IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

IN RE: NEW INDY EMISSIONS LITIGATION	)	
	)	
	)	
	)	
	)	No. 0:21-cv-1480-SAL
	)	No. 0:21-cv-1704-SAL
	)	

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS AND AN AWARD FOR CLASS REPRESENTATIVES

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I. INTRODUCTION

This litigation ("the Litigation") arises out of allegations by the Class Representatives Kenny N. White, Candice Cherrybone, Shane Nickell, Tracie Nickell, Amanda Swager, Shara Swager, Terri Kennedy, Marty Kennedy, Enrique Lizano, Sansanee Lizano, Melda Gain, and Orrin Gain, ("Plaintiffs" or "Class Representatives"[1]), that Defendants, New-Indy Catawba, LLC and New-Indy Containerboard, LLC (collectively, "New-Indy" or "Defendants), engaged in wrongful and negligent conduct in their operations of the New-Indy Catawba pulp and paper mill (the "Mill") which caused emissions of hydrogen sulfide ("H_2S"), methyl mercaptan, dimethyl disulfide, dimethyl sulfide (collectively, "total reduced sulfur," or "TRS") and other noxious chemical contaminants to be released from its wastewater treatment facility into the air of the surrounding community, causing damages to Plaintiffs and the Class Members.

Following contentious litigation spanning a period of more than three years, the parties reached a proposed class settlement, as set forth in the May 29, 2024 Unopposed Motion to Preliminarily Approval Class Settlement ("Settlement" or "Settlement Agreement") *See* ECF Nos. 350-1.

This Honorable Court granted preliminary approval of the Settlement by Order dated June 5, 2024. *See* ECF No. 352, *passim*. This Settlement provides for the payment of $18,000,000.00 in satisfaction of claims for damages for a defined class of residents near the Mill, as well as attorneys' fees and costs. In addition, separate resolutions have been reached in three other cases, in which Defendants have agreed to undertake remedial activities valued at $85,000,000.00, to

[1] As per the Court's June 5, 2024 Order, the above-noted Plaintiffs have been appointed as Class Representatives. *See* ECF No. 352, ¶ 5. Unless otherwise defined or stated, all capitalized terms shall have the same meanings contained in the Motion for Preliminary Approval of Settlement.

resolve the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") Action, the Prevention of Significant Deterioration ("PSD") Action, and the Interventional Action which have been brought before this Honorable Court.[2]

This Class Settlements was the culmination of Plaintiffs' Counsel's vigorous efforts. In the class litigation, *alone*, Plaintiffs' Counsel:

- recorded 24,455.24 hours of time among attorneys, paralegals, and other professionals;
- took or defended a total of 52 depositions;
- reviewed more than one million (1,000,000) pages of documents produced by Defendants;
- produced to Defendants 371,581 pages of non-individual Plaintiff-specific documents, primarily as a result of numerous FOIA requests to the United States Environmental Protection Agency and the South Carolina Department of Health and Environmental Control;
- obtained 66,806 pages of documents as a result of Rule 45 subpoenas to non-parties, primarily non-litigation consultants of Defendants;
- disclosed and served Rule 26 expert reports for 17 experts in the fields of pulp mill design and operations, wastewater treatment plant design and operations, air modeling, air monitoring, meteorology, atmospheric chemistry, toxicology, otolaryngology,

[2] As used herein, CWA/RCRA Action refers to the lawsuit pending as Civil Action No. 0:23-cv-00602-SAL before this Honorable Court. Likewise, the Intervention Action means the lawsuit filed and docketed as Civil Action No. 22-cv-02053-SAL (D.S.C.) and currently on appeal to the United States Court of Appeals for the Fourth Circuit as Appeal No. 23-1052. Furthermore, PSD Action refers to the lawsuit filed and docketed as Civil Action No. 0:22-cv-02366-SAL (D.S.C.), also currently on appeal to the United States Court of Appeals for the Fourth Circuit as Appeal No. 23-1988.

pulmonology, psychology, computer assisted mapping, remediation, property valuation, damage calculations, and business organizations;

- prepared for and argued on April 11-12, 2024 a Motion for Class Certification, Defendants' Motions for Summary Judgment, two of Defendants' *Daubert* motions, as well as on June 1, 2022, a Motion to Dismiss and a Motion to Strike; and
- briefed more than 2,500 pages as a result of extensive motions practice.

The $18,000,000.00 cash recovery obtained for the Class was achieved through the skill, experience, and effective advocacy of Plaintiffs' Counsel in the face of considerable risk and opposition from highly experienced, skilled defense counsel. In recognition of these efforts, Plaintiffs' Counsel respectfully request attorneys' fees of 20% of the proposed class settlement amount, or $3,600,000.00, plus payment of reasonable litigation costs, which separately total $4,029,444.44. In addition, Class Representatives seek service awards for their representation of the Class.

The requested percentage fee, substantiated through a lodestar cross-check, is consistent with fees awarded in similar actions in this Circuit, and is the appropriate method to compensate counsel light of the favorable and certain recovery obtained for the Class.

Notwithstanding the significant challenges inherent in this Litigation, Plaintiffs' Counsel undertook the representation of the Class on a contingency fee basis and, to date, no payment has been made for their services or for the litigation costs incurred on behalf of the Class. Plaintiffs' Counsel, who have extensive experience in prosecuting class action cases such as this one, firmly believe that the Settlement is the result of their diligent and effective advocacy, as well as their reputations as attorneys who are unwavering in their dedication to the interest of the Class and unafraid to zealously prosecute a meritorious case through trial and subsequent appeals. In this

case, which asserted claims based on complex legal and factual issues that were vigorously opposed by skilled and experienced defense counsel, Plaintiffs' Counsel were able to secure an impressive result for the class while considering the risk of nonpayment.

Moreover, in addition to the significant risks and obstacles presented, the prosecution of the litigation required an extensive effort by Plaintiffs' Counsel, who marshalled considerable resources and committed substantial amounts of time and expense in the prosecution of this Litigation. Indeed, by the time the Settlement was reached, Plaintiffs' Counsel, among other things, had conducted an extensive investigation into the underlying facts and thoroughly researched the law pertinent to Class Members' claims and the Defendants' defenses. Plaintiffs' Counsel also prepared and filed a detailed Complaint and Amended complaint, outlining the Class's allegations against Defendants. Further, the class wide recovery could not have been possible without the efforts of Plaintiffs' Counsel to travel to local affected communities and to engage and establish relationships with community members. This recovery also required Plaintiffs' Counsel to travel about the country locating, working with, and deposing experts on topics as disparate as wind patterns, toxicology, and the prerequisites of business organizational structures under Delaware law. It required preparation and counseling from Plaintiffs' Counsel to prepare the Class Representatives to answer written discovery and to be deposed. Plaintiffs' Counsel also had to engage in extensive discovery, reviewing over one million pages of documents from Defendants. This recovery required specialized knowledge on the prosecution of both class action cases and environmental cases. Overall, this Litigation required over 24,000 total hours of work between the reputable firms of highly skilled class action attorneys representing the plaintiffs to achieve any recovery, let alone a recovery so favorable to the community.

For the reasons set forth herein, as well as in the Unopposed Motion to Preliminarily approve Class Settlement,[3] the Joint Declaration of Co-Lead Class Counsel,[4] and the Declaration of Beattie B. Ashmore, Esquire,[5] Plaintiffs' Counsel respectfully submit that the attorneys' fees requested are fair and reasonable under the applicable legal standards and in light of the contingency risk undertaken, the diligent efforts of counsel in prosecuting this Litigation on behalf of the Class, and the substantial and certain benefits obtained, and therefore should be awarded by this Honorable Court.[6] Moreover, the costs requested are reasonable in amount and were necessarily incurred for the successful prosecution of the Litigation. Finally, Class Representatives should be awarded for their respective time spent representing the interests of the Class at large.

II. ARGUMENT

a. A Reasonable Percentage of the Fund Recovered is the Appropriate Method for Awarding Attorneys' Fees in Common Fund Cases

For their efforts in creating a common fund for the benefit of the Class, Plaintiffs' Counsel seek a reasonable percentage of the fund recovered as attorneys' fees, as put forward in the unopposed motion for preliminary settlement approval. As denoted by the 4th Circuit, and as additional assurance that the 20% requested fee is reasonable, Plaintiffs' Counsel have undertaken a "lodestar cross-check," the results of which show a ratio regularly accepted as reasonable and fair. Importantly, when using the lodestar cross check, "the Court needs [sic] not apply the 'exhaustive scrutiny' typically mandated, and the court may accept the hours of Lead Counsel." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 264 (E.D. Va. 2009).

[3] *See* ECF Nos. 350 to 350-9, *passim*.
[4] *See* Exhibit A, attached hereto.
[5] *See* Exhibit B, attached hereto.
[6] Counsel notes that the requested figure—20%—is less than the individual contracts signed by class members.

Over the last few decades, the percentage method of awarding fees has become an accepted method, if not the prevailing method, for awarding fees in common fund cases throughout the United States. While it is true that, unlike other Circuits, the Fourth Circuit does not mandate the use of the percentage-of-recovery method, that Court has stated that "a district court may choose the method for determining the reasonableness of attorneys' fees based on its judgment and the facts of the case." *See McAdams v. Robinson*, 26 F.4th 149, 162 (4th Cir. 2022) (citing *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 760 (S.D. W.Va. 2009). The facts of this case support the use of a percentage-based calculation.

A percentage fee award is appropriate generally because it encourages counsel to obtain the maximum recovery for the class at the earliest possible stage of litigation and, hence, most fairly correlates plaintiffs' counsel's compensation to the benefit achieved for the class. *See, e.g., Trs. v. Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). In *Blum v. Stenson*, 465 U.S. 886 (1984), the U.S. Supreme Court recognized that under the "common fund doctrine" a reasonable fee may be based on "a percentage of the fund bestowed on the class." *Id.* at 900 n.16. Moreover, supporting authority for the percentage method in federal courts throughout the United States is overwhelming.[7] The *Manual for Complex Litigation* also endorses the use of the percentage-of-the-fund method in awarding attorneys' fees in common fund cases. *See Manual for Complex Litigation* § 14.121, at 187 (4th ed. 2004) (commenting that "The vast majority of courts of appeals now permit or direct district courts to use the percentage-of-the fund method in common-fund cases.") (footnotes omitted).

[7] Courts favor the percentage-of-recovery approach for the award of attorneys' fees in common fund cases. In fact, two Circuits have ruled that the percentage method is mandatory in common fund cases. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 786, 774-75 (11th Cir. 1991).

The rationale for compensating counsel in common fund cases on a percentage basis is sound. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of the recovery.[8] Second, it more closely aligns the lawyers' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. *See Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986) ("The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains… [t]he unscrupulous lawyer paid by the hour may be willing to settle for a lower recovery coupled with payment for more hours. Contingent fees eliminate this incentive and also ensure a reasonable proportion between the recovery and the fees assessed to defendants…").

Here in the Fourth Circuit, the benefits of contingent fees are likewise recognized. *See In re Abrams & Abrams, P.A.*, 605 F.3d 238, 244-45 (4th Cir. 2010) ("Fixing a lodestar fee in this contingency case was error and threatens to nullify the considerable advantages of contingency arrangements…As an initial matter, contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation. Sadly, a plaintiff sometimes has little to offer a lawyer other than his personal plight."). In fact, numerous courts have criticized using the lodestar method, of multiplying hours worked by predetermined fees, as the sole method for encouraging plaintiffs' attorneys to needlessly drag out complex litigation for years in order to run up hours, even when their clients' and the class's interests would be much better served by an

[8] Courts are encouraged to look to the private marketplace in setting a percentage fee. *See In re Cont'll Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The judicial task might be simplified if the judge and the lawyers [spent] their efforts on finding out what the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character.").

earlier, more efficient settlement of a case.[9] Accordingly, Plaintiffs' Counsel request this Court utilize the below proposed lodestar cross-check method only as additional support for the 20% fee requested in this case.

Importantly, as stated earlier, it is widely accepted in the Fourth Circuit to award attorneys' fees based on percentage of the common fund recovery, particularly when the lodestar method is used as a "cross-check." *See, e.g., In re Mills*, 265 F.R.D. at 261 ("Thus, using the percentage of fund method and supplementing it with the lodestar cross-check takes advantage of the benefits of both methods.") (cleaned up); and *In re MI Windows & Doors Inc. Prod. Liab. Litig.*, No. 2:12-MN-00001-DCN, 2015 WL 4487734, at *1 (D.S.C. July 23, 2015) ("Even when the percentage of recovery method is used, courts often use the lodestar method to 'cross-check' the award of attorneys' fees."). The lodestar calculus requires applying the number of hours worked by reasonable rates within the community in question. *See Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 243 (4th Cir. 2009) ("In calculating an award of attorneys' fees, a court must first determine a lodestar figure by multiplying the number of reasonable hours expended times a reasonable rate."). What constitutes a reasonable rate varies based on location. *See Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994) (finding reasonable rates are determined "by compensating attorneys at the prevailing market rates for the relevant community."). "Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee." *Jones*, 601 F. Supp. 2d at 766. Courts similarly find that

[9] *See e.g., In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) (noting that the lodestar method has been criticized for giving plaintiffs' counsel "the incentive to delay settlement in order to run up fees."); *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (finding the lodestar method creates, "a disincentive for the early settlement of cases.") (cleaned up); *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 964 (E.D. Tex. 2000) ("Again, simply put, the lodestar method rewards plodding mediocrity and penalizes expedient success.").

a fee award request is reasonable when the lodestar exceeds the fee award request. *See Robinson v. Carolina First Bank NA*, 2019 WL 2591153, at *15 (D.S.C. June 21, 2019) (Lewis, J.) ("…the fee award as requested by Class Counsel is reasonable, as the lodestar exceeds the fee award requested.").

Here, class counsel's lodestar results in an amount of $16,504,598.75 and a lodestar multiplier of 0.21. As the lodestar exceeds the fee award requested, the fee award is reasonable.

b. Plaintiffs' Counsel's Fee Request is Reasonable under Fourth Circuit Criteria

Plaintiffs' Counsel request the reasonable fee of 20% of the Settlement Amount, plus $4,029,444.44 for costs necessarily incurred in the prosecution of the Litigation. These requests are fair and reasonable under the relevant standards. To determine the reasonableness of the percentage fee award sought by Plaintiffs' Counsel in this action, the Court may elect to apply all or some of the factors that the Fifth Circuit enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), which were adopted by the Fourth Circuit in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978).[10] These factors are:

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

[10] In the 4th Circuit, these factors are referred to variably as the *Barber* or *Johnson* factors.

Johnson, *supra* at 717-19 and *Barber*, *supra* at 226. Notably, it is widely recognized that "rarely are all of the *Johnson* factors applicable."[11] *Phillips Petroleum*, 838 F.2d at 456. As described below, an analysis of the applicable factors supports the requested fee.[12]

1. *The Time and Labor Involved in Obtaining the Settlement Supports the Fee Request*

Plaintiffs' Counsel have marshalled considerable resources and time in the research, investigation, and prosecution of this Litigation on behalf of the Class. The Settlement was only reached after counsel, among other things, (a) conducted extensive investigation into the underlying facts, including all the allegations set forth in the Complaint, where investigation included, but was not limited to, interviews of witnesses with information concerning the Class's allegations; (b) thoroughly researched the law pertinent to the Class Members' claims and the defenses likely to be raised by Defendants; (c) successful opposed Defendants' multiple motions to dismiss; (d) consulted with many experts and disclosed 17 expert witnesses and served 17 Rule 26 expert reports; (e) conducted fifty-two (52) depositions; (f) engaged in comprehensive discovery, including voluminous document production and written responses; and (g) engaged in five days of mediation sessions with Defendants to efficiently resolve all claims. The Settlement was reached at a time when the Class and its counsel were fully cognizant of the strengths and weaknesses of the case, and the risks of continued litigation.

Class Representatives and their professionals have expended over 24,000 hours in the prosecution of this Litigation with a resulting lodestar of more than $16 million, which represents a negative multiplier to counsel's lodestar. *See e.g.*, *In re Genworth Fin. Sec. Litig.*, 210 F. Supp.

[11] Factors four, seven, and eleven do not apply in this case, thus Plaintiffs' Counsel will not analyze those factors.

[12] The Local Civil Rules of this District require that petitions for attorneys' fees comply with the *Barber* requirements, which "are also relevant when a common fund is created and a percentage-fee method is sought in the application." Local Civ. Rule 54.02 (D.S.C.).

3d 837, 845 (E.D. Va. 2016) ("The fee awarded in this case, $61,320,000, results in a lodestar multiplier of 1.97. District courts within the Fourth Circuit have regularly approved attorneys' fees awards with 2-3 times lodestar multiplier."); *Kay Co. v. Equitable Prod. Co.*, 749 F. Supp. 2d 455, 470 (S.D. W.Va. 2010) ("Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorneys' fee."); *In re Rite Aid Corp. Sec. Litig.*, 269 F. Supp. 2d 603, 611 (E.D. Pa. 2003) (awarding a fee equal to a multiplier of 4.07 and recognizing that "multipliers in this range are fairly common.") (internal citations omitted), *vacated on other grounds*, 396 F.3d 294 (3d Cir. 2005); and *Domonoske v. Bank of America, N.A.*, 790 F. Supp. 2d 466, 476 (W.D. Va. 2011) (collecting cases and holding that a 1.8 lodestar multiplier is "well within the normal range of lodestar multipliers").

Counsel spent a significant amount of time and resources in representing the Class. Plaintiffs' Counsel were aggressive, efficient, and successful, resulting in a favorable monetary recovery for the Class. This factor therefore strongly supports approval of the requested fee.

2. The Novelty and Difficulty of the Questions Presented Supports the Requested Fee

Courts have long recognized that the novelty and difficulty of the issues in a case are significant factors to be considered in making a fee award. *See Johnson*, 488 F.2d at 718. In cases where plaintiffs' counsel must address "procedurally and substantively complex" law in the prosecution of the Class's claims, this prong has weighed in favor of approving fees. *See Kirkpatrick v. Cardinal Innovations Healthcare Solutions*, 352 F. Supp. 3d 499, 505 (M.D. N.C. 2018). Similarly, in this case, Plaintiffs' Counsel navigated complex legal issues in order to achieve a positive result for the Class. That result was achieved through extensive research, effort, and energy on behalf of Plaintiffs' Counsel, who vigorously litigated this case, in spite of these difficulties, until the eve of trial. Despite the novelty and difficulty of the issues raised, counsel

secured a very favorable result for the Class under difficult and challenging circumstances. This factor supports the requested award.

3. The Skill Requisite to Perform the Legal Service Properly Supports the Requested Award

This Settlement was achieved by Plaintiffs' Counsel – some of the preeminent class action attorneys in the country – with decades of experience in prosecuting and trying complex class action cases. As this Court recognized in *Edmonds v. United States*, class action cases are complex and inherently require certain legal skills and abilities. *See* 658 F. Supp. 1126 (D.S.C. 1987). This case was no different. From the outset, Plaintiffs' Counsel engaged in a concentrated effort to obtain the maximum recovery for the Class and to resolve the ongoing environmental concerns with the Mill. The recovery obtained is the direct result of the significant efforts of Plaintiffs' Counsel, whose reputations as class action attorneys who zealously carry a meritorious case through to trial and appeals enabled them to negotiate a favorable recovery where less qualified attorneys may have failed. *Genworth*, 210 F. Supp. 3d at 844.

The quality of opposing counsel can also be important in evaluating the quality of plaintiffs' counsel's work. *See Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at *100 (N.D. Tex., Nov. 8, 2005) (weighing standing of opposing counsel when determining attorneys' fees "because such standing reflects the challenge faced by plaintiffs' attorneys"). Defendants are represented by highly skilled and capable counsel from Morgan, Lewis & Bockius, LLP, which, according to published reports, in 2023 was the 9th highest grossing law firm in the world, and locally by Smith Robinson and McCoy Law Group. The ability of Plaintiffs' Counsel to obtain a favorable settlement for the Class in the face of such formidable opposition confirms the quality of their representation and supports the granting of the requested fee.

4. The Customary Fee and Awards in Similar Cases Supports the Requested Fee

Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. *Genworth*, 210 F. Supp. 3d at 845. For example, in *Deem*, the court noted that the "one-third fee requested by counsel is very much in line with fee awards in similar common fund cases." *Deem*, 2013 U.S. Dist. LEXIS 72981, at *16. The requested fee is also supported by the following fee awards within the Fourth Circuit: *See McAdams*, 26 F.4th at 162 (approving a 43% fee of the common fund); *In re Lumber Liquidators*, 27 F.4th 291, 308 (4th Cir. 2022) (approving district courts awarding of 28% of common fund, over objectors); *Epstein v. World Acceptance Corp.*, No. 6:14-CV-01606-MGL, 2017 WL 11461887, at *1 (D.S.C. Dec. 18, 2017) (awarding a fee of 30%, plus costs); *In re Merry-Go-Round Enters.*, 244 B.R. 327, 330 (D. Md. 2000) (holding that 40% negotiated contingency fee on $185 million settlement was appropriate in bankruptcy context); *Helmick v. Columbia Gas Transmission*, No. 2:07-CV-00743, 2010 U.S. Dist. LEXIS 65808, at *15 (S.D. W.Va. July 1, 2010) (awarding one-third of settlement fund in fees); *Hardwick v. Rent-A-Center, Inc.*, No. 3:06-CV-00901, slip op. (S.D. W.Va. Feb 3, 2006) (awarding fees of one-third of amount of settlement, plus costs). Thus, the requested fee is consistent with customary contingent fees in the private marketplace and supports a fee award of 20%, plus costs incurred.

5. The Contingent Nature of Plaintiffs' Counsel's Representation Supports the Requested Fee

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties which were overcome in obtaining the settlement. *See Genworth*, 210 F. Supp. 3d at 844; *Phillips v. Triad Guar., Inc.*, 2016 U.S. Dist. LEXIS 60950, at *19-*20 (M.D. N.C. May 9, 2016). Plaintiffs' Counsel undertook to represent the Class on a contingent fee basis, assuming all the risk that the Litigation would yield no recovery and leave them completely uncompensated.

Unlike counsel for defendants who are paid an hourly rate for their costs on a predetermined basis, Plaintiffs' Counsel has not been compensated for their time or expense in represented the Class.

Plaintiffs' Counsel prosecuted this Litigation for over three years on a wholly contingent basis and have borne all the possible risks, including surviving dispositive motions, proving liability, causation and damages, prevailing in a "battle of the experts," and litigating the case through to the eve of trial. All of this was done with no guarantee of compensation and at cost commensurate with complex civil litigation of this type. Plaintiffs' Counsel understood that Defendants were well-financed and would (and, in fact, did) retain a large and highly experienced corporate class action defense firm to mount a strong defense. In undertaking this risk, Plaintiffs' Counsel were obligated to, and did, ensure that sufficient resources were dedicated to the prosecution of this Litigation.

Defendants steadfastly maintained that they did nothing actionable, and had litigation continued, they would have persisted in attacking the elements of Plaintiffs' claims. Indeed the risk of no recovery in complex cases of this type is very real. There are numerous class actions in which plaintiffs' counsel expends thousands of hours and yet the defense is victorious, leaving Plaintiffs and their Counsel with no renumeration in spite of their diligence, time, and expense. As one court recognized, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005). Even plaintiffs who get past summary judgment and succeed at trial may find their judgment overturned on appeal or on a post-trial motion. *See e.g. Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming judgment as a matter of law on the basis of loss causation following a jury verdict partially in plaintiffs' favor); *Robbins v. Kroger Props.*, 116 F.3d 1441, 1448-49 (11th

Cir. 1997) (jury verdict of $81 million for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant).

Because the fee in this matter was entirely contingent, the only certainties were there would be no fee without a successful result and that such result would be realized only after considerable efforts by experienced litigators. Plaintiffs' Counsel committed significant resources of both time and advanced costs because such was necessary in a case such as this, if there was to be any recovery for either the Class or their Counsel. The contingent nature of Plaintiffs' Counsel's representation in this case strongly favors approval of the requested fee.

6. *The Amount Involved and the Results Obtained Support Plaintiffs' Counsel's Requested Fee*

Many courts, including the Supreme Court of the United States, have consistently recognized that the result achieved is one of the most important factors to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *see also In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of the recovery, and the end result achieved are of primary importance, for these are the true benefit to the client").

Here, a favorable and certain recovery of $18,000,000.00 has been obtained through the efforts of Plaintiffs' Counsels. This recovery, which will provided substantial and meaningful compensation for the Class Members, supports the awarding of the requested fee in this case.

7. *The Experience, Reputation, and Ability of Plaintiffs' Counsel Supports the Fee Request*

Plaintiffs' Counsel's successful efforts in efficiently bringing this Litigation against Defendants to a positive conclusion are the best indicators of the experience and ability of the attorneys involved. That Plaintiffs' Counsel have managed the Litigation in a disciplined and pragmatic fashion confirms that this Litigation was ably prosecuted for the benefit of the Class. As

discussed above, Plaintiffs' Counsel are well regarded nationally for their successful representation of clients in class action matters. This factor supports the requested fee award.

8. The Undesirability of the Case Supports the Requested Attorneys' Fees and Costs

Class action cases have often been recognized as "undesirable" due to the financial burden on counsel, and the time demands of litigating class actions of this size and complexity. *See, e.g. Millsap v. McDonnell Douglas Corp.*, No. 94-CV-633-H(M), 2003 U.S. Dist. LEXIS 26223, at *41 (N.D. Okla. May 28, 2003) ("This case is…undesirable, in the way that all contingent fee cases are undesirable, because it produced no income, but has required significant expenditures").

This was never an easy case and the risk of no recovery remained high throughout the pendency of this Litigation. When counsel undertook representation of the Class here, it was with the knowledge that they would have to spend substantial time and financial resources, while facing significant risks and without any assurance of being compensated for their efforts. This "undesirability" of the litigation supports the requested fee.

c. The Reaction of the Class Confirms that the Requested Fee is Reasonable

The Class's positive response to the settlement also supports the requested fee. Pursuant to the retention agreements with the Class Representatives and more than 1,800 individually retained clients, Plaintiffs' Counsel were entitled to a thirty-three and one third percent (33 and 1/3%) fee. Plaintiffs' Counsel are now requesting Court approval of a fee which constitutes twenty percent (20%) of the common fund, a percentage far lower than originally agreed to by Plaintiffs' Counsel and the Class Representatives.. All Class Representatives signed and executed the Settlement Agreement within forty-eight hours of receiving the document, demonstrating their agreement not only to Plaintiffs' Counsel's request fees and costs, but also the settlement amount. *See* ECF 350 to 350-1 at 22-23. Local news articles discussing the settlement have also quoted class members

who are optimistic about the settlement.[13] The Class's reaction weighs in favor that the fee is reasonable.

d. Class Counsel's Reasonable Costs were Necessarily Incurred and Should be Awarded

Payment of reasonable costs to counsel who create a common fund is both necessary and routine. *Genworth*, 210 F. Supp. 3d at 845; *In re MicroStrategy, Inc.*, 172 F. Supp. 2d 778, 791 (E.D. Va. 2001). Payment of costs like those requested here is routinely permitted. The appropriate analysis to apply in deciding which costs are compensable in a common fund case of this type is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See e.g. Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) ("Harris may recover as part of the award of attorneys' fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'") (internal citations omitted); and *New Eng. Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 635 (W.D. Ky. 2006) ("In determining whether the requested expenses are compensable, the Court has considered 'whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases.'") (internal citations omitted).

Plaintiffs' Counsel's $4,029,444.44 in costs include hiring experts, travel, document review platform costs, mediating the Class's claims, court reporters and videographers, computerized legal research, and various other time-consuming activities commonly occurring in litigation. These expenses reflect reasonable costs expended for purposes of prosecuting this Litigation and thus should be paid. Plaintiffs' Counsel sought to prosecute this Litigation effectively and

[13] *See* Exhibit C (Queen City News article, dated May 31, 2024) at 1 (quoting a class member who said, "What's important is that we can live now going forward and that no one's going to get sick and our environment is safe.")

efficiently. Courts have recognized that rejecting costs such as this disincentivize lawyers operating on a contingency fee from expending the necessary resources to adequately prosecute claims. Accordingly, Plaintiffs' Counsel respectfully request reimbursement of these reasonable costs be awarded in addition to the above-noted 20% attorneys' fees.

III. PLAINTIFFS' COUNSEL'S REQUESTED COST REIMBURSEMENT IS REASONABLE

Plaintiffs' Counsel's application for costs and fees also comports with the applicable local and federal rules. Plaintiffs' Counsel are requesting $4,029,044.44 in reasonable, necessary costs incurred during the course of this litigation, which includes, but is not limited to, expert witness costs, travel costs for hearings and depositions, witness costs, court reporter costs, and filing fees.

IV. CLASS REPRESENTATIVES ARE ENTITLED TO REIMBURSEMENT FOR THEIR TIME THROUGH REASONABLE SERVICE AWARDS

Class Representative service awards (also called incentive payments) are "fairly typical in class action cases." *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015) (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)). District Courts in the Fourth Circuit have permitted these awards without making a distinction between current and former representatives. *See Brown v. Transurban USA, Inc.*, 318 F.R.D. 560 (E.D. Va. 2016). The *Brown* case discussed the plaintiffs' request of service awards "which [would] be divided among all current and former Class Representatives." *Id.* at 578 (approving plaintiffs' proposal to award former class representatives about half of what current representatives would receive).

Rather than distinguish representatives purely based on their status, the key consideration by courts is whether the award is reasonable in light of what the representative has put into the case. *See Berry*, 807 F.3d at 613-14. This is because these payments are meant to be considered as reimbursements to class representatives for their time spent supporting the litigation. Factors to

determine the reasonableness and fairness include: (a) reasonableness - the Representatives' participation in the litigation (e.g. depositions, discovery, public nature of litigation [possible reputational harm], etc.); (b) fairness – that the amount was not agreed to prior to settlement (if it was, could show bad incentives between reps and other class members) and whether the award is contingent upon agreeing to proposed settlement (if so, could be seen as negotiated in bad faith). *Id.* In most cases, former and current representatives will be entitled to different amounts based primarily on factor (a). *See Brown*, 318 F.R.D. at 578. It is up to plaintiffs' counsel to submit to the court a reasonably fair award figure, not based on the representatives' statuses, but rather on the work the representatives put into the case.

Here, the Class Representatives, both current[14] and former,[15] expended significant time and resources in the prosecution of this Class Action. Current class representatives were deposed by seasoned defense counsel, and many had their homes inspected by Defendants' air quality experts. Both current and former representatives were actively engaged and invested in the prosecution of this litigation and provided Class Counsel invaluable insights into both the specific areas in which they resided and the community at large. For these efforts, Plaintiffs propose $10,000 service payments to current Class Representatives and $5,000 service payments to former Class Representatives.

These figures represent a fair amount for the work each individual put into this Litigation, not merely for the sake of themselves and their respective families, but for the neighbors, many of

[14] Current class members are as follows: Kenny N. White, Candice Cherrybone, Shane Nickell, Tracie Nickell, Amanda Swager, Shara Swager, Terri Kennedy, Marty Kennedy, Enrique Lizano, Sansanee Lizano, Melda Gain, and Orrin Gain.

[15] Former Class members are as follows: John Hollis, Krista Manus-Cook, Jean Hivanec, Kathleen Moran, Shirley Landsdown, Ethel Piercy. These individuals had various personal reasons for ending their representation of the Class, ranging from moving out of the area to simply no longer feeling as if they had the time and energy to participate in the action.

whom they will never know. This thoughtful and diligent conduct should be incentivized through this common legal mean of so doing.

V. CONCLUSION

The 20% fee requested by Plaintiffs' Counsel, or $3,600,000.00, is reasonable under all applicable standards and is supported by the court-appointed Class Representatives. Plaintiffs' Counsel therefore respectfully request that the Court award attorneys' fees of $3,600,000.00, to be divided pursuant to Counsel's written agreements, and expenses in the amount of $4,029,444.44. In addition, Plaintiffs' Counsel respectfully request that this Court award service payments to each Class Representative for their time spent in representing the Class's interests which totals $150,000.00.

DATED: July 22, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

MOTLEY RICE LLC

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

IN RE: New Indy Emissions Litigation	)	Case No.:	0:21-cv-01480-SAL
	)		0:21-cv-01704-SAL
	)		
	)		
	)		
	)		

JOINT DECLARATION OF CO-LEAD CLASS COUNSEL CHASE T. BROCKSTEDT, PHILIP C. FEDERICO, T. DAVID HOYLE, AND RICHARD A. HARPOOTLIAN IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL AND MOTION FOR ATTORNEYS' FEES, REIMBURSEMENT OF COSTS, AND SERVICE AWARDS

COMES NOW, co-lead Class Counsel, Chase T. Brockstedt, Philip C. Federico, T. David Hoyle, and Richard A. Harpootlian, the undersigned, declaring as follows, pursuant to 28 U.S.C. § 1746:

1. I, Chase T. Brockstedt, am an attorney licensed in the State of Delaware and a partner at Baird, Mandalas, Brockstedt, and Federico LLC.

2. I, Philip C. Federico, am an attorney licensed in the State of Maryland and the District of Columbia, and a partner at Baird, Mandalas, Brockstedt, and Federico LLC.

3. I, T. David Hoyle, am an attorney licensed in the District of Columbia, the State of Florida, the State of Georgia, and the State of South Carolina and a member at Motley Rice LLC.

4. I, Richard A. Harpootlian, am an attorney licensed in the State of South Carolina and owner of Richard A. Harpootlian, P.A. law firm.

5. We are each over the age of eighteen, suffer no legal disabilities, and have personal knowledge of the facts set forth below, and if called as a witness, could and would testify competently to them.

6. Upon a review of the relevant files and pleadings produced in the prosecution of this class litigation, we state the following.

PROFESSIONAL EXPERIENCE

7. Baird, Mandalas, Brockstedt, and Federico LLC is a law firm with offices in Delaware and Maryland and is well-known for successfully trying and/or settling major class action cases in their region and across the country.

8. Motley Rice LLC is one of the nation's largest plaintiffs' litigation firms and has played leadership roles in some of the most significant litigation in the United States.

9. Richard Harpootlian, P.A. is recognized as one of the preeminent South Carolina law firms in the areas of both criminal defense and class action litigation.

OUR PARTICIPATION IN THIS LITIGATION

10. By order of December 8, 2021, the Court appointed Philip C. Federico, T. David Hoyle, Richard A. Harpootlian, and Chase T. Brockstedt, as Interim Co-Lead Counsel pursuant to Rule 23(g), FRCP.

11. By order of June 5, 2024, the Court appointed Philip C. Federico, T. David Hoyle, Richard A. Harpootlian, and Chase T. Brockstedt, as Class Counsel.

12. Our participation in this litigation began in early 2021, when our firms investigated and later filed two, separate putative class actions in connection with the failed conversion of the New-Indy pulp and paper mill in Catawba, South Carolina. These lawsuits were thereafter consolidated.

13. Over the course of the litigation, we, along with our legal team[1]:

[1] The legal team appointed as Class Counsel is co-counsel with: Gary V. Mauney of Mauney PLLC, Thomas E. "Tommy" Pope and Ben P. Leader of Elrod Pope Law Firm P.A. and Leon E. Stavrinakis of Stavrinakis Law Firm LLC.

a. Recorded a total of 24,455.24 hours prosecuting this case.[2] Timekeepers included nine (9) partners, two (2) senior counsel, eighteen (18) associates, and sixteen (16) supporting staff members in the consolidated class action. The total lodestar[3] attorneys' fee value of this is $16,504,598.75.

b. Managed and incurred necessary costs of $4,029,444.44 as a result of: retaining seventeen disclosed experts, retaining several consulting experts, travel expenses, deposition transcripts, online research, litigation support services, e-discovery platform hosting, and other types of expenses routinely required in complex litigation.

c. Organized, made usable, and reviewed more than one million (1,000,000) pages of documents produced by Defendants over the course of this complex litigation.

d. Organized, made usable, and reviewed 371,581 pages of documents obtained through numerous FOIA requests to the United States Environmental Protection Agency and the South Carolina Department of Health and Environmental Control.

e. Organized, made usable, and reviewed 66,806 pages of documents produced by third parties pursuant to multiple subpoenas.

[2] Time from the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") action, the Prevention of Significant Deterioration ("PSD") action, and the interventional action are not included.

[3] Class Counsel's firms' lodestar figures are based upon the firms' current hourly rates set by the firms for each individual timekeeper. The hourly rates are the same as, or comparable to, the rates submitted by Class Counsel's firms and accepted by courts for lodestar cross-checks in other class action fee applications. These hourly rates do not include expense items which are recorded separately.

f. Deposed, or defended the depositions of, fifty-two (52) individuals.

g. Argued multiple dispositive motions as well as presented arguments during a two-day hearing on class certification.

h. Litigated three related cases, involving complex issues of federal environmental and administrative law.

i. Worked with two mediators, over the course of five days of in-person mediation sessions, to effectuate a favorable resolution of these claims for the Class members.

j. Organized multiple day-long, in-person strategy meetings, especially in preparation for an impending trial.

14. According to our firms' timekeeping records, Co-Lead Class Counsel personally recorded 4,724.75 hours on this litigation, which is approximately 20% of the total time recorded.

OPINION

15. Having personally participated in these settlement discussions, if called to testify, we would testify they were arms-length discussions and that all the requirements for Class Action certification are met in this Settlement.

16. If we were called to testify, we would testify based on our experience and personal involvement in this litigation, that this Settlement presents a fair and reasonable resolution to a complex legal claim.

17. It is our opinion, based on our experience and personal involvement in this litigation, that this Settlement maximizes the recovery the putative Class Members could achieve on a present-value basis considering the known risks while avoiding costly and time-consuming years of litigation.

18. It is our opinion, based on our experience and personal involvement in this litigation, that this Settlement and our Motion for Attorneys' Fees and Costs should be approved by the Court as fair, reasonable, and adequate.

19. While Co-Lead Class Counsel did not commit to or promise any of the Class Representatives a service award, we believe that the Class Representatives in this case have significantly contributed to this litigation and fulfilled their duties to a great benefit of the class and request approval of a class award as set forth in Plaintiffs' motion.

We declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 19, 2024.

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ROCK HILL DIVISION

IN RE: NEW INDY EMISSIONS LITIGATION	)	Case No. 0:21-cv-01480-SAL Case No. 0:21-cv-01704-SAL
	)	**Declaration of Beattie B. Ashmore**

NOW COMES Beattie B. Ashmore who states the following:

BACKGROUND AND QUALIFICATIONS

1. I am a former Federal prosecutor and have been a practicing attorney in Greenville, South Carolina for over thirty-eight (38) years.

2. I am a 1981 graduate of the College of Charleston, and I obtained my juris doctor degree from the University of South Carolina School of Law in 1986.

3. I have extensive experience representing both individuals and corporations in wrongful death, personal injury, and class action litigation.

4. I began my career clerking for Bankruptcy Judges from 1986-1990. From 1990 through 1996, I was an Assistant United States Attorney in South Carolina; I spent three years in the civil division and three years in the criminal division with that office. During that time, my civil division areas of practice involved defending the United States and its agencies in all areas of civil litigation. My civil trial experience included wrongful death, medical malpractice, various tort actions and asset forfeiture. While in the criminal division of the United States Attorney's Office, I prosecuted a number of cases including bank fraud, wire fraud, mail fraud, weapons charges, bankruptcy fraud, securities fraud, bank robbery, money laundering, and drug offenses. In my last year as an Assistant United States Attorney, I had the highest number of convictions in

the State of South Carolina with over 160 convictions. I received a special commendation from the Director of the FBI in 1993 for the successful conviction at trial of two defendants in a white-collar fraud case.

5. My trial experience includes dozens of criminal trials. These cases include bankruptcy fraud, bank fraud, mail fraud, wire fraud, and numerous drug offenses including multi-defendant conspiracy cases. My civil trial experience ranges from securities fraud to healthcare fraud. I have also defended hundreds of individuals in State and Federal courts, having tried cases ranging from DUI to murder. I have argued before the Fourth Circuit Court of Appeals, the South Carolina Court of Appeals, and the South Carolina Supreme Court.

6. I have been selected as a Super Lawyer by Super Lawyers Magazine every year since that periodical began issuing its annual list. I have been rated as one of the Top 25 lawyers in South Carolina by Super Lawyers Magazine annually since 2014.

7. I have obtained the AV Preeminent Rating from my peers with Martindale-Hubbell® — the highest rank given for legal ability and ethical standards.

8. I am past President of the South Carolina Chapter of the Federal Bar Association (2022), and past President of the Greenville Association of Criminal Defense Lawyers. I have served for decades on the South Carolina Commission on Lawyer Conduct. I am currently the Chair of the Upstate Citizens Screening Committee which is part of the process in electing South Carolina state court Judges.

9. I have served as a federal Receiver for four different District Court Judges in South Carolina in cases related to the criminal prosecution of federal Ponzi schemes. In my first three Receiverships, I was involved in extensive federal litigation and returned over 55 million dollars to 8000 victims. I served as the Receiver for The Honorable G. Ross Anderson, Jr., in the case of

USA v. Virgil Womack; The Honorable Margaret B. Seymour in the case of USA v. The Three Hebrew Boys; and The Honorable J. Michelle Childs in the case of USA v. Ron Wilson/Atlantic Bullion and Coin. Currently I am the Receiver for The Honorable Bruce H. Hendricks in the case of USA v. Scott Kohn which is a 300 million dollar Ponzi scheme. In that case, I filed over 120 different federal lawsuits and the distribution process has very recently begun.

MY ASSIGNMENT

10. I have been asked by Class Counsel, Richard A. Harpootlian, Esquire, of Richard A. Harpootlian Law Firm, P.A., T. David Hoyle, Esquire, of Motley Rice LLC, and Chase T. Brockstedt, Esquire and Philip C. Federico, Esquire, of Baird Mandalas Brockstedt & Federico LLC, to review relevant information and to express opinions on the reasonableness of the fees and costs of Class Counsel[1] for which reimbursement is sought. I have conferred with Class Counsel concerning their petition. My independent review includes the following:

a. The pleadings in this case as reflected in a review of the docket maintained by this Court as 0:21-cv-01480-SAL which currently contains 355 entries.

b. Plaintiffs' Motion and Memorandum of Law in Support of the Motion for an Award of Attorney's Fees and Costs and an Award for Class Representatives.

c. Supporting Materials to the above-described Motion.

d. Conferences with Class Counsel by telephone.

e. Class Action Settlement Agreement and Release. (ECF #350-1); and

f. Order Granting Preliminary Approval of Class Settlement Agreement. (ECF # 352).

[1] The legal team appointed as Class Counsel is co-counsel with: Gary V. Mauney of Mauney PLLC, Thomas E. "Tommy" Pope and Ben P. Leader of Elrod Pope Law Firm P.A. and Leon E. Stavrinakis of Stavrinakis Law Firm LLC.

11. Based on the foregoing and a careful review of the relevant documents in this extensive matter, I am of the opinion to a reasonable degree of professional certainty that the fees and costs sought by Class Counsel are reasonable, appropriate, ethical, and clearly within the range of fees and costs awarded in similar cases. The specific bases of my opinion are set forth below.

CASE TIMELINE AND SUMMARY OF RELEVANT EVENTS

12. The class action suits subsequently consolidated under the title *In re: New Indy Emissions Litigation* were filed in May-June 2021. By the time of filing, substantial work had been undertaken by Class Counsel, including retaining several consulting, and ultimately testifying, experts in the fields of wastewater treatment operations, air monitoring, and toxicology.

13. On September 13, 2021, these cases were stayed pending a Motion to Consolidate.

14. On September 23, 2021, a Motion to Consolidate was filed along with a Motion to Appoint Interim Class Counsel pursuant to Rule 23(g), FRCP.

15. On December 8, 2021, the Court granted the Motion to Consolidate Cases, Appoint Interim Counsel, and granted leave for Plaintiffs to file an Amended Complaint.

16. On December 15, 2021, the Plaintiffs filed a Consolidated Amended Complaint.

17. On January 14, 2022, Defendants filed motions pursuant to Rule 12(b)(1), Rule 12(b)(6), and Rule 12(f), FRCP.

18. On February 8, 2022, Plaintiffs responded in opposition to these Motions to Dismiss.

19. On February 22, 2022, Defendants filed reply briefs on these Motions to Dismiss.

20. On June 1, 2022, the Court conducted a hearing on these motions.

21. On August 5, 2022, the Court issued orders denying the Motion to Dismiss for lack of Personal Jurisdiction and regarding Defendants' motions to dismiss Plaintiff's nuisance claim,

negligence and gross negligence claim, and concerning Defendants' alternative request to strike Plaintiffs' class allegations. Defendants' motions regarding Plaintiff's negligence per se claim was granted in part, which the Court dismissed without prejudice.

22. On September 2, 2022, Defendants filed their answers to the Consolidated Amended Class Action Complaint.

23. On September 12, 2022, the Court entered agreed-upon Case Management Documents including an ESI Order and a Confidentiality Order.

24. On July 18, 2023, Plaintiffs filed a Second Amended Complaint.

25. On August 1, 2023, Defendants filed their answers to the Second Amended Complaint.

26. On August 28, 2023, Plaintiffs filed their Identification of Expert Witnesses, which named seventeen (17) retained expert witnesses.

27. On September 5, 2023, Defendants filed their Identification of Expert Witnesses, which named seven (7) retained expert witnesses.

28. On November 1, 2023, Plaintiffs served a rebuttal expert report pursuant to Rule 26(a)(2)(D)(ii), FRCP.

29. On November 1, 2023, discovery closed. I am informed that during discovery, Plaintiffs, *inter alia*:

a. Took or defended a total of 52 depositions, including Defendants' officers, employees, and consultants;

b. Organized, reviewed, and made usable more than one million (1,000,000) pages of documents produced by Defendants;

c. Produced to Defendants 371,581 pages of non-individual Plaintiff-specific documents, primarily as a result of numerous FOIA requests to the United States Environmental Protection Agency and the South Carolina Department of Health and Environmental Control;

d. Obtained 66,806 pages of documents as a result of Rule 45 subpoenas to non-parties, primarily non-litigation consultants of Defendants; and

e. Conducted a Rule 34 inspection of the Mill with a team of experts whose single day of testing cost in excess of $150,000.00.

30. Remarkably, despite the voluminous discovery involved, not a single Motion to Compel appears on the docket, although there were six informal telephone conferences with the Court.

31. On November 7, 2023, Plaintiffs filed a Motion for Class Certification which utilized the full 35 pages allowed for briefing in this District. Plaintiffs also attached 32 exhibits to this briefing.

32. On November 28, 2023, Defendants filed an Opposition to the Class Certification Motion.

33. That same day, Defendants filed a Motion in Limine, four *Daubert* motions, and a Motion for Summary Judgment.

34. That same day, Plaintiffs filed five *Daubert* motions.

35. On December 8, 2023, Plaintiffs filed a Reply in support of the Class Certification Motion.

36. On December 12, 2023, the parties filed their responses to the November 28th motions.

37. On April 11-12, 2024, the Court held hearings, concerning the Class Certification Motion, Defendants' Summary Judgment motion, and certain *Daubert* motions.

38. A review of the docket reflects that the briefing and supporting materials filed concerning the robust motions' practice in this action is likely 2,500 pages or more.

OPINIONS

Time and Labor Required.

39. All told, Class Counsel devoted over 24,455 hours, with a lodestar[2] value of over $16,504,598.75 million, to achieve the Settlement. This reflects a significant investment of time and labor by Class Counsel.

The novelty and difficulty of the questions.

40. This case was based on a delicate weaving together of concepts in an extremely complex factual and legal context. The complexity of this matter is best illustrated by the number of experts that each side disclosed, and the number of depositions taken.

The skill requisite to perform the legal service properly.

41. Class Counsel conducted the litigation and achieved the Settlement with skill, perseverance, and diligent advocacy.

42. Class Counsel was opposed by a team of attorneys from distinguished and excellent law firms: Morgan, Lewis & Bockius LLP, Smith Robinson, and McCoy Law Group, LLC. New-

[2] Class Counsel's firms' lodestar figures are based upon the firms' current hourly rates set by the firms for each individual timekeeper. The hourly rates are the same as, or comparable to, the rates submitted by Class Counsel's firms and accepted by courts for lodestar cross-checks in other class action fee applications. These hourly rates do not include expense items which are recorded separately.

Indy's counsel did their job well by testing every factual allegation and by briefing thoroughly their legal points. Their vigorous representation made a very difficult case even more difficult.

43. Had Class Counsel not achieved the Settlement, there would remain a significant risk that the Named Plaintiffs and other members of the Settlement Class may have recovered less, or nothing, from Defendants.

44. I believe the result achieved here to be an excellent result. Class Counsel took, in my view, a significant risk in accepting this representation and have produced a successful and laudable result that other lawyers of lesser skill would not likely be able to replicate.

The preclusion of other employment by the attorney due to the acceptance of the case.

45. In reviewing the number of hours worked by Class Counsel and their staffs, I am particularly impressed by the number of hours they devoted to this intense litigation. Because Class Counsel made this time commitment, it follows that several of them had to turn away new legal business. This resulted in "lost opportunity costs" directly related to this litigation.

The customary fee.

46. Based on my experience and awareness of complex litigation in South Carolina, the amount of attorneys' fees and expenses to be paid from the Settlement Fund are reasonable and consistent with awards in similar cases.

47. In many class action cases, courts have routinely approved fees more than the twenty percent sought here.

48. For example, in an article that has been cited by courts repeatedly, Professor Brian Fitzpatrick studied all federal class actions that settled in 2006 or 2007. Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and their Fee Awards, 7 JOURNAL OF EMPIRICAL

LEGAL STUDIES 811 (2010). He found that most fee awards (exclusive of costs) ran from 25 percent of the recovery to 40 percent, and that more awards fell into the 30-35 percent range than any other.

49. In a study published in 2017, Professor Theodore Eisenberg and colleagues assembled a dataset of 450 class actions that settled more recently. Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N. Y.U. L. REV. 937, 948 (2017). They reported mean and median fee awards of 27 percent and 29 percent, respectively.

50. Here, Class Counsel have applied for fees equal to 20 percent of the recovery. In cases with settlements of this size, there are hundreds or even thousands of class actions with similar awards. By comparison to comparable cases, the requested fee is plainly reasonable.

Whether the fee is fixed or contingent.

51. Here, the fee requested by Class Counsel is based on their prosecuting this litigation on a contingent nature.

52. This is a perfect case for a contingency fee because the claims of the approximately 6,000 class members would have been very small, and, based upon my education, training, and experience, no competent attorney would have taken the case on an hourly basis because the clients could not afford to hire an attorney on an individual basis.

Time limitations imposed by the client or circumstances.

53. Class Counsel coordinated their efforts and divided the various aspects of the case to avoid duplication; this proved to be both expeditious and successful. Time was of the essence in this case – both to bring relief to the class and to meet the deadlines set by the Court. By way

of example, all 52 depositions in this case were taken in the span of less than 6 months. Expert reports were served less than 60 days before class certification briefing.

The amount involved and the results obtained.

54. The Settlement provides for the payment of $18,000,000.00 in satisfaction of claims for damages for a defined class of residents near the New-Indy pulp and paper mill in Catawba, South Carolina, as well as attorneys' fees and costs. In addition, Defendants have agreed to undertake remedial activities valued at approximately $85,000,000.00, to resolve the Clean Water Act ("CWA") and Resource Conservation and Recovery Act ("RCRA") action, the Prevention of Significant Deterioration ("PSD") action, and the interventional action which have been brought before the Court.

The experience, reputation, and ability of the attorneys.

55. It is my opinion that the Class was represented by uniquely qualified, experienced counsel. I will not repeat herein all the specific information set forth in Class Counsel's motion for fees. Suffice it to say that Class Counsel represents the top echelon of complex litigation lawyers.

56. Dick Harpootlian is rightfully considered one of South Carolina's preeminent attorneys, both as a well-known criminal attorney and a noted class action practitioner, and he is a former State Senator.

57. The firm of Motley Rice is widely regarded as one of this country's leading law firms in complex litigation. I have personally litigated against David Hoyle, a very experienced complex litigation attorney, in a significant damages case and I personally know him to be a very gifted and zealous advocate for his clients.

58. I have never worked with the other Class Counsel Phil Federico and Chase Brockstedt at Baird Mandalas Brockstedt & Federico, LLC but I know by reputation that they are well-known for successfully trying and/or settling major class actions.

59. Thomas E. "Tommy" Pope and Leonidas E. "Leon" Stavrinakis are excellent lawyers who brought their talents and legislative experience to bear in this litigation.

60. In summary, Class Counsel, individually and collectively, are extremely well-regarded, successful, and uniquely capable of handling a case of this magnitude. The class counsel "team" took on a proceeding with complex issues that resulted in a settlement that would not have been possible but for their skill and determination.

The undesirability of the case.

61. Class Counsel took a risk of defeat when they filed these actions as putative class actions, especially considering Judge Lydon's prior denial of class certification in *Tillman v. Highland Indus., Inc.*, No. 4:19-cv-02563, 2021 WL 4483035, at *3 (D.S.C. Sept. 30, 2021) and the limitation on damages for nuisance set forth in *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129. 747 S.E.2d 468 (2013). Moreover, unlike other environmental cases in which the alleged contamination is man-made, such as PFAS, "total reduced sulfur," or "TRS" is naturally occurring. Of note, no individual cases were filed concerning this alleged environmental contamination after the putative class actions were filed.

The nature and length of the professional relationship with the client.

62. Class Counsel litigated these cases for approximately three years. The Class Representatives were also each deposed and many had a Rule 34 inspection conducted of their homes in addition to cooperating with written discovery.

Awards in similar cases.

63. As United States District Judge Joe Anderson noted in *Montagne v. Dixie National Life Insurance*, No. 3:09–00687–JFA, 2011 WL 3626541 (D.S.C. Aug. 17, 2011), "the riskier the case, the greater the justification for a substantial fee award."

64. Here, Class Counsel undertook substantial risk and expended substantial time and money in vigorously litigating this action. The result is a global settlement that is expected to "solve the problem" with respect to remediation and brings meaningful monetary relief to the Class.

65. Considering awards in similar cases, Class Counsel's request here of 20% of the Settlement Fund is imminently reasonable.

SUMMARY

66. This has been a very difficult and unusual case against excellent, highly competent, and thorough adversaries. Class Counsel undertook to do what many thought was an impossible task, and they did the job extremely well. Based on the foregoing, it is clear that the fee request of Class Counsel in the amount of $3,600,000.00 is reasonable and entirely appropriate. Also, Class Counsel incurred expenses in the amount of $4,029,444.44 in the course of handling this class action. Likewise, it is my opinion that these costs advanced by counsel were reasonably incurred, fair, and deserving of court approval, given the immense complexity of this case.

67. All of the opinions I have expressed herein are to a reasonable degree of professional certainty in the field of complex litigation.

68. I say nothing further.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 22, 2024.

Beattie B. Ashmore

EXHIBIT C

LANCASTER COUNTY

South Carolina New-Indy plant reaches $103 million settlement over environmental concerns

by: Shaquira Speaks
Posted: May 31, 2024 / 04:16 PM EDT
Updated: Jun 3, 2024 / 10:04 AM EDT

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LANCASTER COUNTY, S.C. (QUEEN CITY NEWS) — It's been described as "terrible," like "rotten eggs" and even a "sweet urinal cake."

"We're in a situation where the stench will come in the house and I would suffer from headaches and nausea, nosebleeds, sore throats, and we couldn't live like that," says class-action complainant Jackie Baker.

Three years ago, the Bakers would've never thought they'd be living in a toxic environment. Nearly every day since February 2021, the couple suffered from a smell they've said was similar to fecal matter and rotten eggs — outside and eventually inside their homes.

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NEW INDY LAWSUIT

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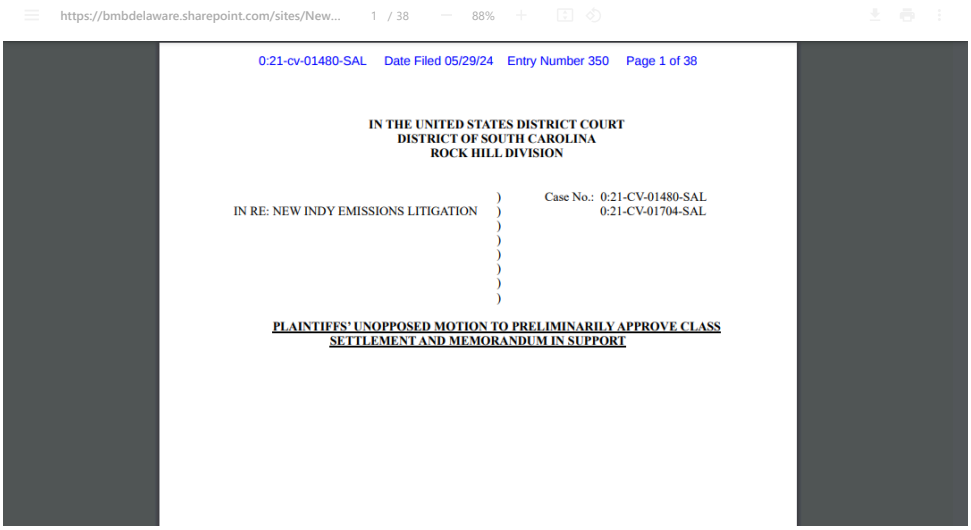
- Neighbors go to appeals court in fight vs. New Indy
- York Co. plant adds new equipment to eliminate smell

State health officials determined the source of the stench was from the New-Indy Catawba Containerboard plant across the river in York County.

"It's one thing to have to check to see if it's raining so you know whether you can go outside or not," Baker said. "But when you have to also check the wind direction and make decisions about your life, if the wind is coming from the southwest. We couldn't enjoy our property."

The Bakers are joined by thousands of other neighbors from York and Lancaster counties in a class-action lawsuit to hold the paper mill's owners accountable.



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0:21-cv-01480-SAL Date Filed 05/29/24 Entry Number 350 Page 1 of 38

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

IN RE: NEW INDY EMISSIONS LITIGATION	)	Case No.: 0:21-CV-01480-SAL 0:21-CV-01704-SAL

PLAINTIFFS' UNOPPOSED MOTION TO PRELIMINARILY APPROVE CLASS SETTLEMENT AND MEMORANDUM IN SUPPORT

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On Wednesday, the plaintiffs filed an unopposed motion for preliminarily approval of a $103 million settlement, with $18 million headed to 6,000 affected neighbors.

Neighbors are set to receive about $3,000 apiece from that $18 million settlement. It's going to be paid in three installments: The first will be paid within five days of the preliminary approval. the second installment a year from the approval, then the third on the second anniversary of that preliminary approval.

Baker and her husband Reed aren't concerned about the proposed payout, though.

"What's important is that that we can live now going forward and that no one's going to get sick and our environment is safe," Jackie Baker said.

The other $85 million in the settlement will go to remediating the impact of the plant's emissions in several counties.

"New-Indy has to take ownership as to what they need to do to correct the issue and that's what the lawsuit is forcing them to do," Reed Baker said. "They're going to fix the ponds. They're going to put a new stripper in. They are going to be good corporate neighbors."

The following is a statement on behalf of Interim Co-Lead Class Counsel in the New-Indy emissions litigation:

> *"New-Indy Catawba and Plaintiffs have reached an agreement to resolve all pending litigation concerning the New-Indy Catawba Paper Mill, subject to the Court's approval of the settlement of the class action lawsuit. The terms of the settlement are described in the public filing. The Parties will not have any further comments as the Court considers the Motion for Preliminary Approval that was filed on May 29."*
>
> - NEW-INDY CATAWBA INTERIM CO-LEAD CLASS COUNSEL

New-Indy declined to comment at this time.

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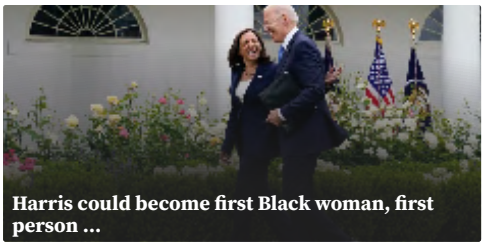
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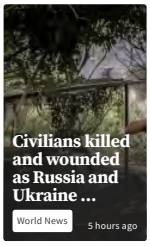
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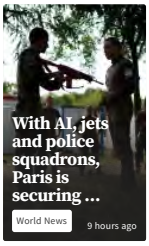
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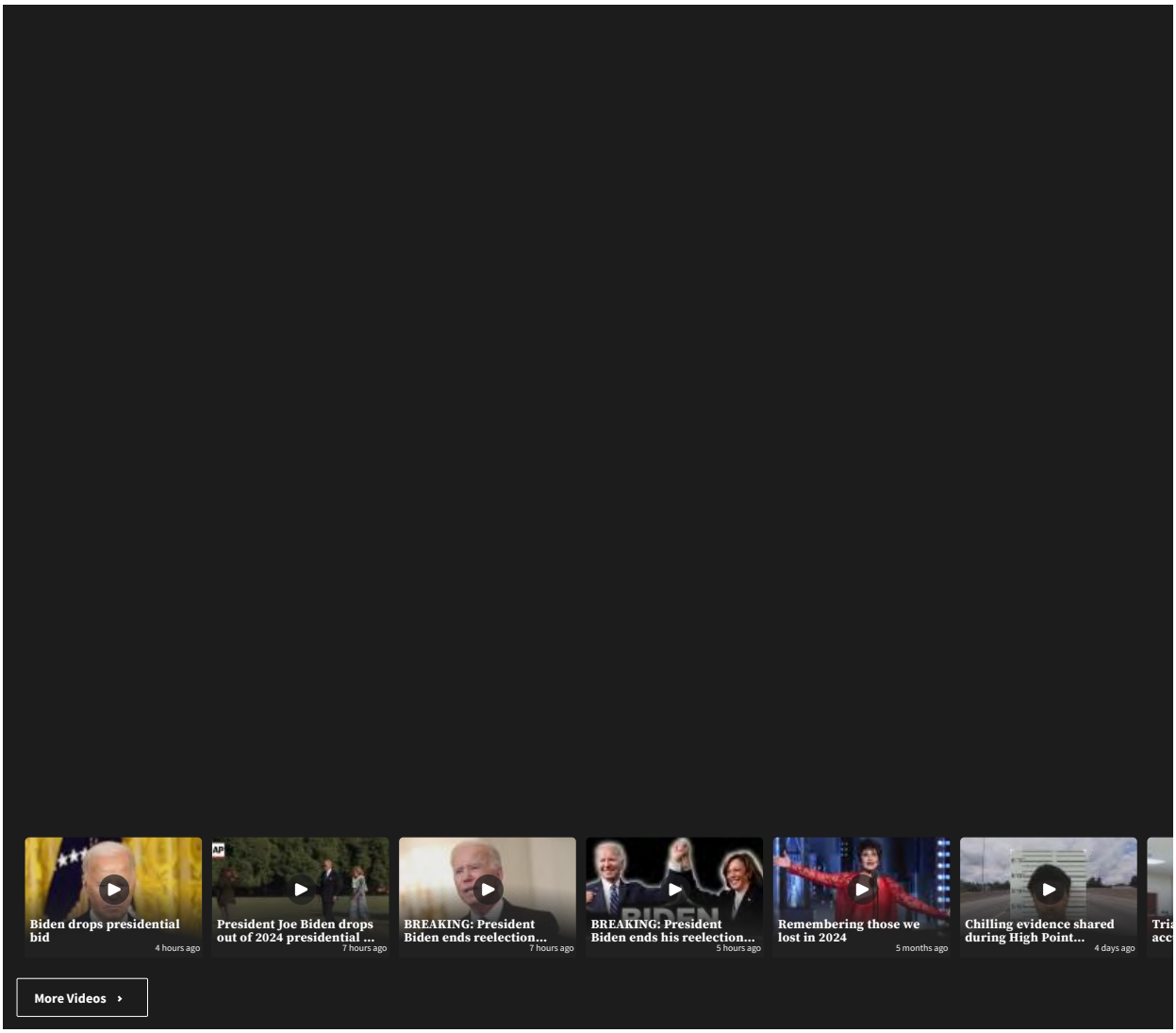

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