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,	)	Case No. 18-cv-697
v.	)	(Jury Trial Demanded)
HUSKY ENERGY INC. and SUPERIOR REFINING COMPANY LLC,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

INTRODUCTION

Class Counsel's representation in this matter resulted in relief to Plaintiffs and a Class of individuals subjected to an evacuation of their homes and businesses after an explosion and fire at Defendants' Superior, Wisconsin oil refinery on April 26, 2018. Defendants have agreed to fully fund the relief set out in the settlement. Defendants also agreed that Class Counsel is entitled to its reasonable attorneys' fees and expenses for representing Plaintiffs and the Class in this litigation. That was a term of the parties' settlement of this action:

> Defendants agree that Class Counsel is entitled to reasonable attorneys' fees and expenses separate and apart from the Claimant and Notice Fund, and shall not oppose Class Counsel's entitlement to attorneys' fees and expenses in their entirety.

However, Defendants reserved the right to challenge *the amount of* fees and expenses requested.

Pursuant to the terms of the Settlement and Rule 23 of the Federal Rules of Civil Procedure, Class Counsel now moves the Court for an award of its lodestar and reasonable expenses, without

multiplier. In the Seventh Circuit, attorneys' fees awarded under the "lodestar method" are presumed reasonable because the lodestar reflects the amount of work reasonably necessary to achieve the results obtained. Here, Class Counsel's lodestar was necessary to litigate and settle this action after years of hard-fought litigation during which Superior Refining Company, LLC and Husky Oil Operations Ltd. ("Defendants" or "Husky") vigorously defended against the admittedly modest claims of individuals subject to the evacuation order. Zimmerman Reed ("Class Counsel") represented Plaintiffs and a certified Class who asserted that Husky's carelessness and unsafe refinery operation put the Plaintiffs and Class at risk of exposure to deadly hydrogen fluoride, resulting in a mandatory evacuation from the areas around the refinery ("Evacuation Order") with attendant personal impacts.

Defendants could have easily righted their wrong by offering just compensation to individuals affected by the Evacuation Order. Instead, they implemented a reimbursement program that limited compensation to documented out-of-pocket expenses. They offered nothing to the neighboring residents and those impacted for being subjected to the evacuation order, including time lost and disruption. Plaintiffs brought this action to ensure that Husky fairly compensate the thousands of people it affected when it caused an explosion and fire at the Superior, Wisconsin refinery.

Throughout the litigation, Husky mounted a significant and highly aggressive defense strategy against the claims of its neighboring residents. Despite this tactic, Class Counsel was able to obtain numerous, critical victories and overcame Husky's many efforts to limit and reduce the case and prevent discovery related to Plaintiffs' claims. Specifically, Class Counsel successfully (1) opposed Husky's three early motions seeking to dismiss all of Plaintiffs' claims, remove Husky Energy, Inc., as a defendant, strike Plaintiffs' class allegations, and strike any reference to the U.S.

Chemical Safety Board's report on the refinery fire and explosion; (2) opposed Husky's multi-month effort to avoid responding to Plaintiffs' discovery requests and to withhold critical documents related to Husky's investigation of the refinery explosion and fire; (3) moved to certify a Class of individuals subject to the Evacuation Order; and, (4) opposed Husky's motion to exclude Plaintiffs' experts.

Despite Husky's prior refusal to discuss any settlement that included classwide relief, Class Counsel's successes in litigation, and particularly its efforts to obtain a certified Class, paved the way for a favorable settlement that provides significant benefits to the Class. The favorability of the result is confirmed by the response. No Class member objected to the Settlement; only 16 Class members opted out; and 5,390 Class members—over a quarter of the Class—submitted valid claim forms.

Class Counsel incurred significant time and expense in the litigation, collecting and presenting evidence of liability and damages and defending against Defendants' challenges, due to (1) the nature of Defendants' business and conduct engendering the Class's right to recovery and (2) Defendants' disproportionate and aggressive litigation strategy. That time and effort was fully necessary to successfully counter Defendants' exhaustive litigation practices and develop a record adequate to establish the Class's prima facie case. Should Defendants oppose this request, they would be challenging Class Counsel for doing the work required to respond to Husky's litigation strategy of excessive motions and obstructive tactics.

Based upon the Declaration submitted, the Court's records, and the arguments presented here, the Court should find that Class Counsel's attorneys' fees under the lodestar method are reasonable because the amount of work was reasonably necessary to achieve the substantial results obtained for the Class and to overcome the strenuous defense of sophisticated Defendants.

Defendants should not prevail on any challenge to the reasonableness of Class Counsel's fees here when it was their own conduct that initiated the evacuation and their antagonistic litigation strategy that required the legal work performed for the Plaintiffs and Class. And while Defendants always have the right to elect a litigation strategy, no matter how broad or adversarial it might be to the claims in the underlying case, it would be improper for a defendant, after having chosen a broad, contentious, and adversarial strategy, then to challenge plaintiffs for the work they had to incur in responding to and overcoming that strategy. Consequently, Class Counsel respectfully moves the Court to find Class Counsel's fees and expenses reasonable and: (1) award attorneys' fees in the amount reflected in Zimmerman Reed's lodestar and (2) reimbursement of expenses as documented and submitted.

BACKGROUND

I. Class Counsel Bore Significant Risk Bringing This Complex Case on behalf of the Class.

Class Counsel undertook significant risk representing Plaintiffs and the Class in this complex, class action lawsuit against well-funded, sophisticated defendants who, at all times through this litigation and beforehand, denied any wrongdoing. Class Counsel represented Plaintiffs on a purely contingency fee basis, ultimately acting as counsel for the certified Class of individuals subject to an Evacuation Order after an explosion at Husky's refinery threatened to spew deadly hydrogen fluoride across the city. *Sec. Amend. Compl.*, Dkt. 93 ¶¶ 1–2, 23–30. Plaintiffs alleged the Evacuation Order caused them and the Class monetary losses from the significant and chaotic disruption of their lives and the loss of use and enjoyment of their property. *Id.* ¶¶ 110–111, 124.

Having brought this complex case under a contingency fee agreement, Class Counsel committed to incurring significant costs and expending significant time and resources with the

chance it might never recover those costs. Decl. of J. Gordon Rudd in Supp. of Mot. for Attorneys' Fees & Reimbursement of Expenses ("Rudd Decl.") ¶¶ 44, 64–65. Due to the short length of time the evacuation order was in effect, Plaintiffs' and Class members' damages were small and, on their own, would be insufficient to justify individual litigation. *Id.* at ¶ 47. Thus, Class Counsel committed to representing a Class with small damages against a sophisticated defendant with significant resources. *Id.* ¶¶ 44, 47, 64–65. Throughout three years of hard-fought litigation, Class Counsel faced a continued risk of little or no recovery of its fees or expenses. *Id.* ¶ 44.

This case also presented unique circumstances from the outset that Class Counsel would need to overcome. For instance, Class Counsel would have to prove that Husky's acts and omissions created a foreseeable risk of the explosion and the Evacuation Order, a fact Husky strongly disputed, and which would require technical, sophisticated, and costly expert testimony. *Id.* ¶¶ 33–37, 44. Additionally, critical to class certification and damages, Class Counsel would need to successfully challenge Husky's reimbursement program, which offered residents a limited opportunity to receive reimbursement for evacuation-related costs. *Id.* ¶¶ 7, 46. Husky frequently leaned on the existence of its reimbursement program to argue a class action was not a superior method of adjudicating this dispute and to assert Plaintiffs had no actionable damages. *Id.* at ¶ 46.

Despite these risks, Class Counsel, on behalf of the Plaintiffs, filed suit, claiming Defendants created dangerous circumstances that led to the explosion and the Evacuation Order.

II. HUSKY PURSUED A DISPROPORTIONATE AND FORCEFUL DEFENSE.

A. Class Counsel defeated Defendants' numerous motions seeking to dismiss or limit the action.

While Defendants may pursue whatever strategy they deem best to defend themselves from this action, having chosen a broad, contentious, and adversarial strategy, they cannot challenge Plaintiffs for incurring time and expense responding to and surviving that strategy. Husky began

its vigorous defense early in this action and sought to dismiss or limit the scope of this action through three separate motions: two motions to dismiss and a motion to strike certain allegations in the Complaint. These motions threatened to eliminate or severely truncate Plaintiffs' case and, as such, Class Counsel formulated oppositions to each one.

First, Defendants moved to dismiss Plaintiffs' claims and their requests for injunctive relief and punitive damages. *See Mot. to Dismiss for Failure to State a Claim*, Dkt. 41. Second, Husky Energy Inc. ("HEI") moved to dismiss itself as a defendant because, it claimed, the Court had no general personal jurisdiction over it as a Canadian entity and no specific personal jurisdiction over it as it did not operate the refinery or the reimbursement program, facts on which Husky also refused to provide discovery. *Mot. to Dismiss for Lack of Personal Jur.*, Dkt. 43; *Mem. in Supp. of Mot. to Dismiss for Lack of Personal Jur.*, Dkt. 44 at 6–8. Third, Defendants moved to strike Plaintiffs' 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*, Dkt. 47. Specifically, Defendants claimed that a class action would be an inferior means of providing relief to the Class compared to their reimbursement program. *Mem. in Supp of Mot. to Strike Pls.' Class Allegations*, Dkt. 48 6–10. Defendants also argued the CSB's investigation and report were inadmissible under applicable CSB regulations. Id. at 12–13.

Class Counsel successfully opposed each of Defendants' motions to dismiss. First, it asserted that Plaintiffs 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*, Dkt. 53. Second, Class Counsel argued that it was premature to strike their class allegations and the CSB report. *Pls.' Opp. to Defs.' Mot to Strike Pls.' Class Allegations*, Dkt. 51. Finally, Class Counsel opposed Defendants' motion to dismiss for lack of

personal jurisdiction because Plaintiffs 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 Jur.*, Dkt. 49.

On August 30, 2019, the Court denied Defendants' motions to dismiss in their entirety, including Plaintiffs' claims for injunctive relief. *Opin. & Ord.*, Dkt. 78. Thus, each of Plaintiffs' claims survived, the Complaint's class allegations and citations to the CSB report were maintained, and HEI remained a defendant in the case.

B. Husky continued to dispute the Court's personal jurisdiction over HEI through appeals and a motion for reconsideration.

After the Court's order denying Husky's three motions to dismiss and strike, Husky continued to seek dismissal of HEI as a defendant. Citing its claim that this Court lacked jurisdiction over HEI, HEI refused to comply with any of Plaintiffs' discovery requests or even provide Plaintiffs with information to support their jurisdictional defense. Rudd Decl. at ¶ 29, n.1. Consequently, Class Counsel lacked the information necessary to determine the validity of HEI's claim that it was not subject to the Court's jurisdiction. Meanwhile, instead of working with Class Counsel to evidence its jurisdictional claims, Husky continued to use aggressive motion practice to overturn the Court's personal jurisdiction findings. Specifically, Husky filed another two motions with the Court: (1) a motion for reconsideration of the Court's order denying Husky's motion to dismiss HEI as a Defendant; and (2) a motion to certify the issue of the Court's personal jurisdiction over HEI for interlocutory appeal to the Seventh Circuit. *See Mot. to Reconsider*, Dkt. 81; *Mot. for Interlocutory Appeal*, Dkt. 79. The Court granted the motion to reconsider, denied the motion to certify for interlocutory appeal as moot, and ordered discovery and briefing on whether it had personal jurisdiction over HEI. *Text Only Ord.*, Dkt. 89 (Oct. 25, 2019).

Having been forced to engage in discovery after stonewalling for months, HEI finally revealed that its lack of jurisdiction argument was premised entirely on the fact that HEI was a holding company and its wholly owned subsidiary, Husky Oil Operations, Inc., which was the Husky entity that operated Husky's many businesses, including the Superior Refinery. Rudd Decl. ¶¶ 26–27, 29, n.1. After learning this, Class Counsel proposed a stipulation to substitute Husky Oil Operations, Inc. for HEI in an amended complaint. HEI immediately agreed. Unfortunately, at the point this occurred, the parties had already expended significant resources litigating an issue that could have been quickly resolved after the Complaint was filed had Husky agreed to participate in discovery and provide evidence to support its jurisdictional defense. Dkt. 93 ¶¶ 10–11. Thus, Husky's personal jurisdiction arguments resulted in an enormous waste of time and resources.[1]

C. Class Counsel obtained discovery over Husky's strident opposition.

During the time Husky's three motions to dismiss and strike were pending, Husky opposed producing any ESI discovery; even refusing to meet and confer regarding search methodologies as required by the agreed-upon ESI protocol. Rudd Decl. ¶¶ 19, 46. Class Counsel attempted to confer with Husky numerous times in hopes of prompting Defendants to provide ESI discovery *Id.* ¶ 20. Class Counsel also proactively narrowed its requests and further specified for Husky the types of information it sought—all related to the refinery explosion—in attempt to prompt Husky to participate in discovery. *Id.* Husky, however, decided on its own that any discovery (beyond

[1] Defendants now seek to justify their decision to waste the Court's and parties' time concerning its jurisdiction arguments, claiming that Plaintiffs were "unsuccessful in obtaining relief of any kind from originally named defendant [HEI]." *Defs.' Resp. to Pls.' Mot. for Final Approval*, Dkt. 260 at 2–3. Defendants ignore that Plaintiffs substituted Defendant HEI with its wholly owned subsidiary, Husky Oil Operations, Inc. Accordingly, HEI remained on the hook for the relief Plaintiffs obtained through this lawsuit. Moreover, as HEI was not a properly named Defendant according to Husky's own claims, that Plaintiffs did not recover directly from HEI—but rather from HEI's wholly owned subsidiary—is entirely irrelevant.

what it had already provided to governmental agencies) was disproportionate to the needs of the case until the Court decided the motions to dismiss. *Id.* ¶¶ 19, 46.

On July 24, 2019, Class Counsel indicated it would move the Court to compel Husky to produce the requested documents and to comply with the Court's Standing Order Relating to the Discovery of Electronically Stored Information and the parties' ESI protocol. *Id.* ¶ 21. In response, Husky finally indicated that it would provide a large number of documents and would draft a formal letter clarifying its position. *Id.* ¶ 22. But Husky's "formal letter" never came. Instead, Husky preempted Plaintiffs' motion to compel with a motion to stay. *Id.* ¶¶ 22–23. Husky asserted that the low individual damages of the Plaintiffs and the motions to dismiss, which had been pending almost eight months, rendered any discovery disproportionate and unreasonable. *Mot. to Stay Discovery*, Dkt. 67 at 2, 7–10.

Class Counsel opposed Husky's motion and moved to compel production of the now narrowed categories of documents sought. *Mem. in Opp. to Husky's Mot. to Stay Discovery*, Dkt. 70. The Court agreed with Plaintiffs, denied Husky's motion to stay, and ordered the parties to meet and confer and agree on how discovery shall proceed. *Order Denying Mot. to Stay*, Dkt. 74 ("[D]iscovery has never been stayed in this lawsuit. Not ever. . . [A]ll parties must attend to their discovery obligations promptly and in good faith.").

Subsequently, Class Counsel undertook significant discovery necessary to obtain and support its motion for class certification, evidence its theory of liability in preparation for summary judgment and trial, and develop methods to establish damages. Rudd Decl. ¶¶ 25–28. Class Counsel served two sets of interrogatories and requests for production of documents on SRC and Husky Oil and took depositions of defense witnesses, Bill Demchuk and Helmut Streblow. *Id.* ¶ 27. Class Counsel also 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 and was set to be Plaintiffs' key witness establishing Husky's liability and wrongdoing; 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. *Id.* ¶¶ 33–37. Class Counsel later withdrew Dr. Kilpatrick's opinion and do not seek reimbursement of any time or expenses related to his opinion. *Id.* ¶¶ 34, 73.

Class Counsel also responded to Husky's discovery requests, including SRC's requests for production of documents and interrogatories. *Id.* ¶ 27. Class Counsel defended depositions of each of the Plaintiffs and each of Plaintiffs' experts. *Id.* ¶ 37.

Apart from formal discovery in this litigation, Class Counsel also sought material information about the explosion and its consequences through requests to government agencies. In all, Class Counsel 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. *Id.* ¶ 28. This information was necessary to support liability and to measure damages.

III. Class Counsel Obtained a Certified Class of Individuals Subject to the Evacuation Order.

Toward the end of discovery, the Parties briefed another series of motions: First, Class Counsel 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.*, Dkt. 108. Specifically, Class Counsel 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.*, Dkt. 109 at 1. Class Counsel 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 Plaintiffs' damages experts—Dr. Baum and Dr. Kilpatrick. *Defs. Opp. to Pls. Mot. for Class Cert.*, Dkt. 141; *Defs. Mot. to Exclude the Opin. of Pls. Expert Charles Baum*, Dkt. 134; *Defs. Mot. to Exclude the Opin. of Pls. Expert John Kilpatrick*, Dkt. 130. Class Counsel 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*, Dkt. 149; *Pls. Resp. to Defs. Mot. to Exclude the Opin. of John Kilpatrick*, Dkt. 151.

Separately, Defendants moved for partial summary judgment on Plaintiffs' request for injunctive relief, on the ground that Plaintiffs 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.*, Dkt. 137 at 1–3. Class Counsel 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.*, Dkt. 182 at 12–16.

On February 19, 2021, the Court ruled on the Class Certification Motion, Defendants' Motion to Exclude Dr. Baum's testimony, and Defendants' Motion for Partial Summary Judgment. *See Opin. & Ord.* ("Class Cert. Ord."), Dkt. 232. 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 Counsel's request to certify a 23(b)(2) injunctive relief class. *Id.* In granting partial summary judgment and dismissing Plaintiffs' injunctive relief claim relating to storage of hydrogen fluoride, the Court relied on, among other things, the fact that, in May 2020, Defendants had agreed to significant safety upgrades in its hydrogen Fluoride in negotiations with the U.S. government and the State of Wisconsin. Class Cert. Order, Dkt. 232 at 14. Those safety upgrades were similar to the type that Plaintiffs sought through their injunctive relief claim, which the Court originally sustained on the pleadings.

Finally, the Court also denied Defendants' motion to exclude Dr. Baum's model for calculating damages, although it allowed Defendants the opportunity to later renew its arguments in a motion *in limine*. *Id.* at 34, 36. In all, Class Counsel secured an important victory, certifying a liability Class and paving the way for the Settlement.

IV. Class Counsel Negotiated a Favorable Classwide Settlement.

A. The Parties mediated over several weeks before finalizing the Settlement Agreement.

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 Northern District of Illinois, where he served for 20 years. Rudd Decl. ¶ 52. At that time, Class Counsel provided Husky's counsel with updated information about the amount of its attorneys' fees and costs, having provided information previously in early 2020 during prior limited settlement discussions. *Id.* ¶ 67.

On April 15, 2021, the Parties participated in an all-day virtual mediation with Judge Andersen, but the Parties did not reach an agreement. *Id.* ¶ 52. The Parties' settlement discussions continued over the next few weeks with Judge Andersen's assistance. *Id.* ¶ 53–54. On May 6, 2021, after extensive, arm's length negotiations, the Parties agreed upon a term sheet outlining the structure of the Settlement Agreement and the Parties continued to negotiate the Settlement's details until Class Counsel moved for Preliminary Approval of the Settlement on June 25, 2021. *Id.* ¶ 54. The Court granted Preliminary Approval and directed notice be issued on August 6, 2021. *Order Granting Prelim. Approval*, Dkt. 250.

B. The Settlement provided significant benefits to the Class.

Under the Settlement, Defendants agreed to pay $1,050,000 into a Claimant and Notice Fund and, additionally, to separately pay any Fee Award after all appeals. *Settlement Agreement* ("SA"), Dkt. 246-1, at §§ 2.5, 3.1, 7.1. Subject to Court approval, the Fund will be used to pay (1) service awards to the Plaintiffs of up to $2,000 each ($6,000 total), (2) the total costs of claims administration, not to exceed $169,000, and (3) Class members' valid and timely claims. *Id.* at § 3.2.

Every Class member had an opportunity to submit a claim for $150 per individual or $300 per household, offset by any amount the Class member previously received through Defendants' reimbursement program. *Id.* at §§ 3.2.3, 4.4. Depending on the number of claims submitted, the values of the individual and family claims would be adjusted pro-rata upwards or downwards.[2]

To receive an award, the Settlement Class members were not required to provide any documentation of their damages. Rather, Class members needed only to submit a simple claim form that requested claimants 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 § 4.3. Claimants also needed to certify that he or she was subject to the Evacuation Order. *Id.* at § 4.3.4. Any amount that Class members received through the Reimbursement Program would be deducted from the claim payment. *Id.* at § 5.4.

In exchange for payment into the Claimant and Notice Fund, Class members agreed 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.

C. The Class Positively Received the Settlement.

The notice plan and simple claim process resulted in substantial participation in the Settlement. Of the estimated 20,782 Class members, 5,390 submitted valid claim forms for payment from the Fund. Rudd Decl. ¶ 61. Class members who submitted valid claims received a *pro rata* increase in the value of their claims from $150 to $167.23, not including deductions for previous payments from the reimbursement program. *Id.* The valid claims will, therefore, exhaust

[2] The Claimant and Notice Fund may also have paid a *Cy Pres* and part of the awarded attorneys' fee and expenses, but only if the number of claims did not exhaust the Claimant and Notice Fund after a *pro rated* increase of up to $200 per individual and $400 per household. SA, at §§ 3.1.5–3.1.7. Here, the claims will exhaust the Claimant and Notice Fund. Rudd Decl. ¶ 61.

the Claimant and Notice Fund, meaning no amount will be used to pay a *Cy Pres* beneficiary or any amount of the awarded attorneys' fees and expenses. *Id*. No Class member objected to the Settlement and only 16 Class members opted out. *Id.*

D. Husky Agreed to Pay Class Counsel's Reasonable 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 Defendant separate from the Claimant and Notice Fund. SA, at § 7.1. Defendants agreed not to oppose Class Counsel's entitlement to reasonable attorneys' fees and expenses. However, Defendants may oppose the amount requested by Class Counsel. *Id.* The parties agreed that the denial or adjustment of the requested attorneys' fees and expenses shall not be grounds to seek modification or termination of the Settlement. *Id.* at § 7.4. Class Counsel, here, seeks an award of reasonable attorneys' fees of $3,151,017.25 and of reasonable expenses of $359,948.97.

ARGUMENT

I. The Court Should Approve Class Counsel's Request for Attorneys' Fees Under the Lodestar Method.

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). To determine reasonable fees in a class action case, courts employ either the "lodestar" method, which awards fees based on the amount of work the attorneys actually performed, or the "percentage" method, which awards a percentage of the fund obtained for the class, depending on the circumstances of the case. *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 500 (N.D. Ill. 2015); *Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 566 (7th Cir. 1994).

Unlike a common fund case, where the percentage method is often employed,[3] here, the Settlement Agreement requires attorneys' fees to be paid *separately* from the fund used to pay Class members. This is an intentionally bargained for, value-adding benefit to the Class. In such cases, the lodestar method is more appropriate. *Reid v. Unilever United States, Inc.*, No. 12-cv-6058, 2015 WL 3653318, at *4–6 (N.D. Ill. Jun. 10, 2015) (calculating reasonable attorneys' fees based on lodestar rather than by awarding a percentage of the settlement fund because the defendant agreed to "pay Plaintiffs' attorneys' fees directly and separately from the Fund"); *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 639 (7th Cir. 2011) (noting that in a fee-shifting case, where attorneys' fees are not paid from a common fund, the "lodestar approach forms the 'centerpiece' of attorneys' fee determinations[.]"). Indeed, because the Class member claims and attorneys' fees are paid separately, there is no scenario where the Class would receive less if Class Counsel were to receive more, the type of conflict that often prompts the use of the percentage method. *Redman*, 768 F.3d at 632–33 (noting that, in common fund cases, unlike here, attorneys' fees might be reasonable only after "changing the relative shares of the settlement received by class counsel and class members . . . .").

[3] Under the common fund doctrine, attorneys' fees and payments to the class are drawn from the same fund and "a reasonable fee is based on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900, n.16 (1984). "The common fund doctrine is based on the idea that individuals who benefit from litigation should share the cost of that litigation." *Stumpf v. Pyod, LLC*, No. 12-cv-4688, 2013 WL 5753829, at *2 (N.D. Ill. Oct. 23, 2013). In other words, the class pays its attorneys. In such cases, the court "must carefully monitor disbursement to the attorneys by scrutinizing the fee applications when fees are paid from a common fund, because in this situation, the court becomes the fiduciary for the fund's beneficiaries." *Id.* (internal citations removed). That is so because "the higher the [attorneys'] fees the less compensation will be received by class members." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). Because Defendants have agreed that Class Counsel is entitled to reasonable attorneys' fees and expenses that will be paid separately, this case does not involve a "common fund" used to pay both attorneys' fees and class member claims, and there is therefore no similar conflict between the Class and Class Counsel. Thus, attorneys' fees need not be awarded based on a percentage of the fund.

The Seventh Circuit has approved attorneys' fees under the lodestar method even when, as is the case here, it exceeds the amount obtained for the Class. *See Sears, Roebuck & Co. Front-Loading Washer Prod. Liab. Litig.*, 867 F.3d 791, 792 (7th Cir. 2017) (holding that attorneys' fees amounting to three times the fund used to pay class claims was justified due to the "extensive time and effort that class counsel had devoted to a difficult case against a powerful corporation . . . ."); *In re. Sw. Airlines Voucher Litig.* ("*Sw. Airlines I*"), 799 F.3d 701, 711–12 (7th Cir. 2015) (holding that a high lodestar in comparison to the amount received by the class was reasonable because of the excellent results obtained by class counsel); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) (holding that the lodestar result does not need to be adjusted to "mimic" a certain percentage of the fund used to pay the class); *Sommerfield v. City of Chicago*, 863 F.3d 645 (7th Cir. 2017) (affirming an award of $430,000 in attorneys' fees where the plaintiff received only $30,000).

As discussed further below, Class Counsel incurred its lodestar advancing this difficult, complex case as efficiently as possible given Husky's forceful, disproportionate defense strategy. *Elec. Constr. Indus. Prefunding Credit Reimbursement Program v. Veterans Elec., LLC*, No. 17-cv-1576, 2021 WL 308545, at *3 (E.D. Wis. Jan. 29, 2021) (finding attorneys' lodestar reasonable even though it was "high with relation to what was being pursued" because of the defendant's "forceful litigation strategy"). While Class Counsel understands Husky's strategy of vigorously litigating its defense, Class Counsel should have the opportunity to recover attorneys' fees and expenses responding to Husky's litigation strategy, especially because those efforts were ultimately necessary to obtain classwide relief. As such, the Court should determine reasonable attorneys' fees using the lodestar method and award Class Counsel its reasonable lodestar of $3,151,017.25.

A. Lodestar Comprises the Presumptively Reasonable Fee.

"Although there is no precise formula for determining a reasonable fee, the district court generally begins by calculating the lodestar—the attorney's reasonable hourly rate multiplied by the number of hours reasonably expended." *Cooper v. Retrieval-Masters Creditors Bureau, Inc.*, 338 F. Supp. 3d 729, 732 (N.D. Ill. 2018). Using the lodestar method, "the amount of the [attorneys' fee] award is, in fact, attributable to the attorney's work." *In re Sw. Airlines Voucher Litig.* ("*Sw. Airlines II*"), No. 11-cv-8176, 2013 WL 5497275, at *5 (N.D. Ill. June 20, 2014), *amended* 2014 WL 2809016 (N.D. Ill. Jun. 20, 2014), *aff'd Sw. Airlines I*, 799 F.3d 701; *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 721 (7th Cir. 2001) (holding that "the market rate for legal fees depends . . . in part on the amount of work necessary to resolve the litigation").

Because the attorney's fee is tied to the work done, the lodestar method helps promote accountability and prevent overcompensation. *Cook*, 142 F.3d at 1013. Courts, therefore, generally find "a strong presumption that the lodestar calculation yields a reasonable attorneys' fee award." *Pickett*, 664 F.3d at 639; *see also City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("We have established a strong presumption that the lodestar represents the reasonable fee . . . ." (internal quotations omitted)). However, courts also look to several additional factors to ensure attorneys' fees awarded under the lodestar method are reasonable, including: (1) the amount of work necessary to resolve the litigation; (2) the risk of nonpayment a firm agrees to bear; (3) the quality of its performance; and (4) the stakes of the case. *N.P. v. Standard Innovation Corp.*, No. 16-cv-8655, 2017 WL 10544061, at *2 (N.D. Ill. July 25, 2017); *Synthroid*, 264 F.3d at 721.

B. Class Counsel's Requested Attorneys' Fees Is Reasonable Under Lodestar Method.

Class Counsel requests the Court award its reasonable lodestar of $3,151,017.25, paid separately from the Fund. SA, ¶ 7.1. The amount of the lodestar is calculated by "multiplying the

number of hours that class counsel reasonably worked by a reasonable hourly rate." *Sw. Airlines II*, 2013 WL 5497275, at *8.

As discussed below, Class Counsel has taken steps to ensure both its rates and hours are reasonable. Additionally, unlike a usual class settlement, Husky here has agreed to pay Plaintiffs' reasonable fees by contract. SA ¶ 7.1 (agreeing to pay reasonable attorneys' fees awarded by the Court). In such cases, there is less of a need for an exacting review of the lodestar. *See Elec. Constr.*, 2021 WL 308545, at *3 ("There is less need to police the reasonableness of fees shifted pursuant to contract . . . because the parties to a contract expressly consent to and define the terms of the fee shifting." (internal citations omitted)). Where, as here, the parties agree to pay attorneys' fees by contract, the reasonableness determination does not "require 'a detailed, hour-by-hour review' of the prevailing party's billing records" because the focus is more narrowly on ensuring counsel did not "run up extra costs" because "some else pays the tab." *Id.* (citing *Matthews v. Wis. Energy Corp.*, 642 F.3d 565, 572 (7th Cir. 2011)).[4] Nevertheless, Class Counsel has scrutinized its lodestar to ensure it is reasonable.

The inquiry starts with the attorneys' hourly rates. "A reasonable hourly rate is 'one that is derived from the market rate for the services rendered.'" *Sw. Airlines II*, 2013 WL 5497275, at *8 (quoting *Picket*, 664 F.3d at 640). Where "the attorney has an actual billing rate that he or she typically charges and obtains for similar litigation, that is presumptively his hourly rate." *Id.* Where

[4] The relaxed analysis of a firm's lodestar comes from the "commercial reasonableness" standard, which applies when parties have privately contracted for payment of attorneys' fees. *Id.* Commercial reasonableness is focused on "guard[ing] against . . . the tendency to take additional risk (or run up extra costs) if someone else pays the tab." *Id.* (citing *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 200 F.3d 518, 521 (7th Cir. 1999)). As described below in the factors supporting Class Counsel's attorneys' fees, there is no risk that Class Counsel "ran up" the costs because its actions were in direct response to Husky's inordinate defense of this case. *See id.* (describing defendants "forceful litigation strategy.")

the attorney "uses contingent fee arrangements[,]" the court may also evaluate "rates [that] similar experienced attorneys in the community charge paying clients for similar work and evidence of fee awards the attorney has received in similar cases." *Id.*

Here, Class Counsel seeks rates commensurate to the experience of the attorneys and staff working on the case and based on their published rates. Rudd Decl. ¶ 69. Class Counsel's published rates have been approved in other cases. *Id.* ¶¶ 81 – 85. Additionally, in similar, complex class actions, courts in Minnesota, where Class Counsel is located, have approved individual partner rates for anywhere between $500 to $950 per hour. *Yarrington v. Solvay Pharmaceuticals, Inc.*, 697 F. Supp. 2d 1057, 1066 (D. Minn. 2010) (holding that Minnesota-based partner rates ranging from $500–$750 "are based on prevailing fees for complex class actions of this type that have been approved by other courts."); *In re: CenturyLink Sales Practices & Securities Litig.*, No. 17-md-2795, 2020 WL 7133805 (D. Minn. Dec. 4, 2020) (approving rates of $450 to $895 "which appear reasonable for this District[.]"); *VillageBank v. Caribou Coffee Co. Inc.*, No. 19-cv-1640, Dkt. 68 (D. Minn. Dec. 1, 2020) (approving hourly rates for attorneys between $375 to $1,150 per hour).[5] Additionally, Class Counsel has adjusted the reasonable hourly rates to account for the type of work performed and adjusted attorney billing rates downward when the work could have been reasonably performed by an attorney with a lower billing rate. Rudd Decl. ¶¶ 70–71.

Second, those reasonable hourly rates were multiplied by reasonable hours incurred in bringing this complex, class action case against a sophisticated defendant who engaged in a disproportionate and forceful defense.[6] Class Counsel litigated this case as efficiently as possible.

[5] Declarations submitted by class counsel in these cases, which list the requested, and later approved, hourly rates, are attached as exhibits. Rudd Decl. ¶¶ 86–89.

[6] Time spent preparing a fee petition is compensable and is included here. *Reid*, 2015 WL 3653318, at *12.

Unlike a usual complex, class action case, here, Class Counsel came from a limited subset of a single law firm, Zimmerman Reed, . Mr. Rudd further assigned appropriately qualified attorneys to the specific tasks required to advance the case. *Id.* ¶¶ 70.

Additionally, the attorneys and staff entered their hours contemporaneously with their activities throughout this litigation to ensure accurate billing records. Rudd Decl. ¶ 66. Prior to submitting this fee petition, Class Counsel also reviewed the time entries and removed any excess, unnecessary, or duplicative time incurred in litigating this action, including any time incurred related to Dr. Kilpatrick's opinion which Plaintiffs withdrew. *Id.* ¶ 73. Class Counsel's lodestar thus includes only those hours reasonably necessary to litigate the case and bring about a successful result. *Id.*

In all, Class Counsel worked 6,250.91 hours in litigating this action, and when multiplied by the attorneys' reasonable hourly rates, the total lodestar equals $3,151,017.25. Class Counsel seeks the exact amount of its audited lodestar, and no additional multiplier.

C. The Circumstances of the Case Support Class Counsel's Lodestar.

Although fees based on the lodestar method are presumed reasonable, *Pickett*, 664 F.3d at 639, the Seventh Circuit has provided several additional factors for courts to evaluate the reasonableness of a fee request. Those include: (1) the amount of work necessary to resolve the litigation; (2) the risk of nonpayment a firm agrees to bear; (3) the quality of its performance; and (4) the stakes of the case. *Standard Innovation*, 2017 WL 10544061, at *2. Here, each factor supports Class Counsel's request for its attorneys' fees.

1. The Amount of Work Necessary to Resolve the Litigation

As demonstrated by Class Counsel's lodestar, this case required significant work and repeated successes to come to an agreement with Defendants, supporting Class Counsel's request

for attorneys' fees. *Sears*, 867 F.3d at 793 (holding that "the extensive time and effort that class counsel devoted to a difficult case against a powerful corporation entitled them to a fee in excess of the benefits to the class."). At every stage of this litigation, Husky employed a forceful defense against Plaintiffs' claims, likely recognizing the risk Class Counsel shouldered, given a small class size with small individual damages. Rudd Decl. ¶¶ 44–48. Husky's strategy, not Plaintiffs', drove up the time and costs necessary to advance this litigation, further showing the reasonableness of Class Counsel's lodestar and fee request. *Elec. Constr.*, 2021 WL 308545, at *3.

Indeed, although most cases might involve a single motion to dismiss, here, Husky filed three cumulative motions, unnecessarily multiplying the proceedings. Rudd Decl. ¶¶ 8 – 9, 13. It sought to dismiss every one of Plaintiffs' claims, prevent Plaintiffs from seeking injunctive relief, assert Plaintiffs suffered no damages dues to the evacuation, dismiss HEI as a Defendant, strike Plaintiffs' class allegations, and prematurely exclude from evidence the CBS's investigation into the explosion. *Id.* ¶ 13.

After Plaintiffs defeated Husky's motions, Husky continued its unnecessary and aggressive motion practice on the issue of the Court's personal jurisdiction over HEI. *Id.* ¶ 29, n.1. Husky simultaneously moved for interlocutory appeal of the Court's jurisdictional ruling and for reconsideration on the same issue, requiring Plaintiffs to respond in opposition. *Id.* This issue could have been resolved without motion practice by substituting the correct party, but for eight months Husky refused to reveal through discovery responses or informally that its "lack of personal jurisdiction" argument was based on the fact HEI's wholly-owned subsidiary, Husky Oil Operations, was the proper Defendant. *Id.*

Plaintiffs also spent significant time attempting to engage with Husky in meeting their respective discovery obligations, including resolving Defendants' refusal to confer over search

methodologies for electronically stored information and its belief that it need not produce any discovery until the Court ruled on its motions to dismiss. *Id.* ¶¶ 19 – 23, 29, n.1, 42–45, n.1. Despite previously agreeing to discovery and ESI protocols, Defendants refused to comply and repeatedly challenged Plaintiffs' entitlement to discovery at all. *Id.* ¶ 19–23. Attempting to prod Husky into discovery, Plaintiffs unilaterally narrowed their discovery requests and spent time in meet and confers and in written correspondences clarifying the limited nature of Plaintiffs' requests. *Id.* ¶ 20.

The Court ultimately had to intervene due to Husky's discovery blockade when Defendants' motion to stay discovery, which they filed only after unilaterally refusing to provide discovery for several months. *Id.* ¶ 23. Plaintiffs opposed Husky's motion to stay and also moved to compel. *Id.* The Court agreed with Plaintiffs, holding that discovery in this case had never been stayed, and ordering the parties to meet and confer and agree on how discovery would proceed. *Id.* ¶ 24.

However, even when formal discovery had begun, Husky's aggressive tactics continued. Specifically, Husky refused to produce clearly relevant documents concerning its investigation into the fire and explosion on privilege grounds. *Id.* ¶ 30. Through numerous meet and confers over several months, Defendants ultimately agreed to produce 200 of 230 allegedly privileged documents it had withheld, and that Plaintiffs challenged. *Id.* ¶¶ 31–32. This issue, again, required a disproportionate and unnecessary amount of time and effort to resolve.

In addition to responding to Husky's litigation strategy, Class Counsel undertook time and effort to efficiently advance this litigation on behalf of Plaintiffs and the Class. Class Counsel obtained relevant evidence through discovery and expert testimony on liability and damages, including deposing relevant witnesses, and defending Plaintiffs' and Plaintiffs' expert's

depositions. *Id* ¶¶ 33–37. Husky strongly disputed liability, retaining its own expert to refute the overwhelming evidence and findings by regulatory bodies that its acts and omissions caused the explosion. Thus, in addition to individual and class damages, Plaintiffs secured expert testimony from Dr. Williams establishing Husky's actions created a foreseeable risk of the explosion. *Id.* ¶ 34–36.

Near the end of discovery in the Spring 2020, Plaintiffs proposed that the parties mediate this case to avoid the risk and burden both parties faced with a decision on class certification. *Id.* ¶¶ 49–50. Class Counsel provided Husky with information concerning its fees and expense at that time, and Class Counsel and Husky engaged in some productive discussions. *Id.* ¶¶ 51, 67. However, Husky declined further discussions with a mediator, resulting in substantial motion practices on several critical issues, including: (1) Plaintiffs' motion for class certification; (2) Husky's motion for summary judgment on Plaintiffs' injunctive relief claim; and (3) Husky's motion to exclude Dr. Charles Baum, Plaintiffs' damages expert. *Id.* ¶¶ 38–43. These issues, particularly Plaintiffs' Motion for Class Certification, were central to advancing this litigation on behalf of the Plaintiffs and the Class. Given the small individual damages caused by the Evacuation Order, without a certified class, relief to Class Members would likely have been completely foreclosed. *See Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits[.]" (emphasis in original)).

After the Court ruled on those motions and certified a Rule 23(b)(3) liability Class, Husky agreed to mediate. Rudd Decl. ¶ 52. As with litigation, mediation discussions were complex and difficult, even with the assistance of Judge Andersen; but each party negotiated in good faith. *Id.* With the Class certified, Husky was, for the first time, willing to discuss a Settlement that afforded

classwide relief. *Id.* After an all-day mediation and continued discussions over several weeks, Plaintiffs and Husky agreed to the basic Settlement structure. *Id.* ¶¶ 52–54.

The culmination of Class Counsel's efforts was a favorable Settlement that offered classwide relief whereby Class members could obtain payment from a $1,050,000 Fund through a simple claim process without having to provide documentary proof of their damages. *Id.* ¶ 58. The Class responded positively to the Settlement and levied no objections at all, and nearly 6,000 Class members will receive a portion of the Fund for their annoyance and inconvenience caused by the evacuation. *Id.* ¶ 61. That result would not be possible with Class Counsel's work litigating against sophisticated, and well-represented Defendants.

2. The Risk of Nonpayment

This case posed significant risk to Class Counsel. Class Counsel agreed to represent on a contingency fee basis Plaintiffs and a proposed class of individuals subject to the Evacuation Order. From the outset, Class Counsel represented a class with small losses flowing from a serious disruption to property rights against a sophisticated defendant with substantial resources. As a single law firm, Class Counsel alone bore the entire risk that it would not recover its fees and expenses. That risk was significant here for two reasons.

First, in any class action where counsel represents plaintiffs on a contingency fee basis, counsel faces substantial risk of non-recovery. *Barbee v. L. Fish Furniture Co.*, No. 1:05-cv-0550, 2006 WL 3201938, at *3 (S.D. Ind. May 4, 2006) ("Plaintiffs' counsel accepted this representation on a contingency fee basis. Such representation, by its nature, involves risks."). That risk is particularly strong in a complex, class action where counsel must endure costly litigation requiring technical expertise to establish liability, causation and damages and confront highly skilled defense counsel who would vigorously advocate on defendants' behalf.

In addition to those typical risks, Class Counsel here undertook representation of a small class relative to a usual class action, where Class members suffered only a small amount of damages that would not justify an individual action. *See, e.g.*, *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1030 (7th Cir. 2018) ("[T]he amount of damages to which each plaintiff would be entitled is so small that no one would bring this suit without the option of a class."). Therefore, Class Counsel faced additional risk because, absent class certification, it likely could not obtain classwide relief or recover any, other than a very small portion, of its fees and expenses. *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, 2015 WL 1399367, at * 4 – 5 (N.D. Ill. Mar. 23, 2015) ("As a putative class action, Plaintiff also faced the risk that the Court would not certify the class, either because of the[] . . . defenses, or because of other potential class issues."). That risk materialized and persisted throughout this case because of Husky's strategy to disproportionately litigate its defense and its initial unwillingness to consider any settlement with classwide relief. Rudd Decl. ¶¶ 9, 19–23, 30–32, 44–50.

Additionally, Class Counsel undertook representation of the Plaintiffs and the Class in this case even though liability and damages would likely turn on costly expert evidence. Liability in this case required technical expert analysis and testimony on whether Husky's operation of its Superior Refinery breached accepted safety standards and created a foreseeable risk of the fire. Rudd Decl. ¶¶ 34–36.

Additionally, proof of classwide and individual damages also benefited from expert analysis because, in cases where individual damages are low, there is a risk that Class members may lack proof of their individual damages. *See, e.g.*, *Byrd v. Aaron's Inc.*, 784 F.3d 154, 173 (3d Cir. 2015), *as amended* (Apr. 28, 2015) (Rendell, J., concurring) ("In most low-value consumer class actions, prospective class members are unlikely to have documentary proof of purchase,

because very few people keep receipts from drug stores or grocery stores."). That fact appeared true at the outset of this case because Husky, through its reimbursement program, turned away nearly half of all applicants for their failure to adequately document their expenses. While Class Counsel developed a damages theory that sought to overcome potential challenges with individual damages, including pursuing more uniform damages like the loss of use and enjoyment of property, Class Counsel still faced a risk that individual damages proceedings would lengthen and complicate this case.

Class Counsel, thus, took on an important but complicated class action representing tens of thousands of individuals whose lives were significantly disrupted due to Husky's knowingly unsafe operation of its refinery. While the class size and individual damages were small, the Seventh Circuit has emphasized that such cases are the quintessential purpose of the class action device because, absent a class action, no individual would bring suit and Husky would have no liability for or obligation to improve its unsafe refinery operations. *See, e.g.*, *Carnegie*, 376 F.3d at 661. Class Counsel took significant risk bringing this case and succeeded in obtaining a positive Classwide benefit as a result.

3. The Quality of Class Counsel's Performance

The third factor, the quality of Class Counsel's performance, further supports awarding Class Counsel its requested lodestar. Class Counsel is deeply experienced in complex, class action cases, and throughout the litigation it obtained several, critical victories that permitted a favorable resolution for the Class. As described in detail above, Class Counsel succeeded with respect to Husky's cumulative motions to dismiss and effort to appeal, Husky's discovery obfuscation, Class certification, and the Settlement. As described further below, each of these victories was necessary to resolving this case.

i. Class Counsel Defeated Husky's Motions to Dismiss the Case.

Class Counsel successfully opposed a series of early motions that threatened to end the case. Rudd Decl., at ¶ 8–9, 29. At the inception of this litigation, Husky brought three motions designed to limit or eliminate Plaintiffs' claims: (1) a motion to dismiss Plaintiffs' Complaint and each of Plaintiffs' claims for numerous different reasons; (2) a motion to dismiss HEI as a Defendant, claiming the Court had no general or personal jurisdiction over it; (3) a motion to strike class allegations and allegations citing to a CBS report that Husky claimed would be inadmissible at trial. Rudd Decl. ¶¶ 13, 15.

Collectively, these motions posed a risk to Plaintiffs' ability to prove their damages and Husky's liability, and to obtain a certified class. As such, Class Counsel vigorously opposed each of these motions. *Id.* ¶ 16. Consequently, the Court denied Husky's motions to dismiss in their entirety, paving the way for Plaintiffs to continue the action, certify the Class, and ultimately, negotiate a favorable Settlement. *Id.* ¶ 29.

ii. Class Counsel Overcame Husky's Discovery Challenges.

Class Counsel also fought successfully to obtain discovery in this case that proved critical to Plaintiffs' Motion for Class Certification. For months in this case, Husky refused to provide discovery, even concerning its claim that HEI was not a proper defendant. *Id.* ¶¶ 16–21. Husky's position forced Class Counsel to expend significant time and effort to resolve numerous discovery disputes and, eventually, to brief dueling discovery motions—Husky's motion to stay discovery and Plaintiffs' motion to compel discovery. *Id.* ¶¶ 19–20, 44–46. Plaintiffs succeeded before the Court, which ordered Husky to participate in discovery because, contrary to Husky's position, discovery had never been stayed in the case. *Id.* ¶ 24.

Even when formal discovery ongoing, Husky continued to refuse to produce highly relevant documents. Rudd Decl. ¶¶ 30–32. Through numerous meet and confers, Plaintiffs again succeeded in obtaining discovery relevant to Husky's investigation of the fire and explosion. *Id.* Class Counsel's efforts proved critical to developing the factual, expert, and legal theories in this case and obtaining information necessary to support class certification and to establish liability at trial.

iii. Class Counsel Obtained a Certified Class of Individuals Impacted by the Evacuation Order.

After discovery, Class Counsel moved to certify a Rule 23(b)(3) damages Class and a Rule 23(b)(2) Class for injunctive relief pursuant to Rule 23(b)(3). Class Counsel sought to define the Class to include all those over the age of 18 subject to the Evacuation Order who suffered economic loss or loss of use and enjoyment of their property, excluding personal damages. Rudd Decl. ¶¶ 38, 42.

Husky opposed Plaintiffs' motion on numerous grounds, including, among others, that the class action device was not the superior method of adjudication and variances in individual injuries and damages prevented class certification. On February 2, 2019, the Court granted Plaintiffs' Motion and certified the same Class Plaintiffs proposed for the purpose of determining Classwide liability, leaving the issue of damages to individualized proceedings. *Id.* ¶ 42–43.

Given the small individual damages, class certification was critical to obtaining favorable Classwide relief. Indeed, the Class Certification Order drew Husky, which previously did not wish to discuss settlement, into mediation generally and into discussions concerning Classwide relief, which Husky previously resisted. *Id.* ¶ 52. Class Counsel's success in obtaining a liability Class thus put this case on a path towards a Settlement that benefited the entire Class.

iv. Class Counsel Negotiated a Favorable Classwide Settlement.

Finally, Class Counsel negotiated a Settlement that substantially benefits the Class, including an amount and process that individual Class members likely could not have obtained at trial. Specifically, Class Counsel negotiated the Settlement to encourage high participation by eliminating any requirement for documentation of damages and by simplifying the claim form. *See Cooper*, 338 F. Supp. 3d at 736 (noting that "[i]n making [fee] determination[s], the district court considers . . . any social benefits not reflected in a small damages award."). That benefit eliminated a hurdle Class members may have had to face should this case go to trial, namely, the possibility that Class members would have to prove their individual damages. Class Cert. Order, Dkt. 232 at 29.

The simple claim process proved successful. Over a quarter of the estimated Class submitted a valid claim form for payment from the Claimant and Notice Fund. The claims rate exceeds those in most other class action settlements. *See, e.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 667 (7th Cir. 2015) (noting that "only a tiny fraction of eligible claimants ever submit claims for compensation" in class action settlements); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 119–20 (2007) (examining class action settlements with participation rates of 10 to 15 percent and, in some cases, lower than 5 percent). No Class member objected and only 16 opted out.

The substantial participation rate reflects a well-received Settlement that provided a direct, monetary benefit to a significant portion of the Class.

4. The Stakes of the Case

This case raised novel and complex issues concerning both liability and damages stemming from an evacuation order that displaced practically the entire city of Superior, Wisconsin. The

refinery explosion posed a serious and credible risk to the Superior residents, who were forced to suddenly and immediately flee the city or bear the risk of harm from the dangerous chemicals spewing in the air. Class Counsel, on behalf of the Plaintiffs, brought this action to obtain meaningful recovery for those impacted by the displacement order, recognizing that Husky's reimbursement program had not offered adequate compensation or a reasonable process for recovery. *Cooper*, 338 F. Supp. 3d at 736 (noting that "[i]n making [fee] determination[s], the district court considers . . . any social benefits not reflected in a small damages award.").

While Plaintiffs did not obtain any specific injunctive relief, the success of Plaintiffs' case on its own serves to incentivize Husky to take adequate precautions to prevent future explosions. In addition, long after Plaintiffs filed their complaint seeking injunctive relief challenging Husky's storage of hydrogen fluoride at the Superior Refinery, Husky agreed to make significant safety improvements in its storage of hydrogen fluoride as part of negotiations with the U.S. government and State of Wisconsin. Class Cert. Order, Dkt. 232 at 14.

Although the individual damages were small, the stakes of the case were high given the significant risk to community health and safety and the substantial disruption caused by the refinery explosion. These factors, collectively, support awarding Class Counsel the amount of its lodestar.

II. The Percentage Method Does Not Result in a Reasonable Attorneys' Fee in This Case.

Class Counsel anticipates that Husky will argue that the percentage method should apply, rather than the lodestar method, to calculate reasonable attorneys' fees in this case. However, the percentage method is not appropriate given the circumstances of this case.

In awarding attorneys' fees, courts may, instead of applying the lodestar method, award a percentage of the amount recovered on behalf of the class. *Kolinek*, 311 F.R.D. at 500; *Sw. Airlines*

I, 799 F.3d at 708 ("Under the 'common fund' doctrine, an attorney who recovers a common fund for the benefit of the class is entitled to a reasonable portion of the fund that is made available to the class . . . ."). In a common fund case, the percentage method helps manage conflicts of interest that exists when class counsel and the class both receive payment from the same fund. *Harman v. Lyphomed, Inc.*, 945 F.3d 969, 975 (7th Cir. 1991) (noting a "frequently cited advantage to the percentage method" is that it "align[s] . . . class attorneys' interests with those of the client[.]"). Here, the Court should decline to apply the percentage method for two reasons: (1) this is not a common fund case where part of the fund is paid to Class Counsel, meaning any benefits of the percentage method would not be achieved here; and (2) the percentage method would not result in reasonable compensation to counsel, who expended significant time and resources to counter the disproportionate litigation tactics Husky undertook.

First, by agreeing to pay attorneys' fees separate from the Claimant and Notice Fund, the parties provided an instant benefit to the Class because, due to the number of claims submitted, the Settlement does not allocate any of the Claimant and Notice Fund to Class Counsel. SA, at § 7.1. Therefore, there is no need to award a specific percentage of the fund (using the percentage method) to Class Counsel to ensure that the fund is fairly and reasonably split between Class Counsel and the Class. *See, e.g.*, *Redman*, 768 F.3d at 629 (noting the judge must critically assess "the reasonableness of the agreed-upon attorneys' fees" where "the higher the fees the less compensation will be received by class members.").

Moreover, unlike a typical common fund case, the Settlement allows for adversarial proceedings that help inform the Court of the reasonableness of the attorneys' fee award. *See id.* at 629 (noting that, in approving a class action settlement or awarding fees, "the judge's task is eased [when] he or she has the benefit of an adversary process[.]"). Specifically, although Husky

agreed to pay Class Counsel their reasonable fee, they also retained the opportunity to challenge any amount Class Counsel requested. SA ¶ 7.1. The determination of reasonable attorneys' fees remains an adversarial issue. Therefore, the types of conflicts prompting use of the percentage method do not exist here: Class Counsel and the Class are not receiving payments from the same fund; regardless of the amount the Court awards Class Counsel, the Class will retain the full value and benefits of the Settlement; and, the interests of the Class are protected by the adversarial process of determining reasonable attorneys' fees.

Second, the percentage method is limited to evaluating the outcome of the case and, therefore, fails to recognize other factors that support awarding Class counsel their lodestar. "Success is one factor—but only one—in determining the amount of a fee award." *Sw. Airlines II*, 2013 WL 5497275, at *5 (holding that "success is a condition precedent to recovery of a fee, but the amount of the fee is not attributable to success or even the degree of success."). Indeed, the Seventh Circuit has expressly "rejected the notion that the fees must be calculated proportionally to damages." *Anderson v. AB Painting & Sandblasting, Inc.*, 578 F.3d 542, 545 (7th Cir. 2009) (internal quotations omitted); *Schlacker v. Law Offices of Phillip J. Rotche & Assoc., P.C.*, 574 F.3d 852, 857 (7th Cir. 2009) ("[T]here is no rule *requiring* proportionality between damages and attorney's fees[.]" (emphasis in original)).

Applied here, the percentage method would punish Class Counsel for having to respond to and overcome Husky's forceful and disproportionate defense. Husky's heavy litigation strategy directly resulted in Class Counsel's lodestar, and Class Counsel should be compensated for those efforts especially because they were necessary to come to a favorable, classwide resolution. *Elec. Constr.*, 2021 WL 308545, at *3. Were Class Counsel unwilling to expend the time and resources

necessary to combat Husky's strategy (which Class Counsel did despite the risk of non-payment), the likely result for the Class would have been no or a much smaller recovery.

III. The Court Should Award Class Counsel's Reasonable Expenses.

In addition to its lodestar, Class Counsel seeks recovery of its reasonable litigation expenses. As with attorneys' fees, Husky has agreed to pay Class Counsel's expenses in an amount awarded by the Court. SA ¶ 7.1. An attorneys' reasonable expenses incurred in litigating a class action may be reimbursed. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 600 (N.D. Ill. 2011); *Craftwood*, 2015 WL 1399367, at *2 ("[R]educing [expenses] because the district judge thinks costs too high in general is not" permitted."). Here, Class Counsel seeks $359,948.97 for reimbursement of its expenses.

Class Counsel has submitted a list of reasonable expenses necessary to litigate this action, including expert costs, court-related fees, copying costs, and costs of serving subpoenas. Rudd Decl., at ¶ 74. These expenses are regularly approved by courts in class cases. *Lynch v. Motorola Mobility, LLC*, No. 1:16-cv-4524, 2018 WL 11372160, at *2 (N.D. Ill. Feb. 1, 2018) ("The expenses for which Class Counsel seek payment include filing and other court fees, legal research, copying costs, fees for serving third-party subpoenas, and transportation and lodging for attendance at hearings. Courts regularly provide the payment of these types of expenses."); *City of Greenville v. Syngenta Crop. Prot., Inc.*, 904 F. Supp. 2d 902, 910 (S.D. Ill. 2012) ("As the affidavits . . . show, the costs sought here are of the type that are routinely reimbursed by paying clients, such as experts' fees, other consulting fees, deposition expenses, travel, and photocopying costs.").[7]

[7] Class Counsel does not seek reimbursement for costs incurred related to its expert, Dr. John Kilpatrick, whose opinion Class Counsel withdrew during briefing on Husky's *Daubert* motions.

A substantial portion of Class Counsel's expenses relate to Plaintiffs' expert, Dr. Williams, who opined on Husky's liability, a hotly disputed issue. Rudd Decl. ¶¶ 75–76. Dr. Williams' opinion was central to establishing Husky's liability at trial, where he would have been Plaintiffs' key witness. Additionally, Dr. Williams was necessarily to refute the opinions of Husky's technical expert, Ennio Mastracci, who claimed Husky operated its refinery safely and that the Class members faced no risk of exposure to hydrogen fluoride. *See Defs.' Opp. to Pls.' Mot. for Class Cert.*, Dkt. 141 at 4. Given the importance of Dr. Williams' testimony, the Court should approve Class Counsel's expert expenses, in addition to the other expenses reasonably incurred in pursuing this case. *Rysewyk v. Sears Holdings Corp.*, No. 1:15-cv-4519, 2019 WL 11553475, at *3 (N.D. Ill. Jan. 29, 2019) ("The expenses for which Class Counsel seek reimbursement include expert fees" and those "types of expenses are regularly approved.").

Class Counsel respectfully requests the Court approve its reasonable expenses in full.

CONCLUSION

Based on the foregoing points and authorities, Class Counsel respectfully requests that the Court award its lodestar of $3,151,017.25 and reimbursement of expenses of $359,948.97.

Dated: December 21, 2021

Respectfully submitted,

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

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Id.¶¶ 34, 73. Class Counsel also does not seek reimbursement for legal research on Westlaw and Bloomberg. *Id.* ¶ 78.

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