

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JASEN BRUZEK, HOPE KOPLIN, and
CHRISTOPHER PETERSON, individually
and on behalf of all others similarly situated,

Plaintiffs,

v.

OPINION AND ORDER

18-cv-697-wmc

HUSKY ENERGY INC. and SUPERIOR
REFINING COMPANY LLC,

Defendants.

On behalf of themselves and other similarly-situated individuals, plaintiffs Jasen Bruzek, Hope Koplin, and Christopher Peterson move this court for preliminary approval of a proposed class action settlement with defendants Superior Refining Company LLC and Husky Oil Operations Limited. (Dkt. #244.) Defendants join in this request. (Dkt. #248.) For the reasons that follow, the court will grant the motion and will hold a fairness hearing on December 22, 2021, at 11:00 a.m.

BACKGROUND

A. Procedural History

This case arises out of the April 26, 2018, explosion and fire at the Superior Refinery in Superior, Wisconsin and the resulting evacuation of the surrounding area. Plaintiffs filed suit in this court on August 20, 2018, alleging negligence, nuisance and trespass, as well as strict liability. On September 30, 2019, the court denied defendants' motion to dismiss for failure to state a claim. (Dkt. #78.)

On February 19, 2021, the court further issued an order addressing various motions from the parties. (Dkt. #232.) In particular, the court (1) granted defendants' motion for partial summary judgment as to plaintiffs' claims for prospective relief against defendants' continued use of hydrofluoric acid; and (2) denied plaintiffs' related motion to certify a Rule 23(b)(2) class seeking safety improvements related to defendants' use of hydrofluoric acid. At the same time, the court certified the following Rule 23(b)(3) class to determine the remaining common questions as to liability:

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.*) Issues of damages were left to individualized hearings. (Dkt. #245 at 12.)

After the court's February 19 order, the parties requested that the court stay proceedings pending attempts at mediation. (Dkt. #233.) Plaintiffs now represent that the settlement class consists of approximately 20,000 Class Members, although class participation is expected to be approximately 28%.

B. Proposed Settlement Fund

On April 15, 2021, the parties attended an all-day mediation with the Honorable Wayne R. Andersen (Ret.) of Chicago JAMS, an organization specializing in mediation, arbitration and alternative dispute resolution services. By agreement, the parties continued settlement discussions with Judge Andersen beyond that date until an agreement was reached in May 2021 ("the Agreement"). Under the terms of the Agreement, defendants agree to pay a total of \$1,050,000 into a Claimant and Notice Fund ("the Fund"), with no

right of reversion. The order of payments made from the Fund will be as follows:

- *First*, subject to application and approval by the court, service awards of up to \$2,000 will be paid to each of the three class representatives.
- *Second*, the total costs of notice and claims administration will be paid to the claim administrator, JND Legal Administration, not to exceed \$169,000.
- *Third*, all settlement benefits will be paid to class members who have submitted a valid claim. Settlement benefits will be one hundred and fifty dollars (\$150.00) per class member or three hundred dollars (\$300.00) per household, subject to an offset for amounts previously paid to or on behalf of the class member through the Reimbursement Program.¹ If, after the payment of the service awards and all notice and claims administration costs, the amount in the Fund is more than the amount of the total claims submitted by class members, settlement benefits will be increased pro rata, not to exceed two hundred dollars (\$200.00) per class member or four hundred dollars (\$400.00) per household, and still subject to an offset for amounts previously paid for the class member through the Reimbursement Program. If, after the payment of the service awards and all notice and claims administration costs, the amount in the Fund is less than the amount of the total claims submitted by class members, settlement benefits will be decreased pro rata, and still subject to an offset for amounts previously paid for the class member through the Reimbursement Program.
- *Fourth*, any amounts remaining in the Fund up to seventy-five thousand dollars (\$75,000.00) shall be disbursed *cy pres* to the Superior Douglas County Family YMCA.
- *Fifth*, any remaining amount in the Fund after the *cy pres* disbursement shall be used to fund any obligation to pay attorneys' fees and expenses, if any, awarded by the court.
- *Sixth and finally*, any remaining funds in the Fund after payment of the fee award shall be disbursed *cy pres* to the Superior Douglas County Family YMCA.

¹ After the explosion, defendants voluntarily established a "Reimbursement Program" through which residents could claim certain expenses incurred as a result of the explosion, fire, and evacuation. Approximately 3,200 individuals applied for relief under the program, and approximately 1,700 received payment. Overall, defendants paid out approximately \$487,813 through this Reimbursement Program.

C. Notice and Proposed Claims Process

Notice is to be provided as described in the Agreement consistent with the notice plan designed by the Claim Administrator, which is attached to the Agreement as Exhibit B and designed to reach and advise Class Members of their rights under the Agreement. Among other things, the plan entails mailed postcard notices, radio advertisements, newspaper notices, targeted Facebook and Google advertisements, and a dedicated settlement website that provides the claim form and its instructions, the Long Form and Short Form Notices, important dates, information responding to frequently asked questions, updates on the status of the settlement, and pertinent documents (including the application for attorneys' fees and reimbursement of costs and expenses filed by class counsel). The notices further provide information and instructions to class members who wish to submit a claim, object to the settlement, or exclude themselves from the class, as well as an explanation of how these choices will impact their legal rights.

The claim administrator expects that the notice will reach well over 70% of the class, with each class member able to submit a claim or request exclusion either electronically through a settlement website or by mail. The claim form requires class members to provide their name, contact information, and chosen method of receipt of payment (by check or electronic payment), and to aver facts under penalty of perjury that establish they are legitimate class members and whether any previous payments were made through the Reimbursement Program. In order to reduce the risk of fraudulent claims, the process will also include an agreed-upon verification designed by the claim administrator, JND Legal Administration. The claim administrator will receive and process claim forms and any

disbursements to class members.

D. Award of Attorney Fees and Costs

Finally, under the Agreement class counsel may move the court for an award of attorneys' fees and expenses to be paid by defendants. While defendants agree that class counsel is entitled to an award of attorneys' fees and expenses, they reserve the right to oppose the specific amount requested. Both parties agree that denial or adjustment of the requested amount shall not be grounds to seek modification or termination of the Agreement itself.

OPINION

I. Preliminary Approval of the Settlement Agreement

A district court may approve a settlement that is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). Settlement approval begins with a preliminary determination whether the proposed settlement is "within the range of possible approval." *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982). Following preliminary approval, the second step is a fairness hearing to give class members an opportunity to be heard, followed by a final decision approving or rejecting the proposed settlement. *Id.* Courts in this circuit consider the following five factors in determining the "fairness" of class action settlements: (1) "the strength of plaintiffs' case compared to the amount of defendants' settlement offer"; (2) "an assessment of the likely complexity, length and expense of the litigation"; (3) "an evaluation of the amount of opposition to 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.” *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996).

The “most important factor” is the “the strength of plaintiff’s case on the merits balanced against the amount offered in the settlement.” *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)). In assessing this factor, a court should attempt to “quantify the net expected value of continued litigation to the class, since a settlement for less than that value would not be adequate.” *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002). Although this task cannot be done with a “high degree of precision,” a court should nonetheless consider “ballpark valuation[s].” *Id.* at 285.

Here, according to plaintiffs the maximum possible recovery for the class would be approximately \$9.8 million.² The estimated value of this “best-case scenario” recovery must, however, be discounted by the risks of litigation, of which there are many. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 578 (N.D. Ill. 2011) (“[A] court must 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.”). First, Dr. Baum’s damages model was challenged on a *Daubert* motion by defendants, and so, its validity as

² This value was derived from a classwide damages model created by plaintiff’s expert Dr. Charles Baum, who estimated that each class member would have suffered losses of approximately \$495.72 over the eighteen-hour evacuation. Multiplying that estimate by the number of class members, estimated to be 20,782 based on census data, results in a total damages award of \$10.3 million. However, because defendants had already paid out \$487,813 to the class for expenses via the Reimbursement Program, that amount must be deducted from the total damages award, leaving the \$9.8 million figure.

a whole is still open to question, as are its constituent parts. Second, in ruling on plaintiffs' class certification motion, this court bifurcated liability and damages, reserving for *individual* hearings issues of causation and damages. As plaintiffs point out, such a process would increase the possibility that individual class members may not participate due to the burden of separate trials relative to comparatively small, individual awards. Third, even class members who *do* participate may lack sufficient evidence of some or all of their individual losses to meet plaintiffs' burden of proof. Fourth, settlement provides compensation now, while continued litigation poses a risk of significantly delaying any future award, if not an individual denial outright, as well as increased attorneys' fee and costs. *See 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."); *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."). Last, but not least, the class is not guaranteed *any* recovery through litigation. *See In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) ("The most obvious risk of continuing this litigation is that Plaintiffs will not be successful."). Considering these risks as a whole, the court concludes, *at least preliminarily*, that the settlement amount offered cut in favor of approval, when compared with the strength of plaintiffs' case.³

The remaining factors also lead the court to conclude that preliminary approval of

³ Of course, additional information will be necessary for the court to evaluate the reasonableness of a total settlement amount that appears roughly 10% of a maximum recovery, including the likely number of class members who will actually file a claim, the likely deductions from the settlement for all fees and costs, and the impact if any on a fee award.

the Agreement is appropriate. At minimum, the likely complexity, length, and expense of litigation would be significant. At this point, a number of challenging stages of litigation remain, including summary judgment, pretrial motions, trial, individualized damages hearings, and possible appeal. In addition, both parties have aggressively litigated this case to date, and they would be expected to continue to do so were it to proceed. In contrast, there is no indication at the moment that any affected party will oppose settlement, and both class counsel and defendants' counsel are experienced and support settlement. Finally, this case is at an advanced stage of litigation, permitting the parties and the court to adequately evaluate the merits of the claims.

The validity of the named plaintiffs' incentive award and counsel's request for attorneys' fees also appear eminently reasonable on their face. The service award -- sometimes, as here, referred to as an "incentive award" -- can be explained as a form of compensation for the extra work a named plaintiff performs in class action lawsuits. *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 410 (7th Cir. 2000). The appropriate amount of an incentive award depends on "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 834 (7th Cir. 2018) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). Here, the award of up to \$2000 for each of the three class representatives certainly appears reasonable in light of their assistance to counsel in initiating and pursuing this action, and in comparison with the amount awarded to class members generally, and in comparison to similar awards in

other cases.

As to attorneys' fees, plaintiffs have not yet moved for a specific award, although the parties have agreed that denial or adjustment of the requested amount shall not be grounds to seek modification or termination of the Agreement.

II. Notice

Finally, the court will address the proposed notice provided by the parties. Notice to all members of a Rule 23(b)(3) certified class must include: (1) the nature of the action; (2) a definition of the certified class; (3) the class claims, issues, or defenses; (4) the option for class members to appear through counsel; (5) the option for class members to be excluded; (6) the time and manner to request exclusion; and (7) the effect of a class judgment on the members. Fed. R. Civ. P. 23(b)(2)(B). Here, the proposed notice provides class members with information regarding the nature and claims of the action, a definition of the class, class members' option to appear through counsel, *and* the availability of and process for exclusion or objection, including the notice details, the option for class members to be excluded, and the effect on members of a class judgment.

Still, the court notes a few, minor modifications to the notice that class counsel should make before sending it out:

- In Section 5, "enjoyment of their property" should be changed to "enjoyment of your property."
- In Section 7, the dollar amount to be paid for notice and settlement administration expenses should be filled in as a maximum of \$169,000 consistent with the proposed Agreement.

With these changes made, the court approves the proposed notice.

ORDER

- 1) Plaintiffs' unopposed motion for preliminary approval of a settlement agreement (dkt. #244) is GRANTED.
- 2) The court preliminarily approves the Agreement (dkt. #246-1) as within the range of reasonableness such that final approval is possible, and as meriting dissemination of notice to the class for its consideration.
- 3) JND Legal Administration is designated and approved to serve as claim administrator.
- 4) The claim form and the notices (dkts. #246-2 through -6) are approved SUBJECT TO ADOPTION of the modifications to the Long Form Notice specifically set forth above in this opinion. The parties shall have discretion to jointly make non-material minor revisions to the claim form or notices. Responsibility regarding settlement administration, including, but not limited to, notice and related procedures, shall be performed by the claim administrator, subject to the oversight of the parties and this court as described in the Agreement.
- 5) The class representatives may apply to the court for a service award up to two thousand dollars (\$2,000.00) to each plaintiff, not to exceed six thousand dollars (\$6,000.00) total.
- 6) This order shall not be construed as an admission or concession by defendants of the truth of any allegations made by the class representatives or of liability or fault of any kind.
- 7) The final approval hearing shall be held before this Court on December 22, 2021, at 11:00 a.m., at the United States District Court Western District of Wisconsin Courthouse, 120 North Henry Street, Room 320, Madison, Wisconsin 53703.
- 8) No later than August 20, 2021, the claims administrator shall start the Notice Plan (dkt. #246-3).
- 9) Valid and complete claim forms must be postmarked via U.S. mail or submitted online no later than November 3, 2021.
- 10) Any member of the class who desires to be excluded from the class must submit a timely request for exclusion to the claim administrator, pursuant to the instructions set forth in the Long Form Notice (dkt. #246-3). The request must be postmarked no later than November 3, 2021.

- 11) Any class member who does not submit a valid and timely request for exclusion may submit an objection to the Agreement. The objection must satisfy the requirements set forth in the Long Form Notice (dkt. #246-3) and must be filed with the Clerk of the Court (not postmarked) no later than November 3, 2021, or it will be rejected, absent a showing of good cause that supports its consideration.
- 12) Any party may submit a response to any objection to the court by no later than November 18, 2021.
- 13) No later than November 18, 2021, the claim administrator shall provide a declaration to the court (a) regarding the number and dollar amount of claims received to date and (b) providing a list of the names of the persons who, pursuant to the notices described herein, have excluded themselves from the class in a valid and timely manner. The court retains jurisdiction to resolve any disputed exclusion requests.
- 14) Class counsel shall file a motion for entry of the final judgment and order no later than November 18, 2021. Defendants shall have no obligation to make separate filings in support of the motion for final approval, but may do so if they so desire. Defendants shall appear at the final approval hearing to confirm their agreement with the terms of the settlement as provided herein.
- 15) Any class member shall have the right to appear and be heard at the final approval hearing, either personally or through an attorney retained at the class member's own expense. However, if the class member wishes to object to the Agreement at the final approval hearing (either personally or through counsel), the class member must submit a timely written objection in compliance with the requirements referenced in Paragraph 11 of this order or demonstrate good cause excusing the objector from compliance.
- 16) If the court grants final approval of the Agreement, then class members who have not timely requested to be excluded, including persons who objected to the Agreement or submitted a valid claim, shall be deemed to have released their claims as set forth therein.

- 17) Class counsel may apply to the court for an award from defendants of their fees, as approved by the court, and may also apply to the court for reimbursement of class counsel's costs and expenses no later than November 24, 2021. In their submission, counsel shall include all supporting time and billing records, including evidence of amount typically charged per hour by each attorney whose reimbursement is being sought, typical contingency payments and a copy of any written fee agreement applicable in this case. Defendants agree that class counsel is entitled to reasonable attorneys' fees and expenses, but may oppose the amount requested by class counsel by way of written submission in opposition to class counsel's application for the fee award and may also oppose the amount requested at any oral argument held by the court at the final approval hearing or at such hearing the court orders. Defendants' response to class counsel's application for fees and expenses will be due December 15, 2021. In their response, opposing counsel is similarly required to provide all time and billing records in defense of this case, including typical hourly rates charged for each attorney who worked on this case, as well as actual invoices to and proof of payment to date by defendants.
- 18) All further proceedings and deadlines in this action are hereby stayed except for those required to effectuate the Agreement and this order.

Entered this 6th day of August, 2021.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge