UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JUAN DUARTE and BETSY DUARTE, on Behalf of Themselves and all Others Similarly Situated, Plaintiffs, vs. UNITED STATES METALS REFINING COMPANY; FREEPORT MINERALS CORPORATION; FREEPORT-MCMORAN INC., and AMAX REALTY DEVELOPMENT, INC., Defendants.	)	Civil Action No. 2:17-cv-01624-EP-MAH Honorable Evelyn Padin Honorable Michael A. Hammer

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ENTRY OF FINAL JUDGMENT

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Defendants United States Metals Refining Company ("USMR"), Freeports Minerals Corporation ("FMC"), Freeport McMoran, Inc. ("FMI") and Amax Realty Development, Inc. ("Amax") (collectively "Defendants") and Plaintiffs Juan Duarte and Betsy Duarte, individually and on behalf of those similarly situated within the Settlement Class, (collectively, "Plaintiffs") by and through their respective undersigned counsel, hereby submit this Memorandum in Support of the Parties' Joint Motion for Final Approval of the Class Action Settlement they have reached in this case and request that the Court enter its Final Judgment consistent with same.[1]

I. INTRODUCTION

This is a Civil Action to secure redress from the Defendants for alleged damages suffered by Plaintiffs as a result of the Defendants' alleged wrongful emission, release, discharge, handling, storage, transportation, processing, disposal and/or failure to remediate toxic and hazardous substances, which was generated as a by-product of their smelter and related industrial operations located on and around 300-400 Middlesex Avenue in the Borough of Carteret, Middlesex County, New Jersey (the "Smelter") and/or their alleged failure to test, identify, disclose, remove and/or properly remediate contamination and hazardous substances related to such operations from Plaintiffs' properties ("Smelter Contaminants").

Plaintiffs allege that USMR owns or formerly owned the Smelter and that USMR is directly liable to Plaintiffs for its wrongful emission, release, discharge, handling, storage, transportation, processing, disposal and/or failure to remediate Smelter Contaminants onto Plaintiffs' properties across the Class Area during its years of operations of primary and secondary copper smelting and metals refining from the early 1900s to approximately 1991.

[1] Capitalized terms used in this Memorandum but not defined herein shall have the definitions prescribed in the Settlement Agreement (Exhibit A).

Plaintiffs allege that Amax, as an owner and operator of the Smelter and the Smelter property, is directly liable to Plaintiffs for its release of Smelter Contaminants onto Plaintiffs' properties across the Class Area and for its failure to properly test and remediate Smelter Contaminants across the Class Area. Plaintiffs further allege that Amax is liable to Plaintiffs as a successor to USMR.

Plaintiffs allege that FMI is directly liable to Plaintiffs for deficiencies in its testing and remediation of Smelter Contaminants across the Class Area. Plaintiffs further allege that FMI is liable to Plaintiffs through its acquisition of USMR, FMC, and Amax.

Plaintiffs allege that FMC is directly liable to Plaintiffs for deficiencies in its testing and remediation of Smelter Contaminants across the Class Area.

Defendants deny that they are liable for any of Plaintiffs' claims, and deny that Plaintiffs have suffered any damages, including but not limited to invasion of their properties with Smelter Contaminants, any loss of use of enjoyment of their properties or any diminution in their property values as a result of Smelter Contaminants.

In the current operative complaint (Fifth Amended Complaint, ECF No. 266), Plaintiffs allege causes of action for private nuisance, strict liability, trespass, and negligence.[2]

The Fifth Amended Complaint defines the Class as follows (¶157):

> All persons who own or owned any Residential Property (as that term is defined by N.J. Admin. Code § 18:12-2.2(b) and includes 'dwelling house[s] and the lot or parcel of land on which the dwelling house is situated [where the] dwelling is functionally designed for use and enjoyment by not more than four families and includes residential condominiums') and (ii) vacant lots zoned for residential use in each case located within the geographical boundary defined by Exhibit A [to the Settlement Agreement] (the

[2] Plaintiffs also originally sought medical monitoring but abandoned this claim in the Second Amended Complaint and in all subsequent Complaints, including the current operative Fifth Amended Complaint.

> "Class Area") at any time during the Class Period, but excluding (i) properties owned by the Defendants or employees of Defendants, and (ii) properties owned by any federal, state, or local government or any subdivision of such government entities. The Class Area is generally bounded by Peter J. Sica Industrial Highway to the East, Romanowski Street to the North-East Cypress Street to the North, Arthur and East Grant Streets to the West, and Middlesex Ave. to the South. The Class includes Residential Properties located on both sides of the boundary streets. The Class Period is from January 30, 2017, to March 27, 2023.

The Class relates to Class 2 Residential Properties (1-4 family)[3] and vacant lots zoned for residential use within the vicinity of the Smelter. The Court certified this Class for settlement purposes only as part of its Preliminary Approval Order. (D.E. 276). The proposed Settlement Agreement resolves the claims of these Settlement Class Members, and disposes of this case in its entirety.

Plaintiffs and proposed Settlement Class Representatives Juan Duarte and Betsy Duarte own Residential property at 3-A Salem Avenue, Carteret, New Jersey, which is within the Class Area. Juan Duarte and Betsey Duarte allege that, as a result of Smelter Contaminants, their use and enjoyment of their property has been interfered with and the value of their property has declined.

After five years of litigation, massive discovery of documents and scientific data, dozens of depositions, and substantial motion practice, the Parties have negotiated an arms-length settlement that completely resolves this matter. The Parties believe that the Settlement Agreement is a fair, adequate and reasonable compromise given the uncertainties and risks of further litigation. The Settlement Administrator has mailed and published notice to the absent class members pursuant to the Preliminary Approval Order (D.E. 276) and consistent with Federal Rule of Civil Procedure 23 and due process. Out of a class encompassing owners of 1,205 residential properties,

[3] N.J. Admin. Code § 18:12-2.2(b).

there is only one (1) opt-out and only one (1) objection. As discussed below, even that one objection focuses on personal injury and medical monitoring issues that are explicitly carved out of the proposed Settlement and accompanying release of claims. Thus, the one objection is not relevant to the fairness of the Release here. The absent Class Members have overwhelmingly "voted with their feet" in support of the settlement with 1,178 timely claims compared to 1,205 Eligible Properties and 1,642 mailed individual notices to current and prior owners. Class Members have filed at least one claim for 68% of the Eligible (class) Properties (some properties have more than one claim). Accordingly, the Parties respectfully request that the Court give its final approval of the proposed Settlement, authorize execution of the Settlement terms, and enter its final judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Settlement rests on a fully developed record where the key legal and factual issues were litigated by the Parties.

The proposed Settlement Agreement was negotiated in good faith, by experienced counsel who vigorously advocated for their respective clients. Negotiations extended over several years and included two unsuccessful rounds of direct settlement discussions, an unsuccessful formal mediation process before an independent neutral, The Hon. Diane M. Welsh, and two additional days of direct settlement negotiations, at which time a settlement was reached directly between counsel for the Parties.

Before finally agreeing to settle, Plaintiffs and Defendants had undertaken extensive discovery in this litigation for over four years. This record enabled each side to evaluate the merits and limitations of their respective factual and legal positions. This discovery included Defendants' document production of several million pages of documents in 28 separate rolling productions between August 2017 and March 2022. (D.E. 277-2 ¶44). The scope of the production

encompassed the history of the Smelter operations and air emissions, the closure of the Smelter and subsequent site investigations, the development and status of the residential remediation program, related reports and correspondence with the New Jersey Department of Environmental Protection ("NJDEP"), corporate records describing the roles and responsibilities of the Defendant corporations, as well as other topics. In addition, Defendants produced their environmental records database that included millions of sampling and property characteristic records relevant to properties within the Class Area. *Id.* The scientific data and related documents consisted of highly technical environmental reports such as soil sampling data, investigation reports, and remediation records. *Id.*

The Parties conducted 34 depositions: including class representatives, 30(b)6 deponents, non-party environmental consultants and engineers, the Licensed Site Remediation Professional ("LSRP") overseeing the NJDEP investigation and cleanup program for residential properties, and 15 experts (some for multiple days). *Id.* ¶46. The Parties appeared for 23 court conferences, including extensive in-person oral argument before Judge Salas on June 23, 2021. *Id.* ¶47. The Court issued numerous Scheduling Orders, which, due to the complexity and magnitude of the case, were periodically amended and deadlines were extended. *Id.*

Expert discovery was extensive including the exchange of seven affirmative Plaintiff expert reports, nine Defense expert reports, Plaintiff rebuttal expert reports, and depositions of each – sometimes multi-day. *Id.* ¶48 These experts were in highly technical fields such as environmental science, medicine, toxicology, statistics, soil chemistry/geochemistry, smelter operations, air modeling, forensic microscopy, economics, property valuation, and appraisal. *Id.*

There was significant motion practice, including seven *Daubert* Motions to preclude Plaintiffs' experts (including renewed Motions), Plaintiffs' Motion to Certify the Class (including

renewed Motion), motions to dismiss, motions for leave to amend, motions to quash subpoenas, and Plaintiffs' appeal to the District Court of Magistrate Judge Mannion's denial of Plaintiffs' 1) Motion for Leave to Amend and 2) to permit Plaintiffs' rebuttal expert reports. *Id.* ¶49. The Parties' pre-trial work resulted in significant substantive development of both the legal and factual disputes central to the case, and gave counsel a thorough understanding of the merits before negotiating the proposed Settlement.

B. The Settlement will provide the Class Members with significant monetary relief.

The proposed Settlement will provide significant monetary relief to Plaintiffs and Class Members that is favorable considering the uncertainties of litigation, including class certification, trial and appeals, and the asserted defenses. The detailed class action Settlement Agreement is attached as Exhibit A. A summary of the proposed Settlement is set forth below. However, in the event of any conflict between the summary and the detailed Settlement Agreement, the Settlement Agreement controls.

Cash Payments – $42,000,000

Under the proposed Settlement, Defendants would establish a Settlement Fund in the amount of Forty-Two Million Dollars ($42,000,000). Defendants will additionally pay up to $250,000 in claims administration costs. The Settlement Fund will cover all fees, reimbursement of costs, payments, and claims administration costs over $250,000 associated with the Settlement Agreement, including the following payments in order of priority: (i) approved attorneys' costs and expenses, (ii) approved fee award to Class Counsel; (iii) approved Claims Administration Expenses above $250,000; (iv) incentive awards or other compensation to the proposed Settlement Class Representatives; and (v) payments to eligible Class Members.

In addition, Defendants and Plaintiffs' Counsel have also negotiated a separate proposed settlement with certain property owners outside of the Class Area (the "Settling Individual Homeowners"). In the event that the total aggregate of payments to all Settling Individual Homeowners (which include Settlement Individual Homeowners' attorneys' fees and costs) is less than $2 million, USMR will also pay the remaining amount to reach a total of $2 million to the class action Settlement Fund (e.g., payments to Settling Individual Homeowners plus this potential payment to the class action Settlement Fund equal $2 million). The Parties anticipate that additional contribution to the class action Settlement Fund will be in excess of $1 million. The Parties anticipate the final Eligible Property Payment Amount will be at least $18,000 (to be allocated among the property owners for that parcel based upon their time of ownership during the Class Period), as detailed below.

The payments described in this section represent the total limit and extent of Defendants' cash payment obligations to the Class under the Settlement Agreement.

Residential Soil Cleanup – $61,000,000

In addition to cash payments, Defendants have incurred more than $61 million in a residential soil cleanup program which includes community outreach, sampling and analysis, environmental remediation, and reporting, all of which is subject to NJDEP oversight (the "NJDEP Program"). The Class Settlement Benefits include the Plaintiffs' Counsel's contribution to the NJDEP Program including, but not limited to, technical review, comments, oversight, monitoring of the NJDEP Program, and an extensive deposition of the responsible oversight authority for the program (the "LSRP") which ultimately influenced and enhanced the USMR residential cleanup program within the Area of Concern ("AOC"). The majority of the cost for the NJDEP Program

has been incurred during the course of this litigation. *See* D.E. 277-1 at 16-18 (ECF page numbers) (describing Plaintiffs' contribution in more detail).

Settlement Class Definition

Solely for purposes of settlement, the Parties agree to certification of the following Settlement Class under Fed. R. Civ. P. 23(b)(3), as set forth in the Settlement Agreement:

Settlement Class:

> All persons who own or owned any Residential Property (as that term is defined by N.J. Admin. Code § 18:12-2.2(b) and includes 'dwelling house[s] and the lot or parcel of land on which the dwelling house is situated [where the] dwelling is functionally designed for use and enjoyment by not more than four families and includes residential condominiums') and (ii) vacant lots zoned for residential use in each case located within the geographical boundary defined by Exhibit A [to the Settlement Agreement] (the "Class Area") at any time during the Class Period, but excluding (i) properties owned by the Defendants or employees of Defendants, and (ii) properties owned by any federal, state, or local government or any subdivision of such government entities. The Class Area is generally bounded by Peter J. Sica Industrial Highway to the East, Romanowski Street to the North-East Cypress Street to the North, Arthur and East Grant Streets to the West, and Middlesex Ave. to the South. The Class includes Residential Properties located on both sides of the boundary streets.[4] The Class Period is from January 30, 2017, to March 27, 2023.

[4] The map at Exhibit A to the Settlement Agreement (the Settlement Agreement is Exhibit A to this pleading) outlines the geographic boundaries of the Settlement Class. The Class Area is generally bounded as follows: Starting at and just west of the parcel at 1 Edwin Street, near the intersection of Bergen and Edwin Street, head north along Edwin Street to Port Reading Avenue

- Left (west) at Port Reading Avenue to East Grant Street
- Right (north) on East Grant Street to Spruce Street
- Right (east) on Spruce Street to Arthur Avenue
- Left (north) on Arthur Avenue to Ash Street
- Right (east) on Ash Street which becomes Cypress Street to Washington Avenue
- Right (southeast) on Washington Avenue to Whittier Street
- Left (northeast) on Whittier Street to Romanowski Street
- Right (southeast) on Romanowski Street to Cooke Avenue
- Right (southwest) on Cooke Avenue to 26 Cooke Avenue

The Class Ownership Period constitutes the period beginning on January 30, 2017, and ending on March 27, 2023.

In exchange for Settlement Class Members releasing Defendants from all claims, including dismissal with prejudice of all claims relating to the Settlement Class, and Class Members providing proof of ownership to the subject Eligible Property as defined in the Settlement Agreement, Class Members will each be entitled to a monetary payment. The monetary payment will be allocated as follows:

1. After initial distributions are made to Class Counsel for attorney's fees and expenses, and to any Settlement Class Representatives as incentive payments, the remaining monies shall be allocated to the Settlement Class. This amount is referred to as the "Settlement Fund."
2. The Parties have computed that the Settlement Class consists of approximately 1,205 "Eligible Properties" (including single family residential properties, vacant residential lots, condominiums, and apartments with 4 or less units). For example,

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- Left (southeast) and north of the 26 Cooke Avenue parcel and south of parking lots of St. Elias Byzantine Catholic Church and Columbian Club (164 High Street) to Locust Street
- Right (southwest) on Locust Street to Irving Street
- Left (southeast) on Irving Street to Roosevelt Avenue
- Left (northeast) on Roosevelt Avenue to Peter J Sica Industrial Highway
- Right (south to southwest) on Peter J Sica Industrial Highway to the north edge of the parking lot of 300 Middlesex Avenue
- Right (west) along the parking for 300 Middlesex Avenue to the intersection of Pershing Avenue and Bergen Street
- Left (south) on Pershing Avenue to Bergen Street
- Right (west) along Bergen Street to and ending at Edwin Street.

The Class Area includes properties on both sides of the boundary streets. In the event of any conflict, the descriptions set forth above take precedence over the map.

if the Settlement Fund consists of approximately $22,000,000 each Eligible Property will slightly exceed $18,000.[5]

3. After the Settlement Administrator determines that all valid and timely Claim Forms have been adjusted and paid the Eligible Property Payment Amount, any remaining monies in the Class Settlement Fund, if any, shall revert to USMR. Notwithstanding the above, however, the reversion to USMR shall not exceed 30% of the amount in the Settlement Fund after deduction of Class Counsel's attorneys' fees, costs and expenses, and payment of approved incentive awards. If there are remaining monies after payment of this reversion amount to USMR, such monies shall be distributed to Class Members filing valid and timely Claim Forms, pro rata.

4. If the Eligible Property changed ownership during the Class Period, then the Eligible Property Payment Amount will be divided among the owners/owner groups for the Eligible Property on a time weighted basis over the Class Period. For example, if the Class Ownership Period is six- and one-half years (6.5) and owner X owned an Eligible Property for 39 months, and Y owned the same property for 39 months, each would receive one-half of the Eligible Property Payment Amount or approximately $9,000 each (based upon the above example of a total Eligible Property Payment Amount of $18,000). Record title ownership and the time period of ownership are subject to verification through the Claims Administration process. If there are multiple owners of record title at the same time for a single Eligible Property, a single payment for the property will be issued to all record title owners

[5] As discussed below, the Parties currently expect that the Settlement Fund available for distribution to Class Members will likely exceed $21 million once the rollover from the Individual Settling Homeowners is included.

as a group. Any subsequent allocation of that payment among those record title owners will be for the record title owners to determine and will not be determined in the Claims Administration process.

As described above, Defendants have also negotiated a separate proposed settlement with the "Settling Individual Homeowners." If the total aggregate of payments to all Settling Individual Homeowners (which include Settlement Individual Homeowners' attorneys' fees and costs) is less than $2 million, USMR will also pay the remaining amount to reach a total of $2 million to the Settlement Fund Escrow Account. USMR shall make such payment (if any) to the Settlement Fund Escrow Account on or before the date 10 business days after the later date of (i) the Effective Date, or (ii) execution of formal settlement documents and payments to all Settling Individual Homeowners. The Parties currently anticipate this additional payment will exceed $1 million.

Cash benefits will be distributed to the Settlement Class Members from the Settlement Fund Escrow Account by the Settlement Administrator. The payment structure to the Settlement Class Members is based on a per-property payment of the Eligible Property Payment Amount that is the same for each Eligible Property in the Class Area.[6] All payments from the Settlement Fund shall be pursuant to the terms of the Escrow Agreement.

The Settlement Administrator shall calculate the Eligible Property Payment Amount after (i) there is a final, non-appealable order on the amount of Settlement Class Counsel's attorneys' fees and costs, Settlement Class Representative incentive awards, and settlement administration costs to be deducted from the Settlement Fund, (ii) receipt of the Settling Individual Homeowners

[6] There are a handful of Eligible Properties that changed use from "residential" to an excluded land classification during the Class Period. Owners of these properties will be eligible for a payment that is proportional to the time period the property was classified as residential.

payments are complete, and (iii) the Settlement Administrator completes a list of all Eligible Properties and that list has been approved by Defendants and Settlement Class Counsel.

The amount allocated to each Class Member will depend upon the number of valid claimants for each Eligible Property and the amount awarded for Settlement Class Counsel's fees and costs, Settlement Class Representatives incentive awards, and settlement administration costs (if any). For example, assuming that (i) the Court grants Class Counsel's pending request for attorneys' fees and costs totaling $20,957,236, (ii) the final settlement administration costs are less than $250,000 (and as a result there is no deduction of the Settlement Fund for administration costs), and (iii) the roll over payment from the Individual Settling Homeowners is $1 million, the Eligible Property Payment Amount will be $18,292.75, which would then be divided among the eligible owners of that property over the Class Period.[7] While the exact amount of the Eligible Property Payment Amount is not known at this time because of the uncertainties described above, the Parties anticipate that it will exceed $18,000 (more than the $17,500 per property estimate contained in the individual notice). In any event, each Eligible Property will be allocated the same

[7] ($42,000,000 (class settlement) + $1,000,000 (individual settling homeowner rollover) – $20,957,236 (class counsel fees and approved costs)) ÷ 1205 (class properties) = $18,292.75 per property.

Note there is also a significant probability (although not a certainty) that the overall class participation rate will fall below 70%, which would then trigger the cap on the reversion to USMR. Under that circumstance, additional settlement funds after deduction of the capped reversion would be distributed to the Class Members filing valid claims. Because we do not yet know (i) how many of the timely filed claims are valid, (ii) how many are duplicates, and (iii) how many are claims for ownership during only a portion of the Class Period (and where there is another eligible owner for that parcel during the remainder of the Class Period), we cannot yet calculate a definitive overall participation rate and project the amount of any subsequent second distribution to the Class Members. The Parties are working with the Settlement Administrator to expedite any additional information regarding the claims response that can be developed and shared with the Court at the Fairness Hearing. Regardless, the Parties believe that the Eligible Property Payment Amount of $18,292.75, standing alone, is a fair and reasonable settlement.

amount,[6] respectively, and where a particular Eligible Property has multiple owners over the Class Period, the Eligible Property Payment Amount will be divided on a time-weighted basis.

In the event that the owner or owner group for an Eligible Property during all or a portion of the Class Period opt(s) out; or fail(s) to complete the Claim and Release Form; or provides a Claim and Release Form with incomplete or inaccurate ownership documentation and fails to correct or supply such information after given reasonable notice of and an opportunity to do so, the settlement payment that such owner or owner group would have been entitled to will be considered unclaimed funds and will be subject to the reversion to USMR (as described above) and then, if the reversion cap is met, allocated to Class Members, as set forth above.

All payments issued to Class Members via check will state, on the face of the check, that the check will expire and become null and void unless cashed within ninety (90) days after the date of issuance. To the extent that a check issued to a Class Member(s) is not cashed within ninety (90) days after the date of issuance, the check will be void, and such funds shall revert to the Settlement Fund, to be distributed as unclaimed funds. To the extent that no claim is made for an Eligible Property within the claims period, the unclaimed funds shall be distributed to the reversion to USMR (as described above) and then, if the reversion cap is met, allocated to the Class Members who have filed complete and accurate claim forms pro rata.

C. The Class notice fully informed the absent Class Members and the claims response has been supportive of the Settlement.

The Settlement Administrator has implemented the notice plan as set out in Paragraph 16 of the Court's Preliminary Approval Order (D.E. 276). JND Declaration at ¶2, attached as Exhibit B. The Settlement Administrator mailed 1,710 individual notices to current and former owners of the Class Properties. There were 74 returned individual notices. *Id.* at ¶9. The Settlement Administrator conducted additional address research and was able to develop a forwarding address

for 6 of those returned notices. *Id*. Publication notice was completed in the New Brunswick Home News Tribune, a daily newspaper serving Middlesex County, New Jersey, once a week for four consecutive weeks. *Id.* at ¶7. Additional notification to potential Class Members occurred as a result of several news stories published in local publications describing the proposed Settlement and providing contact information for the settlement website. *Id.* at ¶8. The Settlement Administrator has maintained an informative website describing the proposed Settlement and containing links to the key settlement documents from the inception of the notice campaign. *Id.* at ¶11. To date, that website has received more than 5,300 unique visitors and more than 34,000 total page views. *Id*. at ¶12. The Settlement Administrator also maintained a toll-free informational phone line to answer questions, and fielded 871 calls. *Id.* at ¶¶15-16. In addition, Class Counsel was contacted by numerous property owners and answered all questions posed concerning the proposed Settlement.

The Settlement Administrator has received 1,178 timely claims from potential Class Members. *Id.* at ¶18. At least one claim has been submitted for 818 of the 1,205 Eligible Properties or 68% of the Class. *Id.* The claim filing response by potential Class Members far exceeds typical class action response norms and demonstrates exceptional support for the proposed Settlement among absent Class Members. *See e.g., Jasper v. C.R. England, Inc.*, No. 08-5266, 2014 WL 12577426, *6 (C.D. Calif. Nov. 3, 2014)(collecting cases--claim rates less than 10% still considered supportive of the proposed class settlement).

Similarly, only one potential Class Member chose to opt out, and only one Class Member filed an objection (discussed in more detail below). JND Declaration, Ex. B at ¶¶21, 23. The lack of any significant negative response also indicates solid support for the proposed Settlement among absent Class Members.

D. There are no objections that are relevant to the Class relief and the claims that are being released.

Only one class member, Doreen M. Stevens, submitted an objection to the proposed Settlement. Ms. Stevens' objection highlighted several alleged facts about her claims that she argued made her "situation . . . different." Stevens Objection, attached as Exhibit C. These alleged facts included:

- She had lived in the Class Area much longer than the 6.5 year Class Period, and as a result had allegedly been exposed to emissions resulting from the Smelter longer than the general class.
- Her mother, father, sister and herself all had cancer, and she is the only survivor.
- She also worked at the Yard Office at the Smelter while it was still operating and was allegedly exposed to Smelter emissions during that time period.

See id. Importantly, Ms. Stevens did not object to the fairness of the proposed Settlement benefits in exchange for her release of the property and related economic claims that are included in the proposed Settlement. Instead, her complaints are focused on alleged personal injuries or perhaps the need for medical monitoring arising from alleged exposure to Smelter emissions. But the proposed Settlement's release of claims specifically carves out both personal injury and medical monitoring claims, and as a result, Ms. Stevens' personal injury claims are not impacted by the proposed Settlement. *See* Settlement Agreement at §1.21, attached as Exhibit A. As a result, Ms. Stevens' objection is largely irrelevant to claims resolved by the proposed Settlement and does not contain a persuasive reason for this Court to find the proposed Settlement is unfair or unreasonable.

ARGUMENT

III. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Standard for Granting Final Approval

Rule 23(e) requires the Court to determine that a class action settlement is fair, reasonable, and adequate before approving it. The Third Circuit has adopted a non-exhaustive, nine-factor test to aid district courts in their review of class action settlements. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The nine *Girsh* factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Id*. "These factors are a guide and the absence of one or more does not automatically render the settlement unfair. Rather, the court must look at all the circumstances of the case and determine whether the settlement is within the range of reasonableness under Girsh." *In re Par Pharm. Sec. Litig*., No. CIV.A. 06-3226 ES, 2013 WL 3930091, at *3 (D.N.J. July 29, 2013) (citation and internal quotation omitted).

The Third Circuit has cautioned that "[t]he evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution" *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig*., 55 F.3d 768, 806 (3d Cir. 1995) and has reaffirmed the "overriding public interest in settling class action litigation." *In re Pet Food Products Liab. Litig*., 629 F.3d 333, 351 (3d Cir. 2010) (internal quotation and citation omitted).

B. The Settlement is fair, reasonable, and adequate and meets the *Girsh* factors for class action settlement approval.

As discussed below, the proposed Settlement satisfies each of the *Girsh* factors and should be approved.

1. The complexity, expense and likely duration of litigation supports approval.

The first *Girsh* factor captures "the probable costs, in both time and money, of continued litigation." *General Motors*, 55 F.3d at 812 (internal quotation marks and citation omitted). The presumption in favor of voluntary settlements is "especially strong" in complex class actions "where substantial judicial resources can be conserved by avoiding formal litigation." *Id*. at 784 (internal quotation marks and citation omitted). This case involves disputes over very complex scientific and other factual issues. As illustrated by the briefing on class certification, key areas of dispute involve highly technical areas of environmental science, geochemistry, toxicology, epidemiology, air modeling, and property valuation, among others.[8] These complex scientific disputes are implicated in the evaluation of over twelve hundred residential properties included within the proposed settlement Class.

Moreover, although the Parties have engaged in five years of fact and expert discovery, continuing to litigate this case through a heavily contested class certification motion, potential appeals of the Court's rulings on class certification and *Daubert* motions, summary judgment, and trial is likely to be "a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998). This *Girsh* factor thus weighs in favor of approval.

[8] *See e.g.*, Plaintiffs' Memorandum in Support of their Motion for Class Certification (D.E. 248) at pp. 10-19; Defendants' Response in Opposition to Plaintiffs' Second Motion for Class Certification (D.E. 251) at pp. 13-16; 21-28. (All page references to the ECF page number)

2. The reaction of the class to the settlement supports approval.

The second *Girsh* factor requires the Court to examine "the reaction of the class to the settlement." *In re AT & T Corp*., 455 F.3d 160, 164 (3d Cir. 2006) (citation omitted). "In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors." *General Motors*, 55 F.3d at 812. When considering the reaction of the class, "[t]he vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement." *In re Cendant Corp. Litig*., 264 F.3d 201, 235 (3d Cir. 2001). Thus, in *Yong Soon Oh v. AT & T Corp*., 225 F.R.D. 142, 147 (D.N.J. 2004), three objections was considered "extremely minimal" as compared with the estimated thousands of class members, and, as such, "weigh[ed] in favor of approving the Proposed Settlement." *Id*.; *see also In re Ins. Brokerage Antitrust Litig*., No. CIV.A. 04-5184 (GEB), 2007 WL 2589950, at *5 (D.N.J. Sept. 4, 2007) *aff'd sub nom. In re Ins. Brokerage Antitrust Litig*., 579 F.3d 241 (3d Cir. 2009) (approving settlement where only two class members filed objections and noting that such a small number of objections strongly weighs in favor of approval); *Pet Food Products*, 629 F.3d at 351 (second *Girsh* factor satisfied where over 9,000 claims had been received as compared to only 114 exclusion requests and 28 objections).

Here, the reaction of the class has been favorable. Out of a potential 1,205 class properties, there was only one (1) opt-out request and one (1) written objection (the deadline for opt-outs and objections was June 26, 2023). As discussed above, the one objection is not relevant to the claims that are included within the proposed Class settlement, because the objection focused on the potential for future personal injury or medical monitoring claims, which are not being released. Thus, even this one objection does not actually criticize the fairness of the proposed settlement

before the Court, but rather illustrates its fairness in expressly excluding personal injury and medical monitoring claims.

Moreover, at least one claim has been submitted for 818 of the Eligible (class) Properties, representing a per-property response rate of over 68%. Courts in the Circuit have found participation rates above 25% to be adequate and to weigh in favor of approval. *See, e.g., Ward v. Flagship Credit Acceptance LLC*, No. 17-2069, 2020 U.S. Dist. LEXIS 25612, at *36 (E.D. Pa. Feb. 13, 2020) (20.5% participation rate); *Taha v. Bucks County Pa.*, No. 12-6867, 2020 U.S. Dist. LEXIS 222655, at *12 (E.D. Pa. Nov. 30, 2020) (25% claims rate suggested that the process was effective and weighed in favor of approval). The participation rate in the Duarte settlement far exceeds this bench mark and suggests strong approval among the absent Class Members.

3. The stage of the proceedings and the amount of discovery completed supports approval.

The *Girsh* third factor "captures the degree of case development that class counsel have accomplished prior to settlement." *General Motors*, 55 F.3d at 813. Through this lens, "courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Id*. Thus, "[t]o ensure that a proposed settlement is the product of informed negotiations, there should be an inquiry into the type and amount of discovery the parties have undertaken." *Prudential*, 148 F.3d at 319. As discussed above, there has been extensive discovery, motion practice and the development of expert opinion over the course of five very active years of litigation. Millions of pages of documents have been produced including detailed scientific data on the properties at issue that has been thoroughly evaluated by the Parties' experts. The Parties made two prior efforts at settlement before the third attempt was successful. Both Plaintiffs and Defendants had a well-developed record to evaluate the strengths and weaknesses of their litigation positions, and this factor supports approval of the proposed Settlement.

4. The risks of establishing liability and damages supports approval.

"The fourth and fifth *Girsh* factors survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *Prudential*, 148 F.3d at 319. A court considers the risks of establishing liability in order to "examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them." *General Motors*, 55 F.3d at 814. The risks of establishing damages is similar and "attempts to measure the expected value of litigating the action rather than settling it at the current time." *Id.* at 816.

The proposed Settlement resolves contested questions of law and fact that would have been the subject of extensive additional litigation, including several highly technical issues that likely would have come down to a battle of the experts. As part of the class certification briefing, each Party's experts engaged on these disputed issues clarifying both the strengths and weaknesses of each Party's position. For example, key disputes included:

(1) whether each Plaintiff property is contaminated;

(2) whether the Smelter is the source of any contamination;

(3) where multiple sources of contamination are potentially present, how much of the contamination would have come from the Smelter, and relatedly, how much Smelter contamination must be present to impose liability;[9]

(4) whether class members' properties declined in value;

[9] The Parties' respective positions on issues (1), (2), and (3) are illustrated by comparison of the opinions of Plaintiffs' experts, Dr. Flowers (D.E. 248-6; 248-18) and Dr. Singh (D.E. 248-7), with those of Defendants' experts, Mr. Hall (D.E. 251-20; 251-21), Dr. Rouhani (D.E. 248-17) and Mr. Mattingly (D.E. 251-22; 251-23).

(5) if so, what is the cause of any decline in value;[10]

(6) whether Plaintiffs suffered annoyance, discomfort and inconvenience as a result of the presence of any contamination; and

(7) whether class members' use and enjoyment of their properties has been unreasonably interfered with in any way as a result of the presence of any contamination.

These are obviously complex issues that will be dominated by expert testimony.

Although Settlement Class Counsel and Defendants each have very different respective views as to how these questions will be answered if the litigation were to proceed, each acknowledges the expense and likely duration of continued proceedings necessary to prosecute the case through class certification, trial, and appeals, and recognizes the risk that the other side's view of the facts and law could ultimately prevail.

5. The risks of maintaining the class action through trial supports approval.

Under Rule 23, the Court may decertify a class at any time during the litigation. Defendants would oppose class certification if the Settlement is rejected and the case is returned to a litigation context. There is no guarantee that this Court will certify all, or any, of Plaintiffs' claims in the event that the case is litigated and the presence and source of alleged contamination become key disputed issues again. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (holding that "Rule 23 does not set forth a mere pleading standard"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) (certification inquiry requires a "rigorous analysis"). Thus, the risks

[10] The Parties' respective positions on issues (4) and (5) are illustrated by comparison of the opinions of Plaintiffs' expert Jeffery Zabel (D.E. 248-39) and Defendants' expert Trevor Phillips (D.E. 251-24).

surrounding class certification weigh in favor of approving the proposed Settlement Agreement here.

6. The final Girsh factors support approval.

"The last two Girsh factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial." *Prudential*, 148 F.3d at 322. In order to assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *General Motors*, 55 F.3d at 806 (quoting MANUAL FOR COMPLEX LITIGATION 2d § 30.44, at 252).

Class Counsel has not speculated as to what the best recovery Plaintiffs could have obtained had they decided to pursue their claims, but contends that the proposed Settlement is fair, reasonable, and adequate given that the value of immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation. Nor is Class counsel obligated to so speculate. As the Third circuit has explained, "[t]he District Court did not abuse its discretion in approving the settlement without specifically identifying the best possible recovery for the class. Indeed, 'precise value determinations are not required' in evaluating a class action settlement." *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 492 (3d Cir. 2017) quoting *Pet Food Products*, 629 F.3d at 355.[11]

[11] Importantly, the Parties have also agreed that the proposed Settlement "does not terminate or modify USMR's obligations under the regulatory cleanup program currently being conducted in Carteret under the oversight of the NJDEP; nor does it impact any future action by the State of New Jersey in Carteret under applicable environmental laws." Settlement Agreement at ¶9.1.3, Ex. A.

In contrast, Defendants contend that if this case were to proceed, expert testimony would show that there has been no discernable diminution in property value attributable to historical air emissions from the USMR Smelter and that Class Members have not been damaged at all. *See e.g.*, Expert Report of Trevor Phillips at ¶¶ 157-163 (D.E. 251-24). Class Counsel disagree with this assessment and believe a damages award would be significant. Nevertheless, the proposed Settlement provides guaranteed significant benefits to the Class Members that likely total more than $18,000 per Eligible Property to be allocated among the owner(s) during the Class Period.

Continuing to litigate this case through class certification, summary judgment, and trial will be a lengthy, complicated, and expensive process. Regardless of the outcome at trial, an appeal would likely follow, thereby imposing additional costs on the parties and further delaying final resolution of this case. Plaintiffs contend that if the case were to proceed to trial, Plaintiffs would continue to pursue substantial damages against Defendants. Nevertheless, the risk that Plaintiffs would not be able to sustain their claims, either at class certification, or on the merits, or would be able to recover damages in a less substantial amount, supports approval of a reasonable settlement that provides substantial and immediate relief to the Class Members. *See Halley*, 861 F.3d at 491 ("[W]e agree with the District Court that the settlement 'yields immediate and tangible benefits, and it is reasonable in light of the best possible recovery and the attendant risks of litigation—little or no recovery at all.'"). As this Court has explained, "even if Defendant could afford a greater amount, this fact provides no basis for rejecting an otherwise reasonable settlement.'" *Saint v. BMW of N. Am., LLC*, No. 12-6105, 2015 WL 2448846, at *11 (D.N.J. May 21, 2015).

C. The Class Notice Satisfied Rule 23(e).

In a Rule 23(b)(3) settlement class action such as this one, the Court must direct that class members be given "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B);

see also D.E. 276 at ¶17. Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Rule 23(c)(2)(B) further provides that the notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

Both the content of the Notice and the method of dissemination complied with the requirements of due process and the Federal Rules of Civil Procedure. Specifically, the content of the Notice here provided all of the required information concerning class members' rights and obligations under the proposed Settlement: it details the procedures for opting out, for submitting claims, and for filing objections, and notifies class members of the consequences of their choices. *See* JND Declaration at ¶9 and Ex. D(individual notice), attached as Exhibit B. The Notice also explains the nature of the claims covered under the Settlement Agreement and the possible relief available. *Id*. The individual mailed notices briefly described the litigation and the terms of settlement, provided a map and street boundaries for the Settlement Class, and included copies of the Claim and Release Form. *Id*.

The method of Notice also complied with Rule 23. On May 10, 2023, individual notice was sent by First Class Mail directly to each current and prior property owner at his or her mailing address as reflected in county property tax records. *Id*. at ¶5. Substantial efforts were made to identify the current addresses of prior owners of Eligible Properties. *Id*. at ¶¶6, 9. The notices given

to the putative members of the Settlement Class included individual notice to all putative class members who could be identified with reasonable effort, plus publication notice and notice via a dedicated settlement website. These notices provided the best notice practicable under the circumstances and fully satisfy the requirements of the Federal Rules of Civil Procedure and the requirements of due process. Moreover, as described above, there has been significant media coverage of the potential Settlement, adding another layer of notice to potential Class Members.

Finally, on April 7, 2023, the Settlement Administrator served notice as required by the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"), on the U.S. Attorney General and on the attorneys general for each state in which a potential claimant resides. *Id*. at ¶¶3-4. Ninety days or more have passed since the CAFA notice was served. No official has taken any action to oppose the proposed Settlement.

There have been no filed objections to the substance or method of notice.

D. The Plan of Allocation Should be Approved.

The "[a]pproval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Computron Software, Inc*., 6 F. Supp. 2d 313, 321 (D.N.J. 1998) (citation and internal quotation marks omitted). In conducting its review, "[t]he Court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund." *Walsh v. Great Atlantic & Pacific Tea Co*., 726 F.2d 956, 964 (3d Cir. 1983).

The proposed plan of allocation here is fair, reasonable, and adequate. The plan of allocation treats all Eligible Properties exactly the same. This treatment is fair given that all of the Eligible Properties are classified similarly: as Class 2 Residential Property (1-4 Family) or residential vacant lots, and are all in relatively close proximity to the site of the former Smelter.

The cash distribution to individual Class Members is based on the fraction of the overall Class Period the individual owned the Eligible Property. Each Class Member is treated the same. Thus, to the extent the settlement payment is intended to compensate class members for any alleged damage to their property, it is fair, reasonable, and adequate that the payment be commensurate with the time-period of property ownership.

IV. CERTIFICATION OF THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE.

In the Court's Preliminary Approval Order, the Court found that for purposes of settlement, the prerequisites of Rules 23(a) and (b)(3) were satisfied, while reserving the Parties' rights to litigate all class issues in the event that the Settlement Agreement is not finally approved or does not become effective for any reason. D.E. 276 at ¶¶2-5. Plaintiffs do not repeat their previous Rule 23 arguments here. However, should the Court find it necessary at final approval for Plaintiffs to demonstrate that the requirements of Rule 23(a) and (b)(3) are satisfied, for settlement purposes only, Plaintiffs incorporate by reference the arguments made in support of class certification in their joint motion for preliminary approval. See D.E. 267-1 at 19-25 (ECF page numbers).

V. CONCLUSION

For the reasons stated above, Plaintiffs request that the Court finalize the certification of a Rule 23(b)(3) class for settlement purposes only (Defendants are unopposed), and the Parties jointly request that the Court enter its final approval of the Parties' proposed Class Action Settlement, enter its final judgment, and grant such other relief and orders as the Court deems necessary and appropriate.

Respectfully submitted this 10th day of July, 2023.

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