Incentive Payments*, Class Counsel seeks Court approval for $200,000 in incentive payments; specifically, Class Counsel wants approval to pay $25,000 to each of the eight Class Representative listed in the style of this case. The proposed incentive payments would come from Class Counsel's attorneys' fees. In regards to this *Motion*, the Court has received the following pleadings: *Objection to Class Action Settlement and Attorneys' Fee Request* filed on June 11, 2012 (dkt. no. 3136).

The Court, after thoroughly reviewing all of the filings and all appropriate legal precedent, **FINDS and ORDERS** as follows:

I. Background

The Court has thoroughly reviewed the background of this action in the *Final Order Approving Settlement* (hereinafter referred to as the Final Order) and incorporates it as if fully set forth herein.

II. Standard of Review

"In general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers, and *a court has wide discretion to award attorneys' fees and costs.*" *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 533, 295 S.E.2d 16, 24 (1982)(emphasis added). The Court notes that there is no law in West Virginia on the appropriate

way to award attorneys' fees and costs in class action settlements. However, the law on this point is so well developed that a consensus has been established within the judicial community.

A. Litigation Expenses

In class action settlements, class counsel is entitled to reasonable costs and expenses. McLaughlin on Class Actions (8th ed.) § 6:23 at 164-165. "Recoverable costs may include filing fees, expert fees, telephone, messenger services, fax and copying charges, electronic research, travel, lodging and meal expenses, costs of mediation and postage." *Id.* "Costs should 'reflect a reasonable amount of expenditures for a case of [its] magnitude,' . . . and also 'bear a reasonable relationship to the time and effort expended and the result achieved.'" *Kay Co. v. Equitable Production Co.*, 749 F.Supp.2d 455, 471-472 (S.D. W.Va. 2010)(citations omitted). In short, "[t]he court must ensure that class counsel does not receive a windfall through expense reimbursement . . . ." McLaughlin on Class Actions (8th ed.) § 6:23 at 165.

B. Attorneys' Fees

There are two methods for determining the appropriateness of attorneys' fees: the lodestar method and the percentage of fund method. *Jones v. Dominion Resources Services, Inc., et. al.*, 601 F.Supp.2d 756, 758 (S.D. W.Va. 2009).

> Under the "lodestar" method, a district court identifies a lodestar figure by multiplying the number of hours expended by class counsel by a reasonable hourly rate. The court may then adjust the lodestar figure using a "multiplier" derived from a number of factors . . . .

Jones, 601 F.Supp.2d at 758 (citations omitted). To put it mathematically: (hours expended x a reasonable hourly rate) x a multiplier = lodestar calculation.

> Under the "percentage of fund" method, the court awards the fee as a percentage of the common fund. The percentage of fund method

> operates similarly to a contingency fee arrangement in that the attorneys receive a percentage of the final monetary value obtained for their clients. Unlike contingency fees, however, the percentage fee award is determined *ex post*, at the end of the litigation, rather than by an *ex ante* arrangement.

Jones, 601 F.Supp.2d at 758. To put it mathematically: value of settlement or actual benefits received x percent to award attorney = percentage of the fund calculation.

The vast majority of courts use the percentage of fund method to determine attorneys' fees. McLaughlin on Class Actions (8th ed.) § 6:23 at 148. In fact, the Honorable Joseph R. Goodwin, Chief Judge of the Southern District of West Virginia, has stated that "[t]he percentage method has overwhelmingly become the preferred method for calculating attorneys' fees in common fund cases." *Id.* (citations omitted). Chief Judge Goodwin further states that "[o]ne of the reasons that courts prefer the percentage method is that the percentage method better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended by the attorneys." *Id.* (citations omitted). The lodestar method, however, is used as a cross check to insure fairness. *Id.* at 759.

To make a proper determination, a reviewing court must make four determinations. Under the lodestar method, a reviewing court must determine (1) the reasonable hourly rate and (2) the appropriate multiplier, if any. Under the percentage of the fund method, a reviewing court must determine (3) the actual percent of the fund that the attorneys will receive and (4) the value of the benefits received by the class.

In order to determine the first three, the Court can simply use the factors set forth in Syllabus Point 4 of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986), as these factors are substantially similar to those used by other court's to make a determination as to the lodestar and percentage of the fund methods. *Final Order Awarding Attorneys' Fees and*

Litigation Expenses and Awarding Class [Representatives'] Incentive Payments at 15 *Perrine, et. al. v. E.I. Du Pont De Nemours and Company, et. al.*, Case No. 04-C-296-2 (W.Va. Cir. Ct., Jan. 27, 2011) (Bedell, J.).[2] The *Aetna* factors are:

> The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent;[3] (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Syllabus Point 4 *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). The most important factor, however, is the actual benefit obtained by Class Counsel. Manual for Complex Litigation § 21.71 (4th ed. 2011)(stating that "[c]ompensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees").

Valuation of the actual benefits obtained by Class Counsel is also relevant to the fourth issue that must be resolved by a court. Put another way, a reviewing court must know the value of the actual benefits obtained in order to calculate the percentage of the fund.

The valuation depends on the type of recovery that was obtained. For instance, it is much easier to value the actual benefits obtained where class members receive cash benefits. *Id.* On the other hand, it is harder to value the actual benefits obtained "when class members receive . . . delayed benefits. In such cases, ***the judge must determine the value of [the] benefit[]***." *Id.* (emphasis added).

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[2] This *Order* can be obtained at the following URL:
http://www.perrinedupont.com/uploads/final_order_awarding_atty_fees___exp_01-27-11.pdf.

[3] As will be discussed in section III, B, 1, v., *infra*, this factor is not applicable to an award of attorneys' fees in class action litigation.

> In cases involving a claims procedure or a distribution of benefits over time, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered. It is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete.

Id.

In regards to the percentage of the fund method, 25% is the "benchmark against which the reasonableness of a fee application may be measured . . . ." McLaughlin on Class Actions (8th ed.) § 6:23 at 157 (footnotes omitted). This benchmark is simply a starting point; it does not negate a courts responsibility to properly review the request. *Id.* at 157-158. "[A]wards in the 20 to 30% range are not uncommon, and courts ordinarily are unwilling to award counsel one-third of the recovery." *Id.* (footnotes omitted).

C. Incentive Payments

Incentive Payments, while not universally allowed, are commonplace. McLaughlin on Class Actions (8th ed.) § 6:27 at 175-176. As Judge Posner once stated, "[s]ince without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable." *Matter of Continental Illinois Securities Litigation*, 962 F.2d 566, 571 (7th Cir. 1992).

> In making these awards, courts generally consider special circumstances such as the personal difficulties (if any) encountered by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens shouldered by that plaintiff in lending himself or herself to the prosecution of the claim (attending depositions and other proceedings etc.), and the ultimate recovery.

McLaughlin on Class Actions (8th ed.) § 6:27 at 176.

D. Attorney's Lien

The West Virginia Supreme Court of Appeals has stated that "[w]hen an attorney has properly and timely filed a charging lien in a particular case, the circuit court must address the charging lien in the final order distributing the judgment or fund to which the lien will attach." Sly. Pt. 10, *Trickett v. Laurita*, 223 W. Va. 357, 674 S.E.2d 218 (2009).

III. Discussion

The Court will discuss each issue as raised *supra*.

A. Litigation Expenses

On March 27, 2012, Class Counsel filed his *Petition for Award of Attorneys' Fees and Litigation Expenses* (dkt. no. 3068). He asserted that he had spent $6,573,864.18 in litigation expenses since December 17, 2004 and expected to expend an estimated $850,000.00 in future expenses. *Id.* Consequently, Class Counsel's actual and future expenses are approximately $7,423,864.18. Class Counsel has only requested and Defendants have only agreed to pay up to $7,000,000 in litigation expenses, however. The litigation expenses will be paid out of a separate fund.

Class Counsel has provided the Court with a detailed description of all of the litigation expenses. The Court, after a thorough review, finds that these expenses are reasonable and have actually been expended. The payment of $7,000,000 in litigation expenses will not provide Class Counsel with a windfall. Consequently, the Court **GRANTS** the *Petition for Fees and Expenses* and **ORDERS** the Defendants to pay Class Counsel $7,000,000 per their agreement in the time set out in the conclusion of this *Order*.

B. Attorneys' Fees

Before it can discuss the amount of attorneys' fees to award, the Court must first go through the *Aetna* factors. Upon conclusion of that discussion, the Court will then discuss the percentage of the fund and lodestar methods for calculating attorneys' fees as it relates to each of the two proposed settlements.

1. *Aetna* Factors

i. Time and Labor Required

Class Counsel avers that 26,688.16 attorney hours and 37,280.05 paralegal hours have been spent on this litigation. *Petition for Fees and Expenses* at 9. There is no doubt that this case took a significant amount of time and energy to prosecute. The record in this case – which is explained in further detail in the *Final Order Approving Settlement* § II – is a testament to this fact.

For instance the above styled case has been removed twice, appealed to the West Virginia Supreme Court of Appeals three times, had well over 150 motions filed, and had countless hearings, most of which required a significant amount of time. Furthermore, had Class Counsel not fought and won in the United States Bankruptcy Court for the Southern District of New York, the above styled case would not be in existence today. *See Final Order Approving Settlement* § II, C. At 2,000 billable hours per year, these figures equate to 13 years of attorney's work and over 18 years of paralegal work. The Court knows that Class Counsel's firm is small and recognizes that this expenditure of time represented an enormous commitment of its' total resources for over 7 years.

Consequently, the Court **FINDS** that 26,688.16 attorney hours and 37,280.05 paralegal hours have been expended and that these hours represent the time and labor required to fully prosecute this case.

ii. Novelty and Difficulty

Class Counsel avers that "[v]irtually every aspect of the *Bibb* litigation involved complex issues of proof." *Petition for Fees and Expenses* at 23. Class Counsel listed part of these complex issues of proof:

> How were dioxin molecules made[; h]ow many were made[; h]ow did they escape the manufacturing process[; w]here did they go once they got out[; h]ow did they get there[; h]ow did they get onto the property[; h]ow did they get into humans[; w]hat do they do to humans[; h]ow are they measured in the environment[; h]ow are they measured in humans[; h]ow long do they take to hurt humans[; a]re there studies about what they do to the environment and to humans[; a]re such studies reliable[; a]re there alternative sources[; w]hat did alternative sources contribute to the dioxin in the community[.]

Id. at 17.

The Court does not doubt that this case was difficult. However, there were some areas where Class Counsel had the benefit of other's work. For instance, the fact that Old Monsanto produced and burned material contaminated with 2,3,7,8-TCDD is basically established. Although Monsanto contests this assertion, it is relatively clear that 2, 3, 7, 8-TCDD contaminated waste was burned.[4] *See Final Order Approving Settlement* § I, E. Also, determining how much dioxin was produced was mathematically possible once the production numbers were established and the chemistry of how and when 2, 3,7, 8-TCDD was formed in the process was understood. A lot of that evidence was already developed in the *Conner & Amos,*

[4] The Court notes that the Defendants have contested this issue from the beginning. However, the Defendants' objections to this issue are not borne out by the evidence presented by their own employees in an earlier proceeding. See *Final Order Approving Settlement* § I, E.

Inc. v. Monsanto Chemical Comp., No. 2660 (S.D.W.Va. October 2, 1969) case. Further, this issue turned out to be relatively uncontested as both sides almost agreed as to the total amount of dioxin produced. *See Final Order Approving Settlement* § I, E.

Another example is that the effect of 2,3,7,8-TCDD on humans is fairly well established. In fact, one need look no further than the litigation surrounding Agent Orange – which contained 2,3,7,8-TCDD – to find information on the effects of 2,3,7,8 TCDD on the human body. *See In re "Agent Orange" Prod. Liab. Litig.*,597 F. Supp. 740 (E.D.N.Y. 1984). Quite frankly, there is little doubt as to the toxic effects of 2,3,7,8-TCDD. *See Final Order Approving Settlement* § I, D.

The Court does not mean to suggest that there were no difficult issues that had to be developed. For instance, Class Counsel had to develop – almost out of whole cloth, to put it colloquially – where and in what amount waste contaminated with 2,3,7,8-TCDD was burned. Furthermore, getting the 2,3,7,8-TCDD from the Old Monsanto plant into the Nitro populace was very difficult to prove. Class Counsel had to locate expert witnesses with the capacity to perform complex air modeling to support their position that the waste was spread by air. An enormous amount of data had to be reviewed to develop the locations and timeframes where waste was burned. Counsel had to collate this information, disseminate it to experts, and coordinate their efforts to develop a realistic case that could be presented in an understandable manner to the Court and a jury.

Class Counsel, the head of a small law firm, had to commit the time and resources necessary to battle one of the largest and most reputable firms in West Virginia. This firm was ably assisted by out-of-state counsel from a prestigious law firm. Out-of-state counsel had actually tried the *Paoli* case, a seminal case in the development of the law of medical monitoring.

Additionally, this case does have some novelty. Monsanto has been sued several times for actions they took at their Nitro plant arising from their 2,4,5-T operation. *See Final Order Approving Settlement* § I. G. While these actions are not identical to this case, they are similar enough to not make this case completely novel. Furthermore, lawsuits over 2,3,7,8-TCDD, while not pervasive, are not uncommon either. One of the things that makes this case novel is the shear tenacity of Class Counsel in repeatedly bringing these cases. Class Counsel obviously held a long lasting belief that the 2,4,5-T process was dangerous. From the 1980's forward, at great expense in time and money, he chose an almost solitary course to make the Defendant's accountable for their actions. What makes this exceptional is the fact that he had been uniformly unsuccessful in his efforts up to now. Like Robert the Bruce watching the spider spin his web, he picked himself up each time and went back to the fray.

iii. Skill Requisite to Perform the Legal Service Properly

There is no doubt that the skill required to properly prosecute this case is enormous. One of the most successful plaintiff's firms in West Virginia spent an enormous amount of valuable time and effort to bring this action to a successful conclusion. Very few firms within West Virginia had the necessary skills, both professionally and financially, to successfully litigate this action. As Class Counsel pointed out, there was not an army of lawyers jostling to take on this defendant on these claims.

iv. Preclusion of Other Employment Because of Case

Class Counsel avers the following:

> [D]uring the pendency of (and as a result of Class Counsel's involvement in) the *Bibb* litigation, Class Counsel had to decline involvement in similar toxic tort litigation in Texas and significantly delay involvement in similar toxic tort litigation in Florida. As a result of Class Counsel's involvement in the *Bibb* litigation, it had to decline substantial involvement in certain

> pharmaceutical litigation. Additionally, Class Counsel had to decline substantial involvement [in] litigation involving exposure to organophosphate chemicals by airline pilots and passenger[s].

Petition for Fees and Expenses at 25-26. Also Class Counsel avers that he lost business to another attorney working in his office because of his involvement in the *Bibb* litigation.[5]

The Court does not doubt that Class Counsel's involvement in this litigation cost him business. However, Class Counsel was still busy. A WestLaw search of Class Counsel's name reveals a sample of his activities. This search reveals that Class Counsel has been involved in the following cases during the pendency of this action:

- *White v. Wyeth*, 227 W. Va. 131, 705 S.E.2d 828 (2010) – Class Counsel brought a case under the West Virginia Consumer Credit and Protection Act for the purchasers of hormone replacement therapy ("HRT") drugs against certain defendants in Putnam County, West Virginia. Specifically, the plaintiffs alleged that "the named defendants used unfair and deceptive practices in promoting HRT prescription drug products to doctors and patients for treatment of serious menopausal disorders by using misleading statements in advertising, marketing and labeling of the products." *Id.* 227 W. Va. at 134, 705 S.E.2d at 831. The case was before the West Virginia Supreme Court of Appeals from a certified question from the Honorable O.C. "Hobby" Spaulding.
- *In re Flood Litigation Coal River Watershed*, 216 W. Va. 534, 607 S.E.2d 863 (2004) and *In re Flood Litigation Coal River Watershed*, 222 W. Va. 574, 668 S.E.2d 203 (2008) – Class Counsel, along with other attorneys, brought an action against certain timbering companies and other defendants for injuries and damages allegedly sustained from flooding in Raleigh County, West Virginia. The first case was heard by the West

[5] This allegedly occurred in a case from Logan County, West Virginia. Details about this incident can be obtained from *Ford v. Calwell Practice, P.L.L.C.*, 2012 WL 3079103 (W. Va. June 8, 2012)(unpublished opinion).

Virginia Supreme Court of Appeals from a certified question from the Flood Litigation Panel. The second case went to the West Virginia Supreme Court of Appeals from an appeal from a ruling from the Honorable John A. Hutchison after the liability phase of the trial.[6]

- *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 624 S.E.2d 562 (2005) – Class Counsel brought a personal injury and products liability cause of action in Kanawha County, West Virginia against certain defendants for injuries attributable to exposure to paint. The case was heard by the West Virginia Supreme Court of Appeals on an appeal of a motion for summary judgment.
- *Tolley v. Carboline Co.*, 217 W. Va. 158, 617 S.E.2d 508 (2005) – Class Counsel brought a deliberate intent cause of action, which was "premised upon the theories of negligence, failure to warn, breach of warranty, and strict liability" against certain defendants. *Id.* 217 W. Va. at 160, 617 S.E.2d at 510. The case was heard by the West Virginia Supreme Court of Appeals on an appeal of a motion for summary judgment.
- *O'Neal v. Speed Mining LLC*, 5:10-cv-00446 (S.D. W.Va.) – Class Counsel brought a case in the Circuit Court of Wyoming County, West Virginia, which was removed to the Southern District of West Virginia pursuant to 28 U.S.C. §§ 1332(a) and 1441(a), on behalf of a coal miner who was injured when a shuttle car struck and ran him over.
- *Affiliated Const. Trades Foundation v. West Virginia Department of Transportation*, 2:04-cv-344 (S.D. W.Va.) – This case arose from the construction of a portion of the King Coal Highway.

[6] These cases were ultimately settled through mediation.

- *Drennen v. United States*, 5:06-cv-00390 (S.D. W.Va.) – Class Counsel brought a claim against a federal employee for, *inter alia*, medical negligence under the West Virginia's Medical Professional Liability Act.
- *Maynard v. Logan County Com'n*, 2:07-cv-00186 (S.D. W.Va.)
- *Adams v. Insurance Co. of North America*, 426 F.Supp.2d 356 (S.D. W.Va.)
- *In re Neurontin Marketing and Sales Practices Litigation*, 04-cv-10981-PBS (D. Mass.)
- *Thorne v. Wyeth*, 06-cv-3123(DSD/JJG) (D. Minn.)
- *White v. Dow Chemical Co.*, 2:05-cv-00247 (S.D. W.Va.)
- *In re Prempro Products Liability Litigation*, 4:03CV1507-WRW, 4:06CV00476 (E.D.Ark.)
- *Oken v. Monsanto Co.*, 419 F.3d 1312 (11th Cir. 2005)(per curiam).

This list is not exclusive, as it is contains only those cases reported by WestLaw that contain Class Counsel's name.

In conclusion, Class Counsel obviously declined several invitations to participate in litigation. Whether or not Class Counsel declined other cases, obviously he and his firm spent a major portion of their available time working on this action. Over the last several years, it ultimately became all-encompassing.

v. Customary Fee/Hourly Rate/ Percent to Award Attorney

Class Counsel avers the following:

> Class Counsel undertook to represent the Plaintiffs/Class Representatives in this matter on a 40 percent contingency fee basis. In the experience (and practice) of Class Counsel, a 40 percent contingency fee is commonplace, both locally and nationally, for representing plaintiffs in more complex cases, such as products liability, medical malpractice, and toxic exposure actions, all of which typically require the advancement of greater expenses and consequently present a greater risk to the attorney.

Petition for Fees and Expenses at 28. Furthermore, Class Counsel avers that it is error for a court not to consider the contingency rate consideration in determining attorneys' fees. *Id.* (citing *In re Abrams*, 605 F.3d 238 (4th Cir. 2010).

In regards to Class Counsel's last statement, the Court notes that this is not supported by the great weight of authority. As stated by McLaughlin on Class Actions, "when evaluating the risk of nonpayment, courts will not consider the contingent nature of the fee arrangement . . . ." McLaughlin on Class Actions (8th ed.) § 6:23 at 152. Furthermore, the case cited by Class Counsel was not a class action, but instead a personal injury suit. Therefore, this case is not applicable. Contrary to Class Counsel's assertion, the Court must determine the appropriate fee regardless of what his contingency agreement fee may have been.

As to the percentage of the fund, the Court notes that the great weight of authority has found that an appropriate starting point is 25 percent. *Id.* at 157; *see also Loudermilk Services, Inc. v. Marathon Petroleum Co. LLC,*623 F.Supp.2d 713 (S.D. W.Va. 2009)(finding that 25% "is near the average awarded by Courts" in class action litigation). This rate can be adjusted upwards or downwards depending on certain factors. Furthermore, the Court notes that

> [A]bsent unusual justification such as uncommon performance, it is generally accepted that as the size of the class settlement increases, the percentage of the fee decreases. The rational for the inverse relationship is that larger settlements tend to correspond to larger classes but have no direct relationship to the work of counsel.

McLaughlin on Class Actions (8th ed.) § 6:23 at 151. The Court, however, will discuss the appropriate percent to award attorneys below.

Concerning to the lodestar method, Class Counsel avers that an appropriate hourly rate is $400 an hour. *Petition for Fees and Expenses* at 9. In support of this hourly rate, Class Counsel

cites *Kay Co. v. Equitable Production Co.*, 749 F.Supp.2d 455, 471-472 (S.D. W.Va. 2010). If this rate is not acceptable, Class Counsel avers that the minimum hourly rate is $275 an hour. *Id.*

The Court notes that when determining the appropriate hourly rate, "[t]he party seeking attorneys' fees bears the burden of proving the reasonableness of the hourly rates claimed." *Van Horn v. Nationwide Property and Cas. Ins. Co.*, 436 Fed.Appx 496, 498 (6th Cir. 2011)(citing *Granzeier v. Middleton*, 173 F.3d 568, 577 (6th Cir.1999). Furthermore,

> When determining a reasonable hourly rate, "courts use as a guideline the prevailing market rate ... that lawyers of *499 comparable skill and experience can reasonably expect to command within the venue of the court of record." . . . A district court may rely on a party's submissions, awards in analogous cases, state bar association guidelines, and its own knowledge and experience in handling similar fee requests. . . . "The appropriate rate, therefore, is not necessarily the exact value sought by a particular firm, ***but is rather the market rate in the venue sufficient to encourage competent representation***."

Id. at 498-499 (citations omitted)(emphasis added).

In the case at bar, Class Counsel has provided little in the way of support for his attorney fee hours. First, Class Counsel has not provided a breakdown of the amount of time worked by each attorney. It is axiomatic to say that Class Counsel himself can charge more than a first or second year associate. Consequently, the Court will simply aggregate the hourly rate, since Class Counsel has not provided more complete information.

Second, and most importantly, Class Counsel has provided only minimal support for his hourly rate. Class Counsel has not provided affidavits from practicing attorneys as to the appropriate hourly rate for an attorney practicing toxic tort class action litigation. Furthermore, Class Counsel has only cited one case to point to the appropriate hourly rate; *Kay Co.* Class Counsel argues that the Court in the *Kay Co.* case awarded an hourly rate of $414 an hour. But even as acknowledged by Class Counsel, the *Kay Co.* case did not make a direct finding as to the

appropriate hourly rate; instead this amount was derived at by taking the awarded pre-multiplier lodestar figure divided by the number of hours worked. In other words, Chief Judge Goodwin never made a direct finding that an hourly rate of $414 was the Charleston market rate. In fact, as will be discussed below, $414 is high for the Charleston, West Virginia, legal market.

The Court has thoroughly researched what the appropriate rate is in this community. The highlights from the Court's research are as follows:

- In *Loudermilk Services, Inc. v. Marathon Petroleum Co. LLC*, the Honorable Robert C. Chambers, Judge of the United States District Court, Southern District of West Virginia, found that an "average hourly rate of $175 for attorneys" was neither high nor low for class action work in West Virginia. *Loudermilk Services, Inc. v. Marathon Petroleum Co. LLC*,623 F.Supp.2d 713, 725 (S.D. W.Va. 2009).
- In *Constitution Party of West Virginia v. Jezioro*, the Honorable John Preston Bailey, Chief Judge for the United States District Court, Northern District of West Virginia, found that an hourly rate of $250 an hour was a reasonable rate for an experienced constitutional law attorney with 25 years' experience, $215 an hour was a reasonable rate for an attorney possessing a "large amount of litigation experience, but no particular expertise in constitutional civil rights litigation," and $150 an hour was a reasonable rate for an associate attorney with five years of practicing law in West Virginia. *Constitution Party of West Virginia v. Jezioro*, 2009 WL 2843374, at *7 (N.D.W.Va. Aug.31, 2009)(unpublished opinion).
- In *West Virginians for Life, Inc. v. Smith*, the Honorable David A. Faber, Judge for the United States District Court, Southern District of West Virginia, found that an appropriate hourly rate in West Virginia for a civil rights case to be $100 for a less

experienced attorney and $250 for a more experienced attorney. *West Virginians for Life, Inc. v. Smith*, 952 F.Supp 342, 346 (S.D. W.Va. 1996).

- In *Watkins v. Wells Fargo Home Mortg.*, the Honorable Robert C. Chambers, Judge for the United States District Court, Southern District of West Virginia, found that an appropriate hourly rate for a West Virginia attorney ranged from $300 an hour to $225 an hour, depending upon the experience of counsel. *Watkins v. Wells Fargo Home Mortg.*, 2010 WL 2486247 *3 (S.D. W.Va. 2010)(unpublished opinion).
- In *Van Horn v. Nationwide Property and Cas. Ins. Co.*, the Sixth Circuit Court of Appeals affirmed a district court's determination that a reasonable hourly rate in Ohio for class action case against an insurance company is between "$250 to $450 per hour, depending on each attorney's experience." *Van Horn v. Nationwide Property and Cas. Ins. Co.*, 436 Fed.Appx. 496, 497 (6th Cir. 2011).

The most persuasive case the Court found was *Allen v. Monsanto Co.*, 2007 WL 1859046 (S.D. W.Va. 2007). This case is persuasive because it is the same case currently before the Court[7] with the same parties. The Honorable Robert C. Chambers, Judge for the United States District Court, Southern District of West Virginia, was dealing with "Plaintiffs' Petition for Attorneys' Fees and Costs Due to Improper Removal to Federal Court." *Id.* at 1 (citations omitted). In that case, Class Counsel averred to Judge Chambers that his "hourly rate ranges from as low as $250.00 per hour to as high as $550.00 per hour." *Id.* at 2. Judge Chambers found that the hourly rates requested to be excessive compared to the Charleston market. *Id.* Specifically, Judge Chambers cited *Bostic v. American General Finance, Inc.*, 87 F.Supp.2d 611, 619 (S.D.W.Va. 2000) in which the Honorable Charles H. Haden, Judge for the United States

[7] The style of the case was changed at some point from *Allen, et. al. v. Monsanto Co., et. al.*, to *Bibb, et. al. v. Monsanto Co., et. al.*, because Allen was not named as a Class Representative.

District Court, Southern District of West Virginia, found that $250 an hour was "at the high end of the Charleston legal community." *Allen*, 2007 WL 1859046 at *2 (citing *Bostic v. American General Finance, Inc.*, 87 F.Supp.2d 611, 619 (S.D.W.Va.2000)).[8]

The Court agrees with Judge Chambers' analysis; $400 an hour is high. However, given the fact that very few lawyers in the area would or could credibly take on this work, the Court **FINDS** that $325 an hour is an appropriate hourly rate for attorney's hours. [9]

In regards to the appropriate hourly rate for paralegal hours, the Court notes that Class Counsel has not suggested an appropriate hourly rate.[10] The case law, however, suggests that $100 an hour is appropriate. *Watkins v. Wells Fargo Home Mortg.*, 2010 WL 2486247 *3 (S.D. W.Va. 2010)(unpublished opinion); *cf Loudermilk Services, Inc.* ,623 F.Supp.2d at 725 (finding that $32 per hour was an appropriate hourly rate for "legal assistants"). All of the staff involved in this case for all parties represent the apex of the legal community in skill and work ethic. Consequently, the Court **FINDS** that $100 an hour is the appropriate hourly rate in compensation for paralegal hours.

vi. Time Limitations

Class Counsel argues the following:

> This factor is one that a Court should take into account when the "priority" of the litigation "delays the lawyer's other work." . . . As discussed previously [in *Petition for Fees and Expenses*], the scope and complexity of this case necessarily made it a priority for Class Counsel, to the degree that Class Counsel had to decline involvement in certain litigation and significantly delay its involvement in other litigation. Under such circumstances, Class Counsel is "entitled to some premium" for its priority work in this case.

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[8] Unfortunately, for purposes of comparison the Court does not know what the hourly rates are for senior defense counsel in this action, but assumes that they are deservedly substantial.

[9] The Court understands that Class Counsel selected a "lower base hourly rate" of $275. During this Court's involvement in the case, this Court has been very impressed with the skill of all counsel.

[10] In fact, Class Counsel seems to argue that they should be able to charge paralegal hours at the same hourly rate for attorneys. Obviously, this cannot be justified and would result in Class Counsel receiving a windfall.

Petition for Fees and Expenses at 30.

As discussed *supra*, Class Counsel probably declined some invitations to participate in litigation. Even so, the record establishes that Class Counsel was still very busy with other litigation. The Court notes that it took seven years to get this case to trial. However, that time was consumed in large part by the procedural delay of bankruptcy and removals, a Writ of Prohibition to the West Virginia Supreme Court of Appeals, battles and discovery over class certification, publication of class notice, more discovery on the merits, complex and lengthy motion practice, and delay caused by another judge taking over the case. Consequently, while Class Counsel is entitled to fair and adequate compensation, he is not entitled to some premium above and beyond what is fair and adequate, nor subject to reduction for some delay.

vii. Results Obtained/Benefit to Class

The Court has generally spoken about the results obtained by Class Counsel and the benefits that the Class will receive in the *Final Order Approving Settlement,* filed contemporaneously with this order. The Court fully incorporates that section of the *Final Order Approving Settlement* into this section of this *Order* as is fully set out herein.

viii. Experience and Reputation of Class Counsel

Class Counsel is both experienced with toxic tort class action litigation and has a positive reputation in the legal community.

ix. Undesirability of the Case

Class Counsel avers that this case was very undesirable for several reasons. *Petition for Fees and Expenses* at 32. The Court will not go through every point that Class Counsel makes, but several are noteworthy. First, Class Counsel points to the *Connor & Amos* and the *James R. Boggess v. Monsanto Company* cases to demonstrate that Monsanto has already been sued and

prevailed twice for its actions at the Nitro plant. *Id.* Second, Class Counsel points to the fact that a successor in interest to the Nitro plant declared bankruptcy, thereby making this case more difficult to prosecute. *Id.* Third, Class Counsel avers that the cost of prosecuting this case is extremely expensive. *Id.* at 33. Finally, Class Counsel states that

> [F]ederal and state regulatory agencies were simply not concerned that dioxin might have escaped the former Monsanto plant and contaminated homes in the Nitro community. Instead, federal and state regulators were simply interested in remediating the plant site itself, and in ascertaining the extent of any dioxin contamination in the Kanawha River and certain of its tributaries.

Id. Further, as mentioned in the Final Order Approving Settlement, actions for medical monitoring have not fared well before juries in West Virginia.

The Court agrees with Class Counsel; this case was not desirable. This case is the very definition of high risk, high reward litigation.

x. Nature and Length of Relationship with Client

It is undisputed that Class Counsel has had a long and involved relationship specifically with the Class Representatives and generally with the Nitro community. Class Counsel avers that his "longstanding relationship with the Nitro community played a significant role in Class Counsel's decision to assume the substantial risk imposed by this litigation." *Petition for Fees and Expenses* at 35. Furthermore, Class Counsel states that "[t]he Court should take this into account when considering Class Counsel's fee petition." *Id.* The Court agrees with Class Counsel's assessment.

xi. Awards in Similar Cases

As stated previously, in regards to the percentage of the fund, the great weight of authority has found that an appropriate starting point is 25 percent. The Court can find four cases in the state of West Virginia that are directly applicable for comparison:

- *Perrine, et al. v. E.I. Du Pont De Nemours and Company* – The *Perrine* settlement was worth $120,000,000, which is the sum of $70,000,000 paid by Dupont and the $50,000,000 estimated value of the medical monitoring program. *Perrine, et al. v. E.I. Du Pont De Nemours and Company, Final Order Awarding Attorneys' Fees and Litigation Expenses and Awarding Class Representatives' Incentive Payments,* January 27, 2011 at 10-12 (dkt. no. 04-C-296-2). In *Perrine,* the Court approved attorney's fees of $22,800,000. The biggest difference between the case at bar and *Perrine* is that *Perrine* was tried before a jury, appealed to the West Virginia Supreme Court of Appeals, and remanded for a new trial on the statute of limitations defense. Consequently, there was more work involved in *Perrine* as compared to this case. Furthermore, there was no contingent award – i.e., the triggering event contained within the Medical Monitoring Settlement Class Agreement – in the *Perrine* case, as there is here.
- *Loudermilk Services, Inc. v. Marathon Petroleum Co. LLC* – The settlement award in the *Loudermilk Services* case was $25,000,000. *Loudermilk Services, Inc. v. Marathon Petroleum Co. LLC*, 623 F.Supp.2d 713, 718 (S.D. W.Va. 2009). In that case, an award of $4,250,000 was approved.[11]
- *Kay Co. v. Equitable Production Co.* – The Court found that an attorney fee award of 20%, rather than the requested 25%, of the estimated $28,000,000 to $33,000,000 settlement was appropriate. *Kay Co. v. Equitable Production Co.*, 749 F.Supp.2d 455, 471-472 (S.D. W.Va. 2010).
- *Jones v. Dominion Resources Services, Inc.* – The Court found that an attorney fee award of 20%, rather than the requested 25%, of the estimated $40,000,000 to $50,000,000

[11] In that case, the Court awarded 25% of a $15 million cash fund.

million award was appropriate. *Jones v. Dominion Resources Services, Inc.*, 601 F.Supp.2d 756 (S.D. W.Va. 2009).

2. Percentage of the Fund

The Court has reviewed the objections that go to the question of whether $30,000,000 will actually be paid by the Defendants for the property class settlement and the medical monitoring class settlement. However, a line of authority, going back to *Boeing v. Van Gemert,* 444 U.S. 472, 100 S. Ct. 745, 62 L. Ed. 2d 676, stands for the proposition that Class Counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed. (*See Waters v. International Precious Metals Corporation,* 190 F. 3d 1291 (11th Cir. 1999). In *Boeing*, Justice Powell stated that the common-fund doctrine rested on the perception

> (t)hat persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants' expense. The criteria for application of the doctrine are satisfied when, as here, each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment reserved on his behalf. In this case, absentee Class Members need only prove their membership in the injured class to claim their logically ascertainable shares of the judgment fund. Their right to share the harvest of the suit upon proof of their identity, whether they exercise it or not, is a benefit in the fund created by the efforts of Class representatives and their counsel, and unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the funds and their representation may hear additional costs." *Id. at 472-473, 745.*

This holding was applied in *Waters, supra,* wherein a $40,000,000 settlement of a class action lawsuit was achieved after seven years of litigation and five months of trial, just before closing arguments were made to the jury. The settlement was reversionary, in that any unclaimed funds would revert to the Defendants. It also contained a clear sailing agreement in

which the defendants agreed not to challenge Class Counsel's application for fees not to exceed 33 1/3 % of the settlement fund. The trial court awarded $13,333,333 in fees. The Defendants appealed, noting that the actual payment from the fund to Class Members was only approximately $6,500,000. In affirming the trial court, the 11th Circuit Court of Appeals stated that no case has held that a district court must consider only the actual payout in determining attorney's fees. The appellate court upheld the trial court.

The Court has also reviewed case law which states that "awards of attorney's fees in a common fund cases are committed to the sound discretion of the trial court." *Goodrich v. E. F. Hutton Group, Inc.,* 681 A. 2d 1039 (Del. 1996) at 1050. Moreover, federal courts have reviewed an award of attorney's fees under an abuse of discretion standard. A trial court "has great latitude in formulating attorneys' fees awards subject only to the necessity of explaining its reasoning so that we can undertake our review." *McKenzie v. Cooper, Lewis & Pastko, Inc.,* 990 F. 2d 1183, 1184 (11th Cir. 1993) (citation omitted).

In this action, as mentioned in the Final Order, the plaintiffs make serious claims about continued contamination in houses in the Class Area represented by Mr. Auberle and Dr. Flowers' exhibits. These areas have been compromised in forming the Settlement Area. Moreover, controversy surrounds the triggering event. Therefore, in the exercise of its discretion, this Court has decided to provide Class Counsel with the opportunities to earn additional fees beyond the base amounts allowed, based on the number of individuals who actually qualify for participation in the Class settlements. This serves the public policy objective of having the greatest number of houses cleaned to a standard used to cleanup lead contamination and that Mr. Carr deems appropriate. (*See* Final Order Approving Settlement). If those individuals residing in these homes do face a continuing significant risk, this action will

greatly reduce that risk. Equally, the more individuals who sign up and qualify for medical monitoring, the more chance that they will gain the benefit of a medical monitoring plan very similar to that proposed by Dr. Werntz. Also, greater participation by medical monitoring Class Members provides a greater opportunity to know as soon as possible, whether there has been significant exposure of class members to 2, 3, 7, 8-TCDD, and whether the triggering event will occur.

Using the factors discussed *supra*, the Court will analyze the percentage of the fund as it relates to each of the proposed settlements.

i. Property Class Settlement Agreement

Under *Boeing* the Property Class Settlement Agreement is worth $9,000,000. As to the percentage to award Class Counsel, after going through the factors, the Court concludes that Class Counsel should receive a base fee of 25%, or $2,250,000 from the property class settlement. Additionally, for the reasons stated above, Class Counsel can earn up to an additional 10% in fee if all 4,500 houses are cleaned, for the public policy reasons discussed above. This is payable as follows:

> An additional $200.00 in attorney's fees shall be distributed to Class Counsel for each person who registers for, and actually participates in the Property Class Settlement Agreements, up to an additional $900,000.00.

ii. Medical Monitoring without the Triggering Event

Again, applying *Boeing* the Medical Monitoring Class Settlement Agreement is worth $21,000,000. As with the Property Class, the Court concludes that Class Counsel should receive a base fee of 25%, or $5,250,000 from the base medical monitoring class settlement. Additionally, for the reasons stated above, Class Counsel can earn up to an additional 10% fee if

up to 5,000 people participate in the base medical monitoring program at least once, for the public policy reasons discussed above. This fee is payable as follows:

> An additional $500.00 in attorney's fees shall be distributed to Class Counsel for each person who actually qualified for and participates in the base medical monitoring settlement agreement, up to an additional $2,100,000.00.

These incentives provide the Court with a guarantee that Class Counsel will stay involved in the case on behalf of the Class members. Furthermore, this assures the Court that Class Counsel, along with the Class Administrator, will be involved in registering potential Class Members and ensuring that eligible class members participate in these settlements.

The Court notes that Class Counsel will not receive any credit for those Class Members who register but are not qualified; i.e., do not meet the requirements for admittance into either of the settlement agreements.

The Court will allow Class Counsel to take credit for all of the individuals who are currently registered for the settlements. Furthermore, the Court will be ***very*** liberal in its determination of whom Class Counsel registers. In other words, if there is a question as to who got an individual to register, the Court will give credit to Class Counsel.

iii. Triggering Event

It would be difficult to determine the actual cash value of the triggering event. Of course, the maximum value of the triggering event is $63,000,000; this money will be in addition to the $21,000,000 funds, and will be used for additional testing. As stated, the $63,000,000 is only the maximum value. For every dollar to be spent from it, three contingencies must be met. First, there must be at least 100 or more participants who have their serum dioxin levels tested. Second, of the 100 or more individuals, 25% must have their serum dioxin levels exceed agreed

upon background levels. Third, these first two conditions must happen every testing period for the additional funds to be available.

Basically, there are two competing concerns before the Court. The Court notes that Class Counsel is entitled to some compensation for creating a common fund. In other words, Class Counsel deserves to be compensated for his work in creating a benefit for the Class Members. However, Class Counsel created a fund that can best be described as contingent. The Court must also be mindful of only awarding attorneys' fees for "benefits actually delivered." Manual for Complex Litigation § 21.71 (4th ed. 2011). With this fact in mind, the Manual for Complex Litigation has stated that "[i]t is common to delay a final assessment of the fee award and to withhold all or a substantial part of the fee until the distribution process is complete." *Id.*

Therefore, the Court awards the following to Class Counsel for the creation of the triggering event's additional funds:

- Base Award: $5,500,000 in attorneys' fees shall be paid immediately to Class Counsel for his work in the creation of the triggering event part of the Medical Monitoring Class Settlement Agreement.
- Contingent Award: $6,500,000 in attorneys' fees shall be paid by the Defendants to the Putnam County Circuit Clerk and placed into an interest bearing escrow account and shall be distributed to Class Counsel if the "triggering event" is triggered not later than year five.

The Court notes that this is not an innovative approach. As indicated earlier, the Manual for Complex Litigation supports such a bifurcation. Furthermore, this approach has been approved by other courts. Specifically, the Third Circuit Court of Appeals has approved a District Court's bifurcation when there was a contingent future award.

> [T]he district court was required to make a "reasonable estimate" of the settlement's value in order to calculate attorneys' fees using the percentage-of-recovery method. . . . But, as the district court noted, this is "an atypical common fund case" involving an uncapped, "future fund" whose ultimate value is dependent on the final number of claims remediated under the settlement, and, as a result, "the settlement ... cannot reasonably be valuated." . . . The fee examiner's report reflected this uncertainty. The report could only offer a range of possible values, with the highest and lowest figures separated by over $800 million. Even class counsel's own expert conceded that his calculations were merely "approximations." . . . Consequently, a straightforward application of the percentage-of-recovery test is difficult in this instance.
>
> The district court attempted to overcome this problem by bifurcating the fee award, exercising its sound discretion to award reasonable attorneys' fees. . . . The district court's plan was designed to overcome the speculative nature of the tentative and imprecise settlement valuations. It took into account the settlement's more definite terms by providing an immediate payment based on a percentage of the guaranteed minimum recovery of $410 million, while requiring future payments to be based on actual results in recognition that the ultimate class recovery is not quantifiable at this point. ***We hold the district court's creation of a bifurcated fee structure was an appropriate and innovative response to the structure of the settlement, and well within its sound discretion***.

In re Prudential Ins. Co. American Sales Practice Litigation Agent Actions, 148 F.3d 283, 333-334 (3rd Cir. 1998)(emphasis added)(citations and footnotes omitted). The Court finds this approach to be fair to Class Counsel.

Class Counsel deserves some benefit for creating a contingent award. Therefore, the base award of $5,550,000 represents approximately 8.3% of the possible recovery of $63,000,000. This amount is not excessive, but is still enough to appropriately compensate Class Counsel for his work given the contingent nature of the triggering event.

On the other hand, public policy demands that Class Counsel should not be in a better position than his clients. The Class Members only have a possibility of a further benefit because

Class Counsel bargained and settled for just that. Class Counsel gets exactly what he bargained and settled for his clients; a contingent award. To do otherwise could put Class Counsel into such a position. This would have the effect of destroying the public's faith in the judicial system.[12]

Furthermore, it is inappropriate for the Court to award more without having any knowledge as to the actual benefit that will be provided to the Class Members. Consequently, the Court will approve a contingent award of $6,500,000 if the "triggering event" is triggered at any point through year 5.

Tying the fee award to not later than year 5 is appropriate for two reasons. First, it is tied to the best possible scenario. The record in this case indicates that if the "triggering event" is not triggered within the first two testing cycles – that is year 0 and year 5 – it will probably not occur. Second, it would be inappropriate for the Court to award attorneys' fees 20 or 30 years in the future. Therefore, linking the contingent award to the triggering event occurring not later than year 5 is appropriate.[13]

4. Lodestar Cross Check

The lodestar method confirms the Court's award. As stated *supra*, the Court has determined that approximately 26,688.16 attorney hours and 37,280.05 paralegal hours have been spent on this case. Furthermore, the Court has determined that an appropriate hourly rate in this market is $325 for an attorney and $100 for a paralegal. Consequently, the appropriate fee for attorney hours is $8,673,652 (26,688.16 attorney hours x $325 an hour) and the appropriate

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[12] This public policy concern was eloquently stated by Judge Goodwin in *Kay*. Therein he states that "the Court must consider the public perception that class action plaintiff's attorneys receive artificially high windfalls, often at the expense of Class Members...The Court must also consider whether the fees awarded in this case will promote the important public policy that attorneys should continue to take on 'class actions that vindicate rights that might otherwise go unprotected'" (citation omitted) at 468.

[13] The Court wants to be clear; it is not passing judgment on contingent awards, such as the trigger event in the settlement at bar. Contingent awards are a unique and helpful tool to settle a complicated case. However, an attorney who negotiates a contingent award is not entitled to be fully compensated for the total amount of the contingent award when his own clients may not be able to collect anything. In other words, an attorney should not be in a better position than his clients.

payment for paralegal hours is $3,728,005 (37,280.05 paralegal hours x $100 an hour). Therefore, the total attorneys' fees, without a potential multiplier, are $12,401,657 ($8,673,652 + $3,728,005). The lodestar fee, without the potential multiplier, closely matches the $13,000,000 base award (Property Class: $2,250,000 – Medical Monitoring without the triggering event: $5,250,000 – Medical Monitoring triggering event: $5,500,000).

The Court notes that a multiplier is not a guaranteed benefit. McLaughlin on Class Actions (8th ed.) § 6:23 at 144-145. In fact, "in most cases the lodestar figure is ***presumptively a reasonable fee award***, [and] the . . . court ***may, if circumstances warrant***, adjust the lodestar to account for other factors." 35B C.J.S. Federal Civil Procedure § 1350. These other factors are, as state *supra*, the *Aetna* factors.

Judge Goodwin's order in *Kay v Equitable,* 749 F. Supp. 455 (S.D. W. Va. 2010) provides great guidance. In that order, awarding attorney's fees in a class action, Judge Goodwin discussed the lodestar cross-check method. At the conclusion of his analysis he found that "[c]ourts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorney's fee." *Id.* at 470. He also cited authority that "multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."[14] The Court finds that it is possible the Class Counsel may earn the entire fee, and if so, that represents a multipler of less than 2, which is well within the range of reasonableness.

C. Incentive Payments for Class Representatives

The Court **APPROVES** the award of incentive payments to the named Class Representatives. This case would have never existed without their efforts. Furthermore, they have expended a significant amount of time and energy to assist with the prosecution of this

[14] Judge Bedell also used the lodestar method as a cross-check in *Perrine,* and applied a multiplier of two (2.0) as the lodestar. *Perrine, Final Order Awarding Attorney's Fees and Litigation Expenses and Awarding Class Representatives Incentive Payments,* 04-C-296-2, at 23.

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 confidential medical records to Class Counsel and Defendant; and (5) lending of their names and reputations in the community, to this action. Consequently, the Court **ORDERS** Class Counsel to pay each of the named Class Representatives $25,000 each within the time set out in the conclusion of this *Order*.

D. Attorneys' Liens

The Court notes that there are two attorneys' liens filed in this case. The first attorney's lien was file by Mr. Humphreys against Virdie Allen, Hillman Raynes, Erma Raynes, Charles Agee, and Eileen Agee on September 13, 2007. (dkt. no. 602). The second attorney's lien was filed by the estate of James Harvey Falk, Jr., by counsel, Joanna I. Tabit, Esq., of Steptoe & Johnson PLLC, against Mr. Urban on January 27, 2012. (dkt. no. 2967).

In this *Order*, and in the settlement as a whole, Virdie Allen, Hillman Raynes, Erma Raynes, Charles Agee, Eileen Agee, and Mr. Urban are not receiving any award or fee. Consequently, there is nothing for these liens to attach to; therefore, there is no justiciable issue for the Court to rule upon.[15]

IV. Conclusion

For the reasons set forth *supra*, the Court **FINDS and ORDERS** as follows:

A. The Court **GRANTS** Class Counsel's *Petition for Fees and Expenses* as follows:

[15] If at some point in the future, these individuals receive an award from a future court order, the issue will be addressed at that time, upon motion of counsel seeking the protection of their lien.

1. $20,000,000 shall be paid by the Defendants to Class Counsel. The breakdown of this amount is as follows:
   a. $7,000,000 in reimbursement of litigation expenses;
   b. $2,250,000 in base attorneys' fees for the $9,000,000 provided in the Property Class Settlement Agreement;
   c. $5,250,000 in base attorneys' fees for the $21,000,000 provided in the Medical Monitoring Class Settlement Agreement;
   d. $5,500,000 in attorneys' fees for the potential $63,000,000 "triggering event" provided in the Medical Monitoring Class Settlement Agreement.
2. $9,500,000 shall be paid by the Defendants into an interest bearing federal depositors insurance corporation "FDIC" escrow account in a federally-insured banking institution and shall be distributed as follows:
   a. An additional $200 in attorney's fees shall be distributed to Class Counsel for each person who registers and is qualified for and actually has partnership in cleanup the base Property Class Settlement Agreement, up to an additional $900,000.00;
   b. An additional $500 in attorney's fees shall be distributed to Class Counsel for each person who registers and is qualified for the basic Medical Monitoring Class Settlement Agreement, up to an additional $2,100,000;
   c. An additional $6,500,000 shall be distributed to Class Counsel if the "triggering event" is triggered not later than year five of the settlement.
   d. The payments ordered in Paragraph A.2.a and A.2.b shall be paid to Class Counsel no later than thirty (30) days after the final number of people who

qualify for each program is determined. Barring disagreements, the report of the Class Administrator to the Court will provide sufficient notice of the number of participants, and will trigger the payment of the additional attorney's fees.

B. The Court **GRANTS** Class Counsel's *Motion for Incentive Payments*; consequently, the Court **ORDERS** Class Counsel to pay the sum of $25,000.00 to each of the Class Representatives to be paid within ten (10) days after Class Counsel receives his first fee payment from any portion of the fees awarded to him in IV.A.1, above.

C. 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.

Furthermore, the Court **ORDERS** the Putnam County Circuit Clerk to mail a copy of this *Order* to all parties of record, including:

The Honorable O.C. "Hobby" Spaulding
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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, 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.