UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

JASEN BRUZEK, HOPE KOPLIN, and CHRISTOPHER PETERSON, individually and on behalf of all others similarly situated,	)	**Case No. 18-cv-697** **(Jury Trial Demanded)**
Plaintiffs,	)	
v.	)	
HUSKY ENERGY INC. and SUPERIOR REFINING COMPANY LLC,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

Plaintiffs move the Court for preliminary approval of a class action settlement after reaching an agreement with Defendants. The proposed Settlement resolves the claims of Plaintiffs Jasen Bruzek, Hope Koplin, and Christopher Peterson ("the Class Representatives") and a class of individuals who were over the age of 18 and subject to the evacuation order declared on April 26, 2018 as a result of the Superior Refinery explosion and fire ("the Evacuation Order"), and seek compensation for economic loss or loss of use and enjoyment of their property, excluding personal injury damages ("Class Members"). The proposed Settlement brings nearly three years of hard-fought litigation to a conclusion.

On August 20, 2018, the Class Representatives filed a class action complaint seeking to represent a class of Superior residents subjected to the Evacuation Order against the owners and operators of the Superior Refinery—Husky Energy, Inc. (later replaced with Husky Oil Operations

Ltd. ("Husky Oil")) and Superior Refining Co. LLC ("SRC") (collectively, "Defendants"). Class Representatives alleged Defendants used unsafe operating procedures and outdated equipment, creating a risk of harm that materialized when the refinery exploded, causing a fire and risk that hydrogen fluoride would be released upon and harm Superior's residents. Defendants have consistently denied Class Representatives' allegations and defended themselves aggressively, and assert they already provided adequate compensation through a reimbursement program offered after the explosion and evacuation ("Reimbursement Program").

Litigation of the case has proven to be complex. At the outset, the Parties briefed three motions seeking to dismiss or limit the scope of Class Representatives' case on the pleadings, each of which the Court denied. The Class Representatives and Defendants then undertook significant discovery of Defendants' alleged liability and the Class Representatives' purported classwide damages model, including securing expert testimony and briefing discovery disputes before the Court. Upon completion of fact and expert discovery, the Parties filed several additional critical motions, including Class Representatives' Motion for Class Certification, Defendants' Motions to Exclude Class Representatives' damages experts, and Defendants' Motion for Partial Summary Judgment.

The almost three years of litigation have paved the road for additional, complex disputes to be addressed before and at trial. Class Representatives succeeded in certifying a Class of individuals subject to the Evacuation Order for purposes of determining Defendants' alleged liability and defeating Defendants' motion to exclude the Class Representatives' damages expert. However, Defendants successfully raised challenges to the Class Representatives' ability to prove classwide damages and created the possibility that Class Members would need to individually establish causation and damages at separate hearings, and the Court allowed Defendants to reraise

their motion to exclude Class Representatives' damages expert in the future. The Court also granted Defendants' Motion for Partial Summary Judgment, precluding the Class Representatives from seeking injunctive relief or pursuing their Rule 23(b)(2) class. Thus, both Parties faced risks and additional expenses should litigation continue.

Prior to briefing the motions for class certification and partial summary judgment, the Parties explored settlement without success. Recognizing the complex disputes ahead after the Court's rulings on class certification and summary judgment, the Parties agreed to mediate the case on April 15, 2021 before an experienced mediator, Hon. Wayne R. Andersen, a former judge of the United States District Court for the Northern District of Illinois. The Parties mediated all day before Judge Andersen but failed to reach an agreement. However, after continued negotiations spanning the course of several weeks with further assistance from Judge Andersen, the Parties agreed to a term sheet outlining a basic settlement structure on May 6, 2021.

Now, Plaintiffs come before the Court to present the Settlement Agreement for preliminary approval under Fed. R. Civ. P. 23(e). The Settlement is a benefit to the Class and allows all Class Members to seek relief for alleged losses due to the explosion and Evacuation Order. Under the Settlement, Defendants will pay $1,050,000 into a Claimant and Notice Fund ("the Fund"). The Fund will pay (1) Class Members who submit a valid claim, $150 per Class Member or $300 per household, with the possibility of a *pro rata* increase to $200 per individual or $400 per household, subject to an offset for amounts previously paid to or for the Class Member through the Reimbursement Program, (2) service awards of $2,000 each to the Class Representatives (not to exceed $6,000 total), and (3) the total costs of notice and claims administration (not to exceed $ 169,000). All Class Members will have an opportunity to submit a claim. Payment is not dependent

on the Class Member's ability to prove his or her damages. Rather, to receive a payment, a Class Member need only complete a simple claim form supplying basic information.

Additionally, Defendants have agreed to pay Class Counsel's attorneys' fees and expenses as awarded by the Court ("the Fee Award"), within thirty (30) days of the exhaustion or expiration of any and all appeal rights related to the Fee Award. Class Counsel will separately move the Court for the Fee Award to be paid by Defendants, who again have agreed not to challenge Class Counsel's entitlement to reasonable fees but may oppose the requested amount. Any monies that remain in the Fund after payment of the service awards, the notice and administration costs, valid and timely claims after the *pro rata* increase, and the $75,000 disbursement *cy pres* to the Superior Douglas County Family YMCA shall be used to offset the Fee Award. Defendants shall separately pay the remainder of any such Fee Award separate and apart from the Fund. Neither party may terminate or modify the Settlement based on the Fee Award.

Finally, the Parties have retained an experienced Settlement Administrator, JND Legal Administration, to administer the Fund and to issue Notice to Class Members. Under the Notice Plan, direct mailed notice will be sent to 15,000 households within the Evacuation Zone. The direct mailed notice is expected to reach the vast majority of Class Members. Additionally, the Notice Plan uses four methods to supplement the direct mailed notice program: (1) publication notice placed in two popular local newspapers; (2) an online digital media advertisement campaign directed towards Class Members; (3) radio advertisements played on two local radio stations; and (4) a press release sent to journalists and media organizations throughout Wisconsin. JND expects the direct and supplemental notice will reach well over 70% of the Class, satisfying Fed. R. Civ. P. 23(c)(2)'s notice criteria.

The proposed settlement satisfies the preliminary approval criteria that a settlement be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). As such, Class Representatives bring this unopposed motion requesting the Court to take the initial steps in the settlement approval process by: (1) granting preliminary approval of the proposed Settlement; (2) approving the proposed Class notification procedures and forms of notice; and (3) scheduling the final Fairness Hearing and related deadlines.

BACKGROUND

I. CLASS REPRESENTATIVES' ALLEGATIONS AND CLASS ACTION COMPLAINT

On April 26, 2018, Defendants' refinery in Superior, Wisconsin suffered an explosion and fire that, Class Representatives alleged, created a risk of harm to Superior residents due to the possibility that hydrogen fluoride would be released and harm city residents. Sec. Amend. Compl., ECF No. 93, at ¶¶ 1–2, 23–30 (Nov. 26, 2019). As a precaution, local governmental authorities issued an Evacuation Order that was in place for 18 hours from April 26, 2018 to the morning of April 27, 2018. *Id.* at ¶¶ 31–37.

Class Representatives Bruzek, Koplin, and Peterson[1]—all residents of Superior, Wisconsin—sued Husky Oil and SRC, claiming they created dangerous circumstances that led to the explosion and the Evacuation Order.[2] *See generally id.* Class Representatives sought damages due to the loss of enjoyment and use of their property—which they asserted were suffered by both

[1] Neil Miller, an original Plaintiff in this case, later withdrew and his claims were voluntarily dismissed without prejudice. *Stip. For Voluntary Dismissal Without Prejudice of Pl. Neil Miller*, ECF No. 107 (Mar. 24, 2020).

[2] The initial Complaint was twice amended to add additional allegations, modify the proposed class definition, replace Defendant Husky Energy, Inc. ("HEI") with Husky Oil after jurisdictional discovery, and add Plaintiff Peterson. *See* Compl., ECF No. 1 (Aug. 20, 2018); Amd. Class Action Compl., ECF No. 29 (Nov. 28, 2011); Sec. Amend. Compl., ECF No. 93 (Nov. 26, 2019).

those who evacuated and those who did not—and additionally, evacuation-related travel and meal expenses. *Id.* at ¶ 90. Class Representatives brought four claims against Defendants: (1) negligence, (2) nuisance, (3) trespass on land, and (4) strict liability for extrahazardous activity. ECF No. 93, ¶¶ 106–132. Class Representatives, additionally, sought punitive damages and injunctive relief. *Id.* at ¶¶ 133–36.

Class Representatives also each detailed the damages they allegedly suffered due to the Evacuation Order. Bruzek and Peterson both evacuated from Superior with their families and alleged that they incurred travel and meal expenses and suffered harm due to the evacuation. *Id.* at ¶¶ 91, 95. Plaintiff Koplin also alleged that she suffered losses due to the evacuation of her and her elderly mother who she cared for fulltime, and who died shortly afterward. *Id.* at ¶¶ 92–93.

Defendants have denied all wrongdoing and claimed that their voluntary Reimbursement Program offered a sufficient opportunity for Superior residents to obtain reimbursement for any harm suffered by the evacuation. *Id.* at ¶¶ 82–85. Under the Reimbursement Program, approximately 3,200 individuals applied for relief and approximately 1,700 received reimbursement for costs related to the explosion and evacuation. The remaining applications were denied for having provided insufficient evidence of their costs. Class Representatives acknowledged that Defendants implemented the Reimbursement Program but asserted that it failed to cover all expenses and that many residents subject to the Evacuation Order did not obtain relief through the Reimbursement Program. *Id.* at ¶¶ 88–89.

II. PROCEDURAL POSTURE AND DISCOVERY

A. Defendants' Initial Efforts to Dismiss or Limit Class Representatives' Action

Early in this action, Defendants sought to dismiss or limit the scope of Class Representatives' action through two motions to dismiss and a motion to strike certain allegations

in the Complaint. These early motions threatened to eliminate or severely truncate Class Representatives' case and, as such, Class Representatives strongly opposed each one.

First, Defendants moved to dismiss Class Representatives' claims and Class Representatives' requests for injunctive relief and punitive damages. *See Mot. to Dismiss for Failure to State a Claim*, ECF No. 41 (Jan. 4, 2019). Second, Husky Energy Inc. ("HEI") moved to dismiss itself as a defendant because it claimed that the Court had no general personal jurisdiction over it as it was located in Canada, and no specific personal jurisdiction over it as it did not operate the refinery or the Reimbursement Program. *Mot. to Dismiss for Lack of Personal Jur.*, ECF No. 43 (Jan. 4, 2019); *Mem. in Supp. of Mot. to Dismiss for Lack of Personal Jur.*, ECF No. 44, at 6–8 (Jan. 4, 2019). Third, Defendants moved to strike Class Representatives' class allegations and allegations as to the U.S. Safety and Hazard Investigation Board's ("CSB") investigation into the explosion. *Mot. to Strike Pls. Class Allegations*, ECF No. 47 (Jan. 4, 2019). Specifically, Defendants claimed that a class action would be an inferior means of providing relief to the Class than the Reimbursement Program. *Mem. in Supp. of Mot. to Strike Pls. Class Allegations*, ECF No. 48, at 6–10 (Jan. 4, 2019). Defendants also argued the CSB's investigation and report were inadmissible under applicable CSB regulations. *Id.* at 12–13.

Class Representatives opposed each of Defendants' motions. First, Class Representatives asserted that they had properly pled each of their four claims, and that their requests for punitive damages and injunctive relief should not be dismissed. *Pls.' Opp. to Defs.' Mot. to Dismiss for Failure to State a Claim*, ECF No. 53 (Jan. 25, 2019). Second, Class Representatives argued that it was premature to strike their class allegations and the CSB report. *Pls.' Opp. to Defs.' Mot to Strike Pls.' Class Allegations*, ECF No. 51 (Jan. 25, 2019). Finally, Class Representatives opposed Defendants' motion to dismiss for lack of personal jurisdiction because Class Representatives

alleged HEI oversaw the refinery and Reimbursement Program and had sufficient contacts with Wisconsin. *Pls.' Opp. to Defs.' Mot. to Dismiss for Lack of Personal Jurisdiction*, ECF No. 78 (Aug. 30, 2019).

On August 30, 2019, the Court denied Defendants' motions in their entirety. *Opin. & Ord.*, ECF No. 78 (Aug. 30, 2019). Thus, each of Class Representatives' claims survived, the Complaint's class allegations and citations to the CSB report were maintained, and HEI remained a defendant in the case.

B. The Continued Dispute as to the Court's Personal Jurisdiction Over HEI

Although Class Representatives succeeded in opposing HEI's motion to dismiss for lack of personal jurisdiction, HEI asked the Court to reconsider its decision and moved to certify the Court's order for interlocutory appeal. *See Mot. to Reconsider*, ECF No. 81 (Oct. 10, 2019); *Mot. for Interlocutory Appeal*, ECF No. 79 (Oct. 10, 2019). After the Parties fully briefed both the Motion to Reconsider and the Motion for Interlocutory Appeal, the Court granted the Motion to Reconsider, denied the Motion to Certify for Interlocutory Appeal as moot, and ordered additional discovery on whether it had personal jurisdiction over HEI. *Text Only Ord.*, ECF No. 89 (Oct. 25, 2019). Although Class Representatives maintained that the Court had personal jurisdiction over HEI, they filed a Second Amended Class Action Complaint replacing HEI with Husky Oil Operations, Ltd. as a Defendant, resolving the personal jurisdiction dispute. ECF No. 93, at ¶¶ 10–11.

C. The Parties' Discovery Efforts

The Class Representatives and SRC undertook discovery during nearly three years of litigation. Class Representatives served two sets of interrogatories and requests for production of documents on SRC and HEI, took additional jurisdictional discovery on HEI, and took remote depositions of two defense witnesses, Bill Demchuk and Helmut Streblow.

Early on, Defendants objected to discovery during the pendency of their early motions to dismiss and to strike allegations. The Parties exchanged numerous letters outlining disputes as to the sufficiency of the productions and HEI's refusal to participate in discovery. The Parties also fully briefed Defendants' motion to stay discovery, which the Court denied. *See Mot. to Stay Discovery*, ECF No. 67 (Aug. 1, 2019); *Pls. Opp. to Defs. Mot. to Stay Discovery*, ECF No. 70 (Aug. 9, 2019); *Ord.*, ECF No. 74 (Aug. 13, 2019).

Class Representatives obtained expert testimony and reports from three experts: Dr. John A. Williams, Ph.D., a licensed professional engineer who reported on the causes and risks of the explosion; Dr. Charles Baum, Ph.D., a professor of economics and finance at Middle Tennessee State University, who opined on a classwide method to measure the value of economic losses due to nuisance, annoyance, inconvenience, and discomfort; and Dr. John A. Kilpatrick, a Ph.D. in Finance and the Managing Direct of Greenfield Advisors, Inc., who opined on damages due to loss of use of enjoyment by residential property owners during the period of evacuation. Class Representatives later withdrew Dr. Kilpatrick's opinion.

Class Representatives responded to discovery requests, including SRC's requests for production of documents and interrogatories, and each Class Representative sat for a remote deposition. Additionally, Defendants deposed all three of Class Representatives' experts, and submitted expert reports by: Ennio Mastracci, P.Eng., who opined on the Refinery's practices and safety systems, including the hydrogen fluoride safety systems; Erin M. Johnson, Ph.D., Senior Economist at Data for Decisions, LLC, who responded to Dr. Baum' report and opined that it was not appropriate, from an economic point of view, to determine damages for annoyance, discomfort, and inconvenience, lost wages, and out-of-pocket expenses on a classwide basis; and Trevor E. Phillips, a Managing Director with Alvarez & Marshal Disputes and Investigations, LLC, who

responded to Dr. Kilpatrick's report and opined, from a real estate appraisal perspective, that the loss of use and enjoyment damages alleged by Class Representatives could not reliably be determined in a classwide manner.

Apart from formal discovery in this litigation, Class Representatives also sought material information about the explosion and its consequences through requests to government agencies. In all, Class Representatives made eleven different record requests to: (1) the City of Superior, (2) the City of Superior Fire Department, (3) the City of Superior Police Department, (4) Douglas County, Wisconsin, (5) the Wisconsin Department of Health, (6) the Wisconsin Department of Natural Resources, (7) the City of Duluth, Minnesota, (8) the CSB, (9) the U.S. Department of Environmental Protection, (10) the U.S. Department of Labor Occupational Safety and Hazard Administration, and (11) the Ohio Environmental Protection Agency.

Due to these discovery efforts, the Parties were fully capable of assessing the merits of Class Representatives' case and the costs and risks of continued litigation.

D. Class Representatives' Motion for Class Certification and Defendants' Motion for Partial Summary Judgment

Toward the end of discovery, the Parties briefed another series of motions: First, Class Representatives moved to certify Rule 23(b)(3) and 23(b)(2) classes for three of their claims: negligence, nuisance, and strict liability. *See Pls. Mot. for Class Cert.*, ECF No. 108 (Ju. 13, 2020). Specifically, Class Representatives sought certification of a Rule 23(b)(3) class of "all persons over the age of 18 subject to the Evacuation Order declared on April 26, 2018 as a result of the Superior Refinery explosion and fire." *Mem. in Supp. of Pls. Mot for Class Cert.*, ECF No. 109, at 1 (June 13, 2020). Class Representatives also sought certification of a Rule 23(b)(2) class of "all persons who continue to live within the evacuation zone," seeking injunctive relief with respect to the Superior Refinery's continued operations. *Id.*

Defendants opposed the Motion and, at the same time, moved to exclude both of Class Representatives' damages experts—Dr. Baum and Dr. Kilpatrick. *Defs. Opp. to Pls. Mot. for Class Cert.*, ECF No. 141 (Aug. 18, 2020); *Defs. Mot. to Exclude the Opin. of Pls. Expert Charles Baum*, ECF No. 134 (Aug. 26, 2020); *Defs. Mot. to Exclude the Opin. of Pls. Expert John Kilpatrick*, ECF No. 130 (Aug. 18, 2020). Class Representatives withdrew Dr. Kilpatrick's report and opposed Defendants' motion to exclude Dr. Baum's opinions. *Pls. Opp. to Defs. Mot. to Exclude the Opin. of Charles Baum*, ECF No. 149, (Sept. 4, 2020); *Pls. Resp. to Defs. Mot. to Exclude the Opin. of John Kilpatrick*, ECF No. 151 (Sept. 4, 2020).

Separately, Defendants moved for partial summary judgment on Class Representatives' request for injunctive relief, on the ground, *inter alia*, that Class Representatives lacked standing to pursue an injunction because they did not face an imminent risk of future harm from the operation of the Superior Refinery. *Defs. Rule 56(a) Mot. for Partial Summ. J.*, ECF No. 137, at 1–3 (Aug. 18, 2020). Class Representatives opposed Defendants' Motion, asserting that the Refinery's use of hydrogen fluoride put the Class at continued risk of future harm and, thus, they had standing to sue for injunctive relief. *Pls. Opp. to Defs. Rule 56(a) Mot. for Partial Summ. J.*, ECF No. 182, at 12–16 (Oct. 2, 2020).

On February 19, 2021, the Court ruled on Class Representatives' Class Certification Motion, Defendants' Motion to Exclude Dr. Baum's testimony, and Defendants' Motion for Partial Summary Judgment. *See Opin. & Ord.* ("Class Cert. Ord."), ECF No. 232 (Feb. 19, 2021). The Court certified a Rule 23(b)(3) class for purposes of litigating Defendants' alleged liability as to the negligence, nuisance, and strict liability claims. *Id.* at 20–33. The Court defined the certified Class as: "All persons over the age of 18 subject to the Evacuation Order declared on April 26, 2018 as a result of the Superior Refinery explosion and fire who seek compensation for economic

loss or loss of use and enjoyment of their property, excluding personal injury damages." *Id.* at 36. The Court also granted Defendants' motion for partial summary judgment and, therefore, denied Class Representatives' request to certify a 23(b)(2) injunctive relief class. *Id.*

Finally, the Court also denied Defendants' motion to exclude Dr. Baum's testimony creating a model for calculating classwide damages. *Id.* at 34, 36. However, given the Court's decision to bifurcate the case—in which only common issues of liability may be tried as a class—the Court held that it would allow Defendants to reraise this issue in a motion *in limine* and noted Class Members may need to provide individual evidence of causation and damages. *Id.* at 29, 34.

III. MEDIATION AND THE PROPOSED SETTLEMENT

After the Class Certification and Summary Judgment rulings, the Parties agreed to mediate the case before the Honorable Wayne R. Andersen, a retired judge of the United States District Court for the District of Northern Illinois, where he served for 20 years. On April 15, 2021, the Parties participated in an all-day virtual mediation with Judge Andersen, but the Parties did not reach an agreement. The Parties' settlement discussions continued over the next few weeks with Judge Andersen's assistance. On May 6, 2021, after extensive, arm's length negotiations, the Parties agreed upon a term sheet outlining the structure of the Settlement Agreement now before the Court.

A. The Settlement's Benefits to the Class

The proposed Settlement, which is set forth in the Settlement Agreement ("SA") attached to the Declaration of J. Gordon Rudd, Jr. ("Rudd Decl."), resolves the claims of Class Representatives and the certified Class consisting of approximately 20,000 Class Members. Under the Settlement Agreement, Defendants have agreed to pay $1,050,000 into a Claimant and Notice Fund ("the Fund") and have agreed to pay any Fee Award after all appeals, either from the Fund

(if amount remain in the Fund after all of the other payments have been made, *see* below), separately funded by Defendants, or both. SA, at §§ 2.35, 3.1, 7.1.

The Fund will be used to pay (1) Class Members who submit a valid claim, $150 per Class Member or $300 per household, with the possibility of a *pro rata* increase to $200 per individual or $400 per household, subject to an offset for amounts previously paid to or for the Class Member through the Reimbursement Program, (2) service awards of $2,000 each to the Class Representatives (not to exceed $6,000 total), and (3) the total costs of notice and claims administration (not to exceed $ 169,000).

Id. at § 3.1.3.

To receive an award, Class Members must submit a simple Claim Form. *Id.* at Ex. A. The Claim Form requests each Claimant provide his or her: (1) name, (2) current mailing address, (3) mailing address on April 26, 2018—the date of the explosion and evacuation—and (4) current email address. *Id.* at §§ 4.1, 4.3. Claimants need not provide any proof of damages. Rather, the Claim Form requires only that the Claimant certify that he or she was subject to the Evacuation Order. *Id.* at § 4.3.4. Finally, Class Members must indicate whether any amount was already received through the Reimbursement Program and, if so, the amount received. *Id.* at § 4.3.5. Any amount that Class Members received through the Reimbursement Program will be deducted from the claim payment. *Id.* at § 4.4.

An experienced Claims Administrator, JND, will administer the claims. All Class Members who submit valid and timely claims will receive a Settlement Benefit of $150.00 per individual or a total of $300.00 per household, subject to the set-off for amounts received through the

Reimbursement Program.[3] *Id.* If, after payment of service awards and notice and administration costs, the amount remaining in the Fund exceeds the combined value of all valid $150 individual claims and $300 household claims, then the Claim values will be increased by a pro-rated amount up to $200 per claim or $400 per household. *Id.* at §§ 3.1.4, 4.4. If any amount remains in the Fund after the pro-rated increase, up to $75,000 will be paid to the Superior Douglas County Family YMCA as a *cy pres* beneficiary. *Id.* at § 3.1.5. Any amount remaining after that *cy pres* payment will be used to offset any Fee Award once appeals are finalized. *Id.* at §§ 3.1.6, 3.1.7. In the unlikely event that some amount remains after payment of attorneys' fees, it will then be paid to the Superior Douglas County Family YMCA. If, however, after paying the service awards and notice and administration costs from the Fund, the combined value of all valid $150 individual claims and $300 household claims exceeds the amount in the Fund, then the claim values will be decreased by a pro-rated amount.

In exchange for payment into the Fund, Class Members agree to release Defendants and their affiliates of any and all liability arising out of the Superior Refinery explosion and evacuation except as to personal injury claims. *Id.* at §§ 2.28, 9.1–9.4.

B. Notice Plan

The Settlement Agreement calls for notice to be disseminated to the Class according to JND's Notice Plan, submitted to this Court. *Id.* at § 5.3, Ex. B. Using Census data, JND estimates that approximately 20,782 adults 18 years or older reside in Superior, Wisconsin in approximately 11,727 households. Decl. of Gina M. Intrepido-Bowden of Proposed Plan on Notice of Pendency ("Intrepido-Bowden Decl."), ¶ 14. JND analyzed census data and found that Wisconsin residents

[3] If multiple claimants from the same household submit valid Claims, the Claims Administrator will distribute the $300 reward in equal proportions to each valid Claimant of that household after deducting any amount previously paid through the Reimbursement Program. SA, at § 4.4.

in general, and residents of the Superior area specifically, do not often move outside their state or city. *Id.* ¶ 15. With this in mind, and to maximize reach to all Class Members, JND proposes: (1) a direct mail notice be sent to 15,000 households in or around Superior, Wisconsin ("Direct Notice Plan"); and (2) a publication notice plan (including digital notice) to supplement direct notice ("Indirect Notice Plan"). *Id.* at ¶¶ 11–13.

Under the Direct Notice Plan, JND proposes to send a Postcard Notice via first class mail to approximately 15,000 households that received a May/June 2018 Superior Refinery newsletter referencing Defendants' Reimbursement Program—all of the addresses within the 54880 zip code. *Id.* at ¶¶ 16–18. JND will also send the Postcard Notice to any additional households that made a claim with the Reimbursement Program, the addresses for which will be provided by Defendants. JND estimates Direct Notice will reach the vast majority of the Class. *Id.* at ¶ 19.

Under the Indirect Notice Plan, JND proposes an extensive media campaign with four elements: (1) a half-page Publication Notice published three times each in the *Superior Telegram* and the *Duluth News Tribune* which, collectively, provides a circulation of over 17,000; (2) a 20-day digital effort targeting adults over 18 in Superior, Wisconsin using GDN, an online network that reaches internet users, Facebook users, and the top social media platforms, which JND estimates to create 390,000 impressions; (3) 32 thirty-second radio advertisements on two popular radio stations in the Superior Area, KDKE-FM and KQDS-FM; and (4) a Press Release distributed to journalists and media outlets throughout Wisconsin. *Id.* at ¶¶ 20–24.

Finally, in addition to the Notice Plan, JND will establish and maintain a case website that will allow Class Members to obtain more information about the settlement and to submit Claim Forms online. *Id.* at ¶¶ 25–26. The website will also list a toll-free number and PO box through which Class Members may obtain additional information. *Id.* at ¶ 25.

C. Attorneys' Fees and Expenses

Under the Settlement, Class Counsel may move the Court for an award of attorneys' fees and expenses to be paid by Defendants. SA, at § 7.1. Defendants agree to Class Counsel's entitlement to attorneys' fees and expenses; Defendants may, however, oppose the amount requested by Class Counsel. *Id.* The Parties agree that the denial or adjustment of Class Representatives' requested attorneys' fees and expenses shall not be grounds to seek modification or termination of the Settlement. *Id.* at § 7.4.

ARGUMENT

I. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT.

Parties seeking to settle a class action must seek approval from the Court. Fed. R. Civ. P. 23(e). In reviewing a class action settlement, the Court is tasked with determining whether the Settlement is "fair, adequate, and reasonable, and not a product of collusion." *In re AT&T Mobility Wireless Data Services Sales Litig.*, 270 F.R.D. 330, 345 (7th Cir. 2010) (internal quotations omitted); *Kaufman v. Am. Express Travel Related Services Co., Inc.*, 877 F.3d 276, 283 (7th Cir. 2017) ("A district court may approve a settlement of a class action if it concludes that it is fair, reasonable, and adequate." (internal quotations removed)).

The "fairness" inquiry proceeds through two steps. First, courts conduct "a preliminary, pre-notification hearing to determine whether the proposed settlement is within the range of possible approval. This hearing is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 315 (7th Cir. 1980) (internal quotations removed), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Second, the court conducts a final "fairness hearing" after "Class members are notified of the proposed settlement" to allow "all interested parties [to] have an opportunity to be

heard" before the court's determination on final approval of the Settlement. *Id.* "[D]eference is due to the judgment of the district judge [on the fairness of the settlement] because of his familiarity with the litigants, history of the litigation and the merits of the substantive claims asserted." *Id.*

"At the preliminary approval stage, the Court's task is to evaluate whether the Settlement is within the range of reasonableness." *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, No. 3:13-md-2439, 2015 WL 12616163, at *3 (E.D. Wis. Oct. 2, 2015) (internal quotations removed). When negotiated at arm's length, class action settlements are typically presumed to fall within the reasonableness range. *Id.* at *3. That presumption attaches because "federal courts look with great favor upon the voluntary resolution of litigation through settlement." *Armstrong*, 616 F.2d at 313. "In the class action context in particular, 'there is an overriding public interest in favor of settlement.'" *Id.* at 313 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."). Settlement also "minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *Armstrong*, 616 F.2d at 313.

The Seventh Circuit emphasizes several additional factors to consider when evaluating the fairness of a class action settlement: (1) the strength of plaintiffs' case compared to the amount of defendants' settlement offer, (2) the likely complexity, length, and expense of the litigation, (3) the amount of opposition to the settlement among affected parties, (4) the opinion of competent counsel, and (5) the stage of the proceedings and the amount of discovery completed at the time of settlement. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (citing *Isby*, 75 F.3d at 1199). These factors fully support the proposed Settlement's fairness.

A. The Settlement is Presumptively Valid Because it was Negotiated at Arm's Length by Experienced Counsel after Meaningful Discovery.

"Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness." *Subway*, 2015 WL 12616163 at *3 (citing Manual for Complex Litig., Third § 30.42 (1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.")). Where a "settlement was arrived at as the result of arms-length negotiations by competent counsel . . . [a] strong presumption of fairness attaches . . . ." *Great Neck Capital Appreciation Inv. Partnership, L.P. v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 410 (E.D. Wis. Nov. 6, 2002).

This action has been litigated for three years, putting the Parties in a strong position to understand the risks and possible outcomes of continued litigation and to fully evaluate the fairness of the settlement. *See, e.g.*, *Chesemore v. All. Holdings, Inc.*, No. 09-cv-413-WMC, 2014 WL 12730484, at *1 (W.D. Wis. Apr. 9, 2014) ("[T]he court finds that the proposed settlements appear 'fair, reasonable, and adequate'" because "at this advanced stage of litigation, plaintiffs were well equipped to evaluate the merits of the case."). During nearly three years, the Parties have briefed Defendants' three motions to dismiss and strike; taken extensive discovery, including expert testimony on liability and damages; and briefed Class Representatives' class certification motion, Defendants' partial summary judgment motion, and Defendants' motion to exclude Class Representatives' experts. The Parties are, therefore, well positioned to understand the risks of continued litigation and, further, to assess the value of the Settlement relative to those risks.

With that knowledge at hand, the Parties entered arm's length settlement negotiations before an experienced mediator, Judge Andersen. After an all-day mediation on April 15, 2021, the Parties failed to come to an agreement. However, over the course of the next several weeks

and with the continued help of Judge Andersen, the Parties entered into a term sheet on May 6, 2021 and finalized the Settlement Agreement on June 24, 2021.

Given the advanced stage of the case, the Parties' full understanding of the risks and benefits of continued litigation, and difficult negotiations before an experienced mediator, the Settlement should be presumed fair.

B. The Relevant Seventh Circuit Factors Weigh in Favor of Preliminary Approval.

In addition to the presumption of fairness, the relevant fairness factors to be considered also weigh in favor of preliminary approval.

1. The Strength of Class Representatives' Case Weighed Against the Settlement's Benefits

"The most important settlement-approval factor is 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *AT&T Mobility*, 270 F.R.D. at 346 (quoting *Synfuel Techs.*, 463 F.3d at 653). "In conducting this analysis, the district court should begin by 'quantifying the net expected value of continued litigation to the class[.]'" *Id.* (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284–85 (7th Cir. 2002)). While "a high degree of precision cannot be expected in valuing a litigation, the court should nevertheless insist that the parties present evidence that would enable possible outcomes to be estimated, so that the court can at least come up with a ballpark valuation." *Id* (internal quotations removed). Here, the settlement compares favorably to the strength of Class Representatives' case, considering the difficulty and risks inherent in continued litigation.

a. The Settlement Provides a Significant Benefit to the Class.

Under the settlement, Defendants will pay $1,050,000 into the Fund, which will be used to pay: (1) Class Representatives' service awards, (2) settlement notice and administration costs, and

(3) Class Members' claims. The amount of the Fund and payments to the Class Members are not dependent on any attorneys' fee award or payment.[4]

The Settlement allows *all* Class members to submit a Claim for $150 per individual or $300 per household. SA at § 3.2.3. Depending on the amount remaining after distribution of the service awards and payment of notice and administration costs, the Claim values may increase *pro rata* to up to $200 per individual or $400 per household. *Id.* at § 3.2.4.

While JND has designed a robust notice plan to reach a high percentage of the Class and a simplified claim to encourage participation, JND does not expect 100% of the Class to submit claims. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 667 (7th Cir. 2015) (noting that fewer than all Class members typically submit claims for a part of a class action settlement fund). Class Counsel estimates the amount of the Fund (after deducting Class Representatives' service awards and notice and administration costs) will be sufficient to pay 5,833 individual claims worth $150 (about 28% of the Class), which falls within the expected range of claims rate based on JND's experience. Intrepido-Bowden Decl., at ¶ 32; Rudd Decl., at ¶ 6. Further adjusting for the approximately 1,700 Class members that already received compensation through the Reimbursement Program, Class Counsel estimates that the Fund will be sufficient to pay $150 claims to over 30% of eligible claimants. However, should 100% of the Class Members submit individual claims, each will still receive at least $42. Rudd Decl., at ¶ 7.

Furthermore, the Settlement does not contain any requirement that Claimants provide evidence of damages. To obtain payment, Claimants need only state on the claim form that they

[4] The only instance in which the Fund would be used to pay any attorneys' fees is if, after payment of all claims using the pro-rata increased amounts, Class Representatives' service awards, notice and administration costs, and a $75,000 *cy pres* payment, money still remains in the Fund.

were within the Evacuation Zone on the date of the explosion. *See, e.g.*, *Boeing Co. v. Van Gemet*, 444 U.S. 472 (1980) ("To claim their logically ascertainable shares of the judgment fund, absentee class members need only prove their membership in the uninjured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created . . . ."). This is a substantial benefit given the risk that, should litigation continue, Class Members would be required to submit individual proof of causation and damages. Class Cert. Ord. at 29.

The burden of putting forth evidence of causation and damages—or the inability to do so—might dissuade Class Members from participating in further litigation related to causation and damages, which would lessen the recovery Class Members may obtain. *See, e.g.*, *Silver Buckle Mines, Inc. v. U.S.*, 132 Fed. Cl. 77, 103 (Fed. Cl. 2017) (noting that where "recovery is likely to be small . . . claimants would likely not seek legal redress"); *Mullins*, 795 F.3d at 665 ("[A] critical feature of class actions for low-value claims like this one" is that "only a lunatic or fanatic would litigate the claim individually[.]" (internal quotations removed)). Defendants' Reimbursement Program, for instance, required evidence of losses and secured 3,200 applicants for reimbursement, almost half of whom were denied. Thus, the opportunity to receive an award for losses incurred during a sudden evacuation by submitting a simple claim form, with no proof of damages required, is a substantial benefit to Class Members.

b. The Settlement Benefits Compare Favorably to any Likely Award at Trial.

Class Representatives strongly believe their case is meritorious and believe that they have, with their counsel, positioned themselves to be successful in the litigation. Class Representatives defeated Defendants' three early motions to dismiss or limit the scope of this case; took meaningful discovery despite Defendants' strenuous objections to discovery before rulings on their early

motions; secured expert testimony on Defendants' liability and the Class's damages; and certified a Class of Superior residents impacted by the evacuation.

Were Class Representatives to succeed at trial, dissuade the Court of its concerns about Class Representatives' classwide damages model, defeat Defendants' second motion to exclude Class Representatives' damages expert, and win on any subsequent appeals—in other words, a complete win for Class Representatives—the maximum possible recovery for the Class is approximately $9.8 million. Rudd Decl., at ¶ 8. That highest possible result is measured by using Dr. Baum's classwide damages model (which Defendants challenge) and assuming *all* Class Members evacuated (an overestimate because some unknown percentage of Class Members did not evacuate). Under those assumptions and using Dr. Baum's opinion that evacuees suffered $19.54 per hour in losses and $144 in meals and expenses, each Class member would have suffered losses of about $495.72 over the 18-hour evacuation. ECF No. 109, Ex. HH, at ¶ 25–26. While the number of Class members is not precisely known, JND estimated, based on census data, that approximately 20,782 individuals in the Superior area were over 18 on April 26, 2018, Intrepido-Bowden Decl. at ¶ 14, resulting in $10.3 million in total damages using Dr. Baum's model. The amount Defendants already reimbursed the Class through the Reimbursement Program—about $487,813—must be deducted from that award. Under those conditions, Class Representatives' best-case scenario would be an award of approximately $9.8 million after offsetting the Reimbursement Program payments.

When compared to the best-case scenario, the Settlement is within the range of reasonableness and eminently approvable. *Armstrong*, 616 F.2d at 315 (noting that "the essence of a settlement is compromise[,] an abandonment of the usual total-win versus total-loss philosophy of litigation in favor of a solution somewhere between the two extremes"); *AT&T Mobility*, 270

F.R.D. at 347 ("Because the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to the plaintiffs." (internal quotations removed)). Courts in the Seventh Circuit have held that:

> [S]imply because the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate or unfair. In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of potential recovery.

Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560, 584 (N.D. Ill. 2011) (internal quotations removed) (approving a settlement valued at about 10% of the top range of outcomes for plaintiffs); *see also Behrens v. Landmark Credit Union*, No. 17-cv-101-JPD, 2018 WL 3130629, at *5 (noting that "courts have approved settlement funds representing less than 20 percent of the potential recovery"); *In re Lawnmower Engine Horsepower Mktg. & Sales Practs. Litig.*, 733 F. Supp. 2d 997, 1008 (E.D. Wis. 2010) (approving a settlement that provided Class members with an amount between 4.4% and 13.6% of their damages).

Moreover, in valuing the fairness of a class action settlement, courts do not look only to the maximum potential recovery, but "weigh the value of the proposed settlement against the total amount that the class could recover, *discounted by the weaknesses and risks inherent in the class' claims*." *Schulte*, 805 F. Supp. 2d at 578 (emphasis added); *see also Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985) ("[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of litigation."). Several risks here for Class Representatives shows the maximum possible award is not a likely one.

First and foremost, Class Representatives are not guaranteed recovery through litigation. *AT&T Mobility*, 270 F.R.D. at 347 ("The most obvious risk of continuing this litigation is that Plaintiffs will not be successful."). Class Representatives must still convince a jury of Defendants'

liability for the explosion and must sufficiently establish with a jury and the Court—in the face of Defendants' likely second motion to exclude Dr. Baum and his damages model, and the Court's previously-expressed concerns—that Class Representatives' damages model is sufficient under Wisconsin law and accurately measures Class Members' losses. Even if successful, Class Representatives will likely face appeals.

Second, as discussed above, the Court has made several observations about Class Representatives' method of proving classwide damages that pose difficulties for Class Representatives' case. In ruling on Class Representatives' class certification motion, the Court noted that Class Representatives may need to obtain individualized evidence regarding each Class Member's losses, including the length of evacuation, wages lost, expenses incurred, and personal discomfort or annoyance suffered due to the evacuation. Class Cert. Ord. at 29. Should Class Representatives' damages model be excluded or limited, Class Representatives would be required to establish their damages through separate hearings or as otherwise ordered by the Court and may need to call individual Class members to evidence their losses. Such a process would increase the possibility that Class members may not participate due to the burden of trial compared to the relatively small individual awards or that Class Members who do participate lack sufficient evidence of their losses. *Silver Buckle Mines*, 132 Fed. Cl. at 103; *Mullins*, 795 F.3d at 665.

Third, and finally, settlement provides compensation now, while continued litigation poses a risk of significantly delaying any future award and further increasing attorneys' fee and costs. *See, e.g.*, *Seiden v. Nicholson*, 72 F.R.D. 201, 208 (N.D. Ill. 1976) ("If this case has been litigated to conclusion, all that is certain is that plaintiffs would have spent a large amount of time, money and effort."). The Settlement not only guarantees a benefit to the Class, it provides that benefit now, as opposed to waiting an unknown time in hopes of securing a future award. *AT&T Mobility*,

270 F.R.D. 330 at 347 ("Even if Plaintiffs were to succeed on the merits at some future date, a future victory is not as valuable as a present one."); *Reynolds*, 288 F.3d at 284 ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

Therefore, given the risks of trial (including the possibility of no recovery), a requirement that Class Members each individually evidence their damages, and a significantly delayed award, the settlement is eminently reasonable because it provides all Class members an opportunity to receive a claim payment from a $1,050,000 Fund regardless of their ability to evidence their damages. This factor fully supports preliminarily approving the proposed Settlement.

2. The Likely Complexity, Length, and Expense of Litigation

Should litigation proceed, Defendants would continue to aggressively defend against this action, requiring additional costs, significantly lengthening litigation, and posing a risk of no or a significantly reduced recovery for Class Representatives and the Class. Thus far, Class Representatives successfully defeated Defendants' early motions aimed at dismissing or limiting the case and obtained a certified Class of thousands of individuals subjected to the evacuation for purposes of litigating liability. Class Cert. Ord. at 36. However, continued litigation poses significant risks, including the risks of a loss at the summary judgement or trial stages, challenges establishing classwide damages, and the potential for favorable rulings to be undone on appeal.

The most complicated issue posed by continued litigation is classwide damages. In the Court's order certifying the Class, it noted, without deciding "definitively," that Dr. Baum's classwide damages model may not conform to Wisconsin damages law and, further, that each Class Member may need to provide individualized evidence of causation and damages. Class Cert. Ord. at 29. While the Court denied Defendants' motion to exclude Dr. Baum, it also preserved the opportunity for Defendants to re-raise the issue in a later motion *in limine*. *Id.* at 34.

Individualized damages issues would complicate and lengthen this action. As the Court noted, individualized evidence may be needed on issues like: "how long an individual evacuated (if they evacuated at all), lost wages, expenses incurred, and their personal discomfort and annoyance experienced because of the evacuation." *Id.* at 33. That type of evidence, if required, might jeopardize recovery of some Class Members and substantially discourage participation. Thus, the burden of proving damages would likely discourage Class Member participation and decrease the potential recovery.

Additionally, even if Class Representatives both succeed at trial on liability *and* sufficiently provide evidence of classwide causation and damages or individual Class Member causation and damages, Defendants would likely appeal any unfavorable judgment. The appeals process would undoubtedly delay and potentially undo any recovery for the Class. Although this case has advanced significantly during nearly three years, the complexities of this case and the contested nature of this litigation pose substantial risks of prolonged litigation and substantial expenses. This factor supports preliminary approval of the settlement.

3. The Amount of Opposition to the Settlement

This factor is better considered at the final approval stage because, at that time, Class members will have received notice of the Settlement and an opportunity to respond or opt out.

4. The Opinion of Competent Counsel

"While the court, of course, should not abdicate its responsibility to review a class action settlement merely because counsel support it, the court is entitled to rely heavily on the opinion of competent counsel." *Armstrong*, 616 F.2d at 325; *Johnson v. Meriter Health Services Emp. Plan*, No. 3:10-cv-0426-WMC, 2015 WL 12725371, at *1 (W.D. Wis. Sept. 17, 2014) (considering "the opinion of experienced class counsel that the settlement is fair, reasonable, and adequate under the circumstances" during preliminary approval). Here, Class Counsel and Defendants' counsel are

experienced in class action litigation, fully informed of the merits of the case and the risks of continued litigation, and both support the Settlement. This factor supports preliminary approval of the Settlement.

5. The Stage of the Proceeding and the Amount of Discovery Completed

This case is at an advanced stage of litigation, allowing the Parties and the Court to compare the merits of the case and the possibility of success to the value of the Settlement. Class Representatives filed the initial Complaint on August 20, 2018, nearly three years ago, and since, the Parties have endured litigation and briefing on a variety of complex issues.

Although the litigation is advanced, Class Representatives still face substantial risk and the potential for no recovery or, even should they succeed, delayed recovery due to appeals and separate adjudication of individual damages. Thus, this is not a case where "[t]he lateness of the settlement might suggest that there was little doubt as to the strength of plaintiffs' case and little reason to fear complex litigation." *Armstrong*, 616 F.2d at 324. By settling the case now, Class Representatives ensure *all* Class Members have an opportunity to submit a claim for a portion of the Fund, and that their award will not be delayed or defeated by continued litigation. *See id.* at 325 ("Through settlement, counsel avoided the remedial portion of the litigation and possible appeals from the district court's earlier rulings while securing significant relief for the class free from the uncertainty and delay which would have resulted from further litigation. It is difficult to imagine a more appropriate basis for agreeing to a Settlement, even a settlement reached at such a late stage in litigation." (overruled on other grounds)). This factor supports preliminary approval.

II. THE COURT SHOULD APPROVE CLASS REPRESENTATIVES' NOTICE PLAN AND DIRECT NOTICE TO BE ISSUED TO THE CLASS.

Upon preliminary approval, Rule 23 requires the Court to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who

can be identified with reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "The rule does not insist on actual notices to all class members in all cases" but "recognizes it might be *impossible* to identify some class members for the purposes of actual notice." *Mullins*, 795 F.3d 665 (emphasis in original). While direct notice is "ideal," when it is not possible, "courts may use alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members, all without offending due process." *Id.*; *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) ("When reasonable efforts would not suffice to identify the class members, notice by publication, imperfect though it is, may be substituted.").

Here, the Notice Plan contemplates using both a direct mailed notice and four methods of indirect notice to ensure high reach to the Class. While the Parties do not know the identities of all Class Members, they have information on where Class Members reside based on the area of the evacuation. Using census data, JND identified 11,727 households within Superior, Wisconsin. Intrepido-Bowden Decl. at ¶ 14. The Notice Plan contemplates sending direct notice to 15,000 households in the Superior area, ensuring a high number of Class Members are reached. *Id.* at ¶ 10.

The Notice Plan also calls for an extensive indirect notice effort to supplement direct notice. *Id.* at ¶ 20–24. The supplemental media efforts include: (1) three published half-page notices in two local newspapers, (2) a digital advertising effort targeting likely Class members, leading to 390,000 impressions, (3) 32 thirty-second radio advertisements on two local news stations, and (4) a state-wide press release to journalists and media outlets. *Id.* Through both the Direct and Indirect Notice Programs, JND expects to reach the vast majority of Class Members. *Id.* at ¶ 31.

Additionally, all mailed and indirect notices, including those played over radio, will contain appropriate information about the Settlement, the Class, and the options available to Class Members. Fed. R. Civ. P. 23(c)(2)(B). Specifically, each notice will provide information about the litigation, the Settlement Agreement, the criteria to qualify as a Class Member, and the benefits of the Settlement, including information on the claim forms, the claim values, when the claim forms must be submitted, and who is eligible to submit a claim. SA at Ex. B1, B2, and B3.[5]

The notices also explain the Class Members' options to opt-out or object to the Settlement and includes the requirements and deadlines for doing so. Finally, the notices direct Class Members to the Settlement Website for more information, which will contain the Long-Form Notice, the Claim Form, and a telephone number to contact for more information. The Long-Form Notice and Settlement Website will also include information about the attorneys' fees and service awards for the Class Representatives.

Together, the Class notification procedures provide Class Members with the essential information about the Settlement and all information required by Rule 23 to inform the Class Members of their rights and deadlines to act.

III. THE COURT SHOULD SET SETTLEMENT DEADLINES AND SCHEDULE A FINAL FAIRNESS HEARING.

Class Representatives request that the Court: (1) preliminarily approve the class action settlement, (2) designate and approve JND Legal Administration to serve as Claim Administrator; (3) set a final fairness hearing date; (4) approve, as to form and content, the Claim Form and notices; (5) approve the notice provided by the Notice Plan; (6) set deadlines for starting the Notice Plan (no later than 14 days after the entry of the Order Granting Preliminary Approval of Class

[5] The Parties will provide a draft of the Press Release containing material information about the settlement to the Claim Administrator prior to the Notice Deadline.

Action Settlement); (7) set deadlines for objecting to the Settlement Agreement or excluding oneself from the Settlement Agreement, as well as deadlines for responding to objections; (8) set deadlines for filing papers in support of the Settlement; and (9) set deadlines for Class Counsel to apply to the Court for attorneys' fees and expenses. The Parties have attached hereto as Exhibit C a proposed Preliminary Approval Order.

Class Representatives also propose the Court set the Final Approval Hearing more than 145 days after entry of the Preliminary Approval Order and adopt the following deadlines for Settlement[6]:

Action	Settlement Deadline	Settlement Citation
Deadline for Notice to Begin	14 days after entry of Preliminary Approval Order	SA, at § 2.21
Deadline for Class Members to file a Claim, Request Exclusion, or Object	89 days after entry of the Preliminary Approval Order	SA, at §§ 2.2, 2.13, 2.23
Deadline for Claim Administrator to Determine the Validity of Claims	103 days after entry of the Preliminary Approval Order	SA, at § 4.7
Deadline for Claim Administrator to Prepare a List of Opt Outs	103 days after entry of the Preliminary Approval Order	SA, at § 8.6
Deadline for Claim Administrator to Provide the Court with the Number and Dollar Amount of Claims Received	103 days after entry of the Preliminary Approval Order	SA, at § 4.6
Deadline for the Parties to Respond to Objections	103 days after entry of the Preliminary Approval Order	SA, at §§ 2.23, 8.4

[6] Upon the Court's order entering Preliminary Approval and setting the date for the Final Approval Hearing, Class Representatives will submit to the Court and to the Claims Administrator a revised chart describing the deadlines for action under the Settlement.

Deadline for Class Representatives to Move for Final Approval Hearing	103 days after entry of the Preliminary Approval Order	SA, at § 8.10
Deadline for Class Counsel to Apply for Attorney's Fees and Expenses	At least 28 days prior to the Final Approval Hearing	SA, at § 7.1
Deadline for the Claim Administrator to Certify Compliance with the Notice Plan	At least 14 days prior to the Final Approval Hearing	SA, at § 5.6
Deadline for Class Representatives to Apply for Service Awards	At least 14 days prior to the Final Approval Hearing	SA, at § 6.1
Deadline for Defendants to Respond to Class Representatives' Application for Attorneys' Fees	At least 7 days prior to the Final Approval Hearing	SA, at § 7.1

CONCLUSION

Plaintiffs respectfully request that the Court preliminarily approve the Settlement and issue the proposed Preliminary Approval Order.

Dated: June 25, 2021

Respectfully submitted,

By: */s/ J. Gordon Rudd, Jr.*

ZIMMERMAN REED LLP
Patricia A. Bloodgood, WI Bar No. 1003511
J. Gordon Rudd, Jr., MN Bar No. 222082 (PHV)
June P. Hoidal, MN Bar No. 033330X (PHV)
Charles Toomajian, MN Bar No. 0397879 (PHV)
1100 IDS Center, 80 South 8th Street
Minneapolis, MN 55402
Phone: (612) 341-0400
Patricia.Bloodgood@zimmreed.com
Gordon.Rudd@zimmreed.com
June.Hoidal@zimmreed.com
Charles.Toomajian@zimmreed.com

ZIMMERMAN REED LLP
Christopher P. Ridout, CA Bar No. 143931 (PHV)
2381 Rosecrans Avenue, Suite 328
Manhattan Beach, CA 90245
Phone: (877) 500-8780
Christopher.Ridout@zimmreed.com

Attorneys for Plaintiffs and the Class