UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

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

INTRODUCTION

Plaintiffs Jasen Bruzek, Hope Koplin, and Christopher Peterson ("Class Representatives") move for final approval of the class action settlement that concludes litigation between them and Defendants Husky Oil Operations Ltd. ("Husky Oil") and Superior Refining Co. LLC ("SRC") (collectively, "Husky" or "Defendants"). Class Representatives represent a class of individuals over the age of 18 who were subject to the evacuation order declared on April 26, 2018, as a result of the Superior Refinery explosion and fire ("Evacuation Order"), and who seek compensation for economic losses and loss of use and enjoyment of their property, excluding personal injury damages ("Class members"). The Settlement resolves the Class's claims that Husky's wrongful conduct foreseeably resulted in the refinery explosion, harming Class Representatives and the Class who were subject to the 18-hour Evacuation Order, many of whom fled Superior, Wisconsin.

The Class has shown strong support for the Settlement and responded positively to its benefits. Of the estimated 20,782 Class members, 5,390 submitted a valid Claim Form for payment

from a fund of $1,050,000 created and paid for by Husky. Only 16 Class members, less than 0.08% of the Class, submitted requests for exclusion from the Settlement. Moreover, no Class member objected to the Settlement.

As detailed in Plaintiffs' Memorandum of Law in Support of Class Representatives' Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Mem."), Dkt. No. 245 (Jun. 25, 2021), the Settlement provides significant benefits to the Class. Defendants agreed to pay $1,050,000 into a Claimant and Notice Fund ("Fund"). The Fund will pay (1) service awards of up to $2,000 each to the Class Representatives (not to exceed $6,000 total), (2) the total costs of notice and claims administration (not to exceed $ 169,000), and (3) payments to Class members who submit a valid claim. Claim amounts are subject to an offset for amounts previously paid to the Class member through Husky's reimbursement program.

Class members were able to submit claims with no obligation to document their damages. Rather, to receive a payment, Class members needed only complete a simple claim form providing: (1) basic contact information, (2) address at the time of the Evacuation Order, (3) a certification from each claimant that he or she fell within the evacuation zone on the day of the explosion, and (4) a statement as to whether Husky's reimbursement program paid any expenses or claims of the Class member and, if so, the amount(s) of any payment(s) paid to or for the Class member.

Additionally, Defendants agreed separately to pay Class Counsel's attorneys' fees and expenses as awarded by the Court ("the Fee Award"), within thirty (30) days of the exhaustion or expiration of any appeal rights related to the Fee Award. Class Counsel will separately move the Court for the Fee Award to be paid by Defendants, who have agreed not to challenge Class Counsel's entitlement to reasonable fees and expenses but may challenge the amount.

The positive response from Class members and the Settlement's adherence to the approval criteria shows that the Settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). Additionally, as permitted under the Settlement, Class Representatives request the Court approve service awards of $2,000 each for their effort and time expended throughout the litigation to help achieve these Settlement benefits.

Class Representatives request the Court finally approve the Settlement Agreement and approve service awards of $2000 to each Class Representative to be paid from the Fund.

BACKGROUND

A. Review of the Proceedings

This action arose from an April 26, 2018, explosion at Defendants' refinery in Superior, Wisconsin. The refinery explosion caused a fire that Class Representatives alleged created a risk of harm to Superior residents due to the possibility that hydrogen fluoride would be released and harm city residents. Second Am. Compl., Dkt. No. 93, at ¶¶ 1–2, 23–30 (Nov. 26, 2019). Local governmental authorities issued an Evacuation Order in place for 18 hours from April 26, 2018, to the morning of April 27, 2018. *Id.* at ¶¶ 31–37. Consequently, Class members, who include individuals in the evacuation zone during the Evacuation Order, suffered harm.

Class Representatives Bruzek, Koplin, and Peterson are Superior, Wisconsin residents who sued Husky Oil and SRC on behalf of all community members, claiming Defendants created dangerous circumstances that led to the explosion and the Evacuation Order. Class Representatives brought four claims against Defendants: (1) negligence, (2) nuisance, (3) trespass on land, and (4) strict liability for extrahazardous activity. *Id.* at ¶¶ 106–132. Defendants denied all wrongdoing and claimed that their voluntary program to reimburse some Superior residents ("Reimbursement

Program") offered a sufficient opportunity for Class members to obtain reimbursement for any harm suffered by the evacuation. *Id.* at ¶¶ 82–85.

More than three years later, this action has been hard fought at every stage of the case as part of Defendants' exhaustive litigation strategy. Both sides have spent significant resources and time in motion practice and discovery. Class Representatives (1) defeated Defendants' three early motions to dismiss or limit the case, including a 12(b)(6) motion to dismiss, motion to strike Plaintiffs' class allegations, and a motion to dismiss Defendant Husky Energy Inc. ("HEI") due to lack of personal jurisdiction;[1] (2) obtained discovery over Defendants' strenuous objections;[2] (3) successfully defeated Defendants' motion to exclude their experts;[3] and (4) certified a Class of individuals affected by the explosion.[4] Defendants (1) moved the Court to reconsider its order denying Defendants' motion to dismiss HEI as a Defendant, prompting additional discovery on the Court's personal jurisdiction over HEI;[5] (2) moved for summary judgment on Class Representatives' injunctive relief claims;[6] and (3) challenged Class Representatives' motion for an injunctive relief Class.[7]

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[1] Op. & Order, Dkt. No. 78 (Aug. 30, 2019) (order denying Defendants' motions to dismiss under 12(b)(6) and 12(b)(2) and to strike class allegations).

[2] Op. & Order, Dkt. No. 74 (Aug. 13, 2019) (order denying Defendants' motion to stay discovery).

[3] Op. & Order ("Class Cert. Order"), Dkt. No. 232 (Feb. 19, 2021) (order granting in part Pls.' Mot. for Class Cert.).

[4] *Id.*

[5] Order, Dkt. No. 81 (Oct. 10, 2019) (granting Defs.' Mot. for Reconsideration and denying as moot Defs.' Mot. for Interlocutory Appeal).

[6] Class Cert. Order, Dkt. No. 232 (Feb. 19, 2021).

[7] *Id.*

After the Court's order granting Plaintiffs' Motion for Class Certification and Defendants' Motion for Summary Judgment on Class Representatives' injunctive relief claim, the parties agreed to mediate before Hon. Wayne R. Andersen, a retired judge of the United States District Court for the Northern District of Illinois, where he served for 20 years. After an all-day mediation and several weeks of continued negotiations, the parties agreed to the basic structure of this Settlement. On June 25, 2021, Class Representatives moved for Preliminary Approval of the Settlement. Pls.' Mot. for Preliminary Approval, Dkt. No. 244 (Jun. 25, 2021). On August 6, 2021, the Court granted Plaintiffs' motion, finding the Settlement within the range of reasonableness, and directed the parties' selected Administrator, JND, to notify the Class in accordance with the Court's order. Order Granting Preliminary Approval ("Preliminary Approval Order"), Dkt. No. 250 (Aug. 6, 2021).

B. The Settlement

i. The Settlement's Benefits to the Class

The Settlement Agreement resolves the claims of Class Representatives and the certified Class consisting of approximately 20,782 Class members. Under the Settlement, Defendants have agreed to pay $1,050,000 into the Fund and, additionally, to pay a Fee Award separately from the Fund. Settlement Agreement ("SA"), Dkt. No. 246-1 at §§ 2.5, 3.1, 7.1 (Jun. 25, 2021). The Fund will be used to pay (1) service awards to the Class Representatives 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 § 3.1. JND, an experienced Claims Administrator, will administer the payments from the Fund.

Every Class member had the 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 §§ 3.1.3, 4.4. Under the Settlement, the values of the individual

and family claims would be adjusted pro-rata upwards or downwards depending on the number of valid and timely claims submitted. If, after payment of service awards and notice and administration costs, the amount remaining in the Fund exceeded the combined value of all valid $150 individual claims and $300 household claims, then the Claim values would be increased by a pro-rated amount up to $200 per claim or $400 per household. *Id.* at § 3.1.4. If any amount remained in the Fund after the pro-rated increase, up to $75,000 would be paid to the Superior Douglas County Family YMCA as a *cy pres*. *Id.* at § 3.1.5. Any amount remaining after that *cy pres* payment would be used to offset any Fee Award. *Id.* at §§ 3.1.6., 3.1.7. In the unlikely event that some amount remained after payment of attorneys' fees, it would be paid to the Superior Douglas County Family YMCA. Conversely, if, after paying the service awards and notice and administration costs from the Fund, the combined value of all valid $150 individual claims and $300 household claims exceeded the amount in the Fund, then the claim values would be decreased by a pro-rated amount so that the full value of the Fund, after deducting for service awards and administration costs, would be disbursed to the Class members who submitted valid and timely claims.

To receive an award, the Settlement required Class members to complete a simple Claim Form. The Claim Form requested each claimant provide his or her: (1) name, (2) current mailing address, (3) mailing address on April 26, 2018—the date of the explosion and evacuation—and (4) current email address. *Id.* at § 4.3. Claimants did not need to provide any documentation of damages. Rather, the Claim Form required only that the claimant certify that he or she was subject to the Evacuation Order. *Id.* at § 4.3.4. Finally, Class members had to indicate whether they received any amount through the Reimbursement Program and, if so, the amount received. *Id.* at

§ 4.3.5. Any amount that Class members received through the Reimbursement Program would be deducted from the claim payment. *Id.* at § 4.4.

In exchange for payment into the 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.

ii. Execution of the Notice Plan

JND, the Settlement administrator, successfully executed the Notice Plan contemplated under the Settlement Agreement, as modified by the Court upon preliminary approval. *Id.* at § 5.3; Preliminary Approval Order, at 9. Using Census data, JND previously estimated that approximately 20,782 adults 18 years or older resided in Superior, Wisconsin at the time of the Evacuation Order in approximately 11,727 households. Pls.' Mem. in Supp. of Prelim. Approval, Dkt. No. 245, at 14 (Jun. 25, 2021). To maximize reach to all Class members, JND performed the following: (1) a direct mail notice sent to potential Class members in or around Superior, Wisconsin ("Direct Notice Plan"); and (2) an eight-week publication notice plan (including digital notice) that supplemented the direct notice ("Indirect Notice Plan"). Decl. of Gina M. Intrepido-Bowden Regarding Notice Plan & Settlement Administration ("Intrepido-Bowden Decl."), at ¶¶ 4–5.

Under the Direct Notice Plan, JND sent a Postcard Notice via first class mail to approximately 31,059 individuals around Superior, Wisconsin[8] that may have been affected by the Evacuation Order. *Id.* at ¶ 11. This list included households that made a claim with the

[8] JND sent direct notice to residents of Superior, Wisconsin based on current census data estimating over 30,000 residents. *Id.* at ¶ 6. While this is over-inclusive of the estimated 20,782 Class members, it helped ensure a high percentage of the Class received direct notice of the Settlement. *Id.*

Reimbursement Program, the addresses for whom were provided by Defendants. Approximately 95% of the Postcard Notices were deemed delivered. *Id.* at ¶ 11. JND estimated Direct Notice reached the vast majority of the Class. *Id.* at ¶ 6.

Under the Indirect Notice Plan, JND implemented an extensive media campaign. JND performed the following: (1) published a half-page Publication Notice in the *Superior Telegram* on August 20, 2021, August 27, 2021, and October 22, 2021, and the *Duluth News Tribune* on August 25, 2021, August 28, 2021, September 1, 2021, and October 22, 2021, *id.* ¶ 12; (2) used GDN, an online network that reaches internet users, Facebook users, and the top social media platforms, to implement two periods of digital advertisements from August 20, 2021, to August 29, 2021, and from October 20, 2021, to October 30, 2021, *id.* at ¶ 15; (3) ran 32 thirty-second radio advertisements on KDKE-FM and KQDS-FM, two popular radio stations in the Superior Area, *id.* at ¶ 18; and (4) issued a Press Release to journalists and media outlets throughout Wisconsin on August 23, 2021, and August 25, 2021, *id.* at ¶ 19. JND estimates the GDN effort resulted in 409,531 impressions. *Id.* at ¶¶ 15. Collectively, JND estimates the Direct Notice Plan and Indirect Notice Plan resulted in notice reaching at least 70% of the Class. *Id.* at ¶¶ 21.

Finally, in addition to the Notice Plan, JND established and maintained a website that allowed Class members to obtain information about the settlement and to submit Claim Forms online. *Id.* at ¶ 23. The website also listed a toll-free number and PO box through which Class members could obtain additional information. *Id.* at ¶¶ 25–26.[9]

[9] Defendants have also complied with the Class Action Fairness Act's requirement to notify state Attorneys General of the Settlement. 28 U.S.C. 1715(b); Decl. of Kara L. McCall Regarding Compliance with the Class Action Fairness Act, Dkt. No. 249 (Jul. 9, 2021).

iii. Claims, Opt Outs, and Objections

The Notice Plan and simple claim process resulted in substantial participation in the Settlement. JND reported that 5,390 Class members submitted valid Claim Forms for payment from the Fund. *Id.* at ¶¶ 34. JND estimates that Class members who submitted valid claims will receive 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 the Fund, meaning no amount will be used to pay a *Cy Pres* or any amount of the awarded attorneys' fees and expenses. *Id.*; *see also* SA, at §§ 3.1.5–3.1.7. Additionally, JND received requests for exclusion from the Settlement from only 16 Class members, and no Class members objected to the Settlement. Intrepido-Bowden Decl., at ¶¶ 2–30.

iv. Attorneys' Fees and Expenses

Pursuant to the Settlement and the Court's Preliminary Approval Order, on December 21, 2021, Class Counsel will move the Court for an award of attorneys' fees and expenses to be paid by Defendants. SA, at § 7.1. Defendants agree that Class Counsel is entitled to reasonable attorneys' fees and expenses separate from the Fund; Defendants may, however, oppose the *amount* requested by Class Counsel. *Id.* The Parties agreed that the denial or adjustment of Class Counsel's requested attorneys' fees and expenses will not be grounds to seek modification or termination of the Settlement. *Id.* at § 7.4.

ARGUMENT

I. THE COURT SHOULD FINALLY APPROVE THE SETTLEMENT.

Parties seeking to settle a class action must seek approval from the Court. Fed. R. Civ. P. 23(e). The Court is tasked with determining whether the Settlement is "fair, adequate, and reasonable, and not a product of collusion." *In re AT&T Mobility Wireless Data Services Sales Litig.*, 270 F.R.D. 330, 345 (7th Cir. 2010) (internal quotations omitted). Here, the Court has

already (1) made a preliminary finding that the Settlement is fair, (2) directed notice of the Settlement to be issued to the Class, and (3) provided an opportunity for Class members to submit a claim, opt out or object. Preliminary Approval Order, at 5–9. Now that "Class members [have been] notified of the proposed Settlement" and "all interested parties have [had] an opportunity to be heard," the question is whether the Court should approve the proposed settlement as "'fair, reasonable, and adequate.'" *See Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)). Here, the Court should finally approve the Settlement.

The Settlement represents the culmination of complex, sweeping litigation and provides a significant, Classwide benefit. Since the Court ordered notice to be issued, the Class has overwhelmingly supported the Settlement. Over a quarter of the estimated Class submitted a Claim seeking a payment from the Fund, exceeding the usual claim rate in a class action Settlement. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 667 (7th Cir. 2015) (noting that usually "only a tiny fraction of eligible claimants ever submit claims for compensation" in class action settlements). Furthermore, only 16 Class members of an estimated 20,782 (less than 0.05% of the Class) opted out of the Settlement and no Class member objected to it. *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 230 (N.D. Ill. 2016) ("This extremely low percentage of opposition favors finding that the settlement is fair reasonable and adequate.").

The Settlement's provision of valuable compensation, promotion of participation by only requiring Class members to submit a simple claim form, and waiver of any documentation of damages has, thus, succeeded. The Court should finally approve the Settlement, solidifying the substantial Class benefits it provides and resolving this litigation for all parties.

A. The Settlement Is Presumptively Fair Because It Was Negotiated at Arm's Length by Experienced Counsel after Meaningful Discovery.

"[F]ederal courts look with great favor upon the voluntary resolution of litigation through settlement." *Armstrong*, 616 F.2d at 312. "In the class action context in particular, 'there is an overriding public interest in favor of settlement.'" *Id.* at 313 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."). Therefore, where a "settlement was arrived at as the result of arms-length negotiations by competent counsel . . . [a] strong presumption of fairness attaches . . . ." *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 410 (E.D. Wis. Nov. 6, 2002); Manual for Complex Litig., Third § 30.42 (1995) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.").

The parties are well positioned to understand the risks of continued litigation and to assess the value of the Settlement relative to those risks. *Cheesemore v. All. Holdings, Inc.*, No. 09-cv-413-WMC, 2014 WL 12730484, at *1 (W.D. Wis. Apr. 9, 2014) ("[T]he court finds that the proposed settlements appear 'fair, reasonable, and adequate'" because "at this advanced stage of litigation, plaintiffs were well equipped to evaluate the merits of the case."). This action has been litigated for three years through nearly every major stage of litigation—motions to dismiss, discovery, class certification, *Daubert*, and summary judgment. Specifically, among other things, the parties briefed Defendants' three motions to dismiss and to strike; took and produced extensive discovery, including expert testimony on liability and damages; and briefed Class Representatives' class certification motion, Defendants' partial summary judgment motion, and Defendants' motion to exclude Class Representatives' experts.

After the Court's order on class certification and summary judgment, the parties entered arm's length settlement negotiations before an experienced mediator, Judge Andersen. The Parties mediated all day on April 15, 2021 and continued negotiations over the course of several weeks with the continued help of Judge Andersen. On May 6, 2021, the Parties signed a term sheet. The Parties continued to negotiate and finalize the details of the Settlement Agreement until Class Representatives moved for Preliminary Approval on June 25, 2021, which the Court approved on August 6, 2021.

Since then, the Class's reaction has demonstrated the value the community has placed on the Settlement. In response to the robust notice program, thousands of Class members submitted a Claim and none objected. Only sixteen Class members opted out of the Settlement.

Given (1) the advanced stage of the case, (2) the Parties' full understanding of the risks and benefits of continued litigation, (3) rigorous negotiations before an experienced mediator, and (4) the positive reaction of the Class, the Settlement should be presumed fair and reasonable.

B. The Fairness Factors Support Final Approval of the Settlement.

In addition to the presumption of fairness accompanying class action settlements negotiated at arms' length, courts look to several factors to ensure a Settlement is fair, adequate, and reasonable. Those factors include: (1) the strength of plaintiffs' case compared to the amount of defendants' settlement offer, (2) the likely complexity, length, and expense of the litigation, (3) the amount of opposition to the settlement among affected parties, (4) the opinion of competent counsel, and (5) the stage of the proceedings and the amount of discovery completed at the time of settlement. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (citing *Isby*, 75 F.3d at 1199); *see also* Fed. R. Civ. P. 23(e)(2), 2018 Advisory cmt. Notes (providing similar factors for determining the fairness of a settlement). These factors fully support final approval of the Settlement Agreement.

1. The strength of Class Representatives' case weighed against the Settlement's benefits

"The most important settlement-approval factor is 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *AT&T Mobility*, 270 F.R.D. at 346 (quoting *Synfuel Techs.*, 463 F.3d at 653). "In conducting this analysis, the district court should begin by 'quantifying the net expected value of continued litigation to the class[.]'" *Id.* (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284–85 (7th Cir. 2002)). While "a high degree of precision cannot be expected in valuing a litigation, the court should nevertheless insist that the parties present evidence that would enable possible outcomes to be estimated, so that the court can at least come up with a ballpark valuation." *Id* at 347 (internal quotations removed). Here, the settlement compares favorably to the strength of Class Representatives' case, considering the difficulty and risks inherent in continued litigation and the maximum possible award Class Representatives could have obtained should they prevail at trial.

a. The Settlement provides a significant benefit to the Class.

The Settlement provided every Class member an opportunity to receive a payment from the $1,050,000 Fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980) (holding that class members "right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created . . . ."). Specifically, Defendants agreed to pay $1,050,000 into a Fund to pay: (1) Class Representatives' service awards, (2) Settlement notice and administration costs, and (3) all Class members' claims. Defendants will pay any attorneys' fees and expenses awarded to Class Counsel separately.[10] Furthermore, the amount awarded to

[10] The Settlement called for the Fund to pay attorneys' fees only if, after payment of all claims using the pro-rata increased amounts, Class Representatives' service awards, notice and administration costs, and a $75,000 *cy pres* payment, money still remains in the Fund. SA, §§ 3.1.3–3.1.6. Due to the number of Class members who submitted valid Claim Forms, the Fund

Class Counsel in attorneys' fees and expenses will not be a basis for modifying or terminating the Settlement, meaning payments to Class members from the Fund are not dependent on the attorneys' fees and expense award. SA, at ¶ 7.1.

To obtain a payment from the Fund, Class members needed only to submit a simple Claim Form. *Id.* at § 3.1.3. The Claim Form required Class members to provide basic identifying information and to attest that they were within the Evacuation Zone on the date of the explosion. No Class members had any obligation to prove the existence or amount of their damages.

The ease of the claims process was a substantial benefit to the Class given that, should this case have continued, Class members would have had to individually prove causation and their damages. Class Cert. Order at 29. Indeed, the benefit of a Class action is that the Class may collectively obtain relief even though Class members may not have pursued litigation individually. *See, e.g.*, *Silver Buckle Mines, Inc. v. U.S.*, 132 Fed. Cl. 77, 103 (Fed. Cl. 2017) (noting that where "recovery is likely to be small . . . claimants would likely not seek legal redress . . . ."); *Mullins*, 795 F.3d at 665 ("[A] critical feature of class actions for low-value claims like this one" is that "only a lunatic or fanatic would litigate the claim individually[.]" (internal quotations removed)). The Settlement reflects these advantages because it allows all Class members to obtain relief without having to pursue individual damages trials or prove the amount of their damages at all. Rather, they may seek a part of the Fund by completing a simple Claim Form.

Simplifying the claims process proved effective and justified the Parties' compromise regarding the amount of compensation to each Class member. The Settlement Administrator estimated that the Class includes 20,782 individuals. Dkt. No. 245, at 14 (Jun. 25, 2021). Of those,

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will not be used to pay any portion of Class Counsel's attorneys' fees. Intrepido-Bowden Decl., at ¶ 34 (noting that the Fund will be exhausted with the *pro rata* increase).

5,390 Class members submitted valid Claim Forms. Intrepido-Bowden Decl., at ¶¶ 34. Based on the number of Claims, Class members who submitted a valid claim will receive an estimated $167.23 payment from the Fund for losses incurred due to the 18-hour evacuation, not including deductions for payments previously received from the Reimbursement Program.[11] The Settlement initially contemplated a maximum payment of $150 for individuals and $300 for families.

In addition to payments from the Fund, the Settlement further benefits Class members by ensuring they will not have to pay Class Counsel's attorneys' fees or expenses. Defendants have agreed to pay Class Counsel's reasonable attorneys' fees and expenses separate from the Fund and as awarded by the Court. SA, at § 7.1. The amount awarded to Class Counsel will not be taken from the Fund. Defendants' payment of Class Counsel's reasonable attorneys' fees and expenses is another benefit to the Class.

b. The Settlement benefits compare favorably to any likely award at trial.

Class Representatives strongly believe their case is meritorious and believe that they have, with their counsel, positioned themselves to be successful at trial. Class Representatives defeated Defendants' three early motions to dismiss or limit the scope of this case, took meaningful discovery despite Defendants' strenuous objections to discovery, secured expert testimony on Defendants' liability and the Class's damages, and obtained certification of a Class subject to the Evacuation Order.

[11] This amount assumes the Court awards Class Representatives Service Awards of $2,000. *See* Intrepido-Bowden Decl., at ¶ 34 (estimating the Fund to include $875,000 after deducting the $169,000 notice and administration costs and the $6,000 service awards). Plaintiffs will provide the Court with final claim values when JND completes the process of ensuring claim validity and resolving any deficiencies. *Id.* at ¶ 35.

Were Class Representatives to succeed at trial, dissuade the Court of its concerns about Class Representatives' damages model, defeat Defendants' second motion to exclude Class Representatives' damages expert, and win on any subsequent appeals—in other words, a complete win for Class Representatives—the maximum possible recovery for the Class is approximately $9.8 million. *See* Preliminary Approval Mem., at 22. That highest possible result is measured using Dr. Baum's damages model after deducting for the amount Husky paid through its Reimbursement Program. *Id.* That possible result, however, is likely unattainable for the Class should litigation go forward because the Court has ordered that Class members individually prove causation and damages. Moreover, Defendants have challenged Dr. Baum's analysis, and the Court indicated it would permit Defendants to reraise their *Daubert* motion to exclude Dr. Baum which, if successful, would preclude Class members from introducing Dr. Baum's findings in pursuing their individual damages. Class Cert. Order, at 34. Given the law of the case and the practical consequences of each Class member coming forward to prove causation and damages individually, Dr. Baum's damages model thus likely overestimates the maximum possible award to Class members by a significant margin.

When compared to the likely best-case scenario, the Settlement is fair, reasonable, and adequate. *Armstrong*, 616 F.2d at 315 (noting that "the essence of a settlement is compromise[,] an abandonment of the usual total-win versus total-loss philosophy of litigation in favor of a solution somewhere between the two extremes."); *AT&T Mobility*, 270 F.R.D. at 347 ("[C]ourts should not reject a settlement solely because it does not provide a complete victory to the plaintiffs." (internal quotations removed)). Courts in this circuit have held that:

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

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

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

First, the Class is not guaranteed any recovery through litigation. *AT&T Mobility*, 270 F.R.D. at 347 ("The most obvious risk of continuing this litigation is that Plaintiffs will not be successful."). Class Representatives must still convince a jury of Defendants' liability for the explosion, an issue Defendants strongly dispute, and must establish with a jury and the Court—in the face of Defendants' likely second motion to exclude Dr. Baum and his damages model and the Court's previously stated concerns—that Class members can rely on Dr. Baum's damages analyses. Even if successful, Class Representatives would likely face appeals.

Second, as discussed above, the Court has made observations about Class Representatives' method of proving classwide damages that pose difficulties for Class Representatives' case. In

ruling on Class Representatives' class certification motion, the Court noted that Class members may need to provide individualized evidence regarding each Class member's losses, including the length of evacuation, wages lost, expenses incurred, and personal discomfort or annoyance suffered due to the evacuation. Class Cert. Ord., at 29. Should Dr. Baum's damages measures be excluded or limited, Class Representatives would be required to establish their damages through separate hearings or as otherwise ordered by the Court, which may include calling individual Class members to evidence their losses. Such a process would increase the possibility that Class members may not recover or be able to prove the full value of their damages.

Third, and finally, the Settlement provides compensation now, while avoiding the risks of delaying any future award and increasing attorneys' fees and costs. *See, e.g.*, *Seiden v. Nicholson*, 72 F.R.D. 201, 208 (N.D. Ill. 1976) ("If this case has been litigated to conclusion, all that is certain is that plaintiffs would have spent a large amount of time, money and effort."). The Settlement not only guarantees a benefit to the Class, it provides that benefit now, as opposed to waiting an unknown time in hopes of securing an uncertain, future award. *AT&T Mobility*, 270 F.R.D. at 347 ("Even if Plaintiffs were to succeed on the merits at some future date, a future victory is not as valuable as a present one."); *Reynolds*, 288 F.3d at 284 ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.").

Therefore, given (1) the risks of trial and continued litigation (including the possibility of no recovery), (2) the possibility of requiring Class members to document their damages individually, and (3) the significant delay in an award through litigation, the settlement is eminently reasonable because it provides all Class members an opportunity to receive a claim payment from a $1,050,000 Fund regardless of their ability to document their damages. This factor fully supports final approval of the proposed Settlement.

2. The likely complexity, length, and expense of litigation

Defendants have applied a forceful defense throughout this litigation. Should the case proceed, Defendants would likely continue to vigorously defend themselves against this action, requiring additional costs, lengthening the litigation, and posing a risk of no, or a significantly reduced, recovery for Class Representatives and the Class. Thus far, Class Representatives successfully defeated Defendants' early motions aimed at dismissing or limiting the case, obtained discovery despite Defendants' objections and motion practice to prevent discovery, and obtained a certified Class of thousands of individuals subjected to the evacuation. Class Cert. Order at 36. However, continued litigation poses significant risks, including the risks of a loss should Defendants move for summary judgment on Class Representatives' remaining claims or at trial, and the potential for favorable rulings to be undone on appeal.

The most complicated issue posed by continued litigation is Class members' damages. In the Court's order certifying the Class, it noted, without deciding definitively, that Dr. Baum's damages model may not conform to Wisconsin damages law and may not be usable to prove individual Class members' damages. Class Cert. Order, at 29, 36. Without Dr. Baum's damages model, each Class member may need to provide individualized evidence of causation and damages at a hearing or as otherwise ordered by the Court. *Id.* at 29.

Requiring individualized evidence of damages complicates and lengthens this action. As the Court noted, individualized evidence may be needed on issues like: "how long an individual evacuated (if they evacuated at all), lost wages, expenses incurred, and their personal discomfort and annoyance experienced because of the evacuation." *Id.* at 33. That type of evidence may lessen individual damages or make recovery difficult for some Class members

Additionally, even if Class Representatives both succeed at trial on liability and sufficiently provided evidence of each Class members' individual causation and damages, Defendants would

likely appeal any unfavorable judgment. The appeals process would undoubtedly delay and potentially undo any recovery for the Class. Although this case has advanced significantly during nearly three years, the complexities of this case and the contested nature of this litigation pose substantial risks of prolonged litigation and substantial expenses. This factor supports final approval of the settlement.

3. The amount of opposition to the Settlement

After JND implemented an extensive notice program designed to reach a high percentage of the Class, Intrepido-Bowden Decl., at ¶¶ 12–19, the Settlement has received an extremely positive response from Class members, who subscribed to the Settlement in substantial numbers without a single objection. *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) ("Not one person, company, or institution has filed an objection" and "this overwhelming positive response by the Class attests to the approval of the Class with respect to the Settlement . . . ."). Over a quarter of the Class submitted valid and timely Claim Forms for a payment from the Fund, exceeding the Claims rate in a typical Class action. *See, e.g.*, *Mullins*, 795 F.3d at 667; 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).

Additionally, no Class members objected to the Settlement and only 16 Class members (equating to less than 0.08% of the estimated Class) opted out of the Settlement. Those low indicators of opposition show the Class overwhelmingly supports the Settlement. *Gehrich*, 316 F.R.D. at 230 ("This extremely low percentage of opposition favors a finding that the settlement is fair, reasonable, and adequate."); *In re Sw. Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013), aff'd in relevant part, 799 F.3d 791 (7th Cir. 2015) ("Such a low level of opposition supports the reasonableness of the settlement."); *In re Mexico Money*

Transfer Litig., 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000) (holding that the fact that more than "99.9% of class members have neither opted out nor filed objections . . . is strong circumstantial evidence in favor of the settlement[.]").

The positive response of the Class further supports final approval of the Settlement.

4. The opinion of competent counsel

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

5. The stage of the proceeding and the amount of discovery completed

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

Although the litigation is advanced, Class Representatives still face substantial risk and the potential for no recovery or, even should they succeed, delayed recovery due to appeals and separate adjudication of individual damages. Thus, this is not a case where "[t]he lateness of the settlement might suggest that there was little doubt as to the strength of plaintiffs' case and little reason to fear further complex litigation." *Armstrong*, 616 F.2d at 324. By settling the case now,

Class Representatives ensured all Class members had an opportunity to submit a claim for a portion of the Fund, those who submitted Claim Forms will receive a reasonable portion of their likely losses, and that their award will not be delayed or defeated by continued litigation. *See id.* at 325 ("Through settlement, counsel avoided the remedial portion of the litigation and possible appeals from the district court's earlier rulings while securing significant relief for the class free from the uncertainty and delay which would have resulted from further litigation. It is difficult to imagine a more appropriate basis for agreeing to a Settlement, even a settlement reached at such a late stage in litigation." (overruled on other grounds)). This factor supports final approval.

Therefore, the presumption of fairness and the fairness factors each support final approval.

II. NOTICE TO THE CLASS COMPLIED WITH DUE PROCESS AND RULE 23.

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

In its Preliminary Approval Order, the Court indicated that the Direct Notice Plan and Indirect Notice Plan complied with Rule 23 and due process, with some modifications required by the Court, and were intended to adequately apprise Class members of the Settlement. Preliminary Approval Order, at 9–10. The Notice Plan has been successfully implemented. The Postcard

Notice has been mailed directly to over 30,000 current residents of Superior, Wisconsin, ensuring a high percentage of the estimated 20,782 Class members received notice. Direct Notice was then supplemented with (1) seven total publications in two local newspapers, *Superior Telegram* and *Duluth News Tribune*; (2) radio advertisements on two local radio stations, KDKE-FM and KQDS-FM (3) a digital advertising campaign generating 409,531 impressions; and, (4) two press releases to journalists and media outlets through Wisconsin. Intrepido-Bowden Decl., at ¶¶ 12–19. Collectively, JND estimates that noticed reach at least 70% of the Class. *Id.* at ¶ 21.

Furthermore, "the high number of claims is further proof of the adequacy of the Notice Program." *Schulte*, 805 F. Supp. 2d at 596; *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 169 (2d Cir. 1987) (holding that the large number of claims filed by class members "suggest[ed] that no practical problem exist[ed] as to the adequacy of the notice."); *In re Sears, Roebuck & Co. Front-Loading Washer Prod. Liab. Litig.*, No. 06-cv-7023, 2016 WL 772785, at *8 (N.D. Ill. Feb. 29, 2016) (finding notice sufficient where the "claims rate . . . [was] excellent and at the high end of [the parties] . . . expected at the outset of the notice and claims process."). Here, of the estimated Class, over a quarter submitted valid and timely Claim Forms seeking payment from the Fund. Intrepido-Bowden Decl., at ¶ 34. The high claims rate is further evidence of the sufficiency of the Notice Plan. *Schutle*, 805 F. Supp. 2d at 596.

The Court should therefore approve the Notice Plan as constitutionally sufficient and sufficient under Fed. R. Civ. P. 23.

III. THE COURT SHOULD AWARD SERVICE AWARDS TO CLASS REPRESENTATIVES

The Settlement permits Class Representatives to seek up to $2,000 from the Fund as service awards for their time and effort undertaken in and the risks of pursuing their case against Defendants. SA, at § 6.1. "Because a named plaintiff is an essential ingredient of any class action,

an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). Whether to confer a service award and, if so, what amount to award, depends on several factors, including: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree to which the class has benefited from those actions; and (3) the amount of time and effort the plaintiff expended in pursuing the litigation. *Id.* (citing *Spicer v. Chicago Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267 (N.D. Ill. 1993)).

Here, the factors support $2,000 service awards to each Class Representative. Class Representatives invested significant time assisting Class Counsel in this litigation despite the small, individual monetary losses caused by the Evacuation Order. *See Sw. Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *11 (N.D. Ill. Aug. 26, 2013), aff'd as modified, 799 F.3d 701 (7th Cir. 2015) (awarding an incentive award where "[n]o individual plaintiff would have lost enough on his or her own to justify filing suit[.]"). Class Representatives were involved in this lengthy litigation at every stage and were ready to go to trial if necessary.

Class Representatives assisted Class Counsel with their investigation of this case, including providing information about their experiences with the explosion and Evacuation Order, their impressions of the seriousness of and risk posed by the explosion, and their monetary losses suffered as a result of the evacuation and the loss of use and enjoyment of their property. Class Representatives reviewed and approved the pleadings, which involved initial, amended, and second amended complaints. Each Class Representative responded to discovery, sat for a deposition and spent time preparing with Class Counsel beforehand. Class Representatives were also involved in reviewing and, ultimately, approving the Settlement Agreement.

Class Representatives were, thus, vital to the success of this litigation and awarding $2,000 is reasonable. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d

1028, 1041 (N.D. Ill. 2011) (approving service awards where class representatives played a "role in reviewing, considering, and approving the Settlement agreement and fee application" and were "willing[] to take a more-active role if necessary" and collecting cases awarding service awards between $1,000 and $5,000). The Court should, therefore, approve service awards of $2,000 to each of the Class Representatives from the Fund.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court finally approve the Settlement and approve service awards of $2,000 each to the Class Representatives.

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Respectfully submitted,

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

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