UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

CRYSTAL GOOD, et al., **Plaintiffs,** **v.** **WEST VIRGINIA-AMERICAN WATER COMPANY, et al.,** **Defendants.**	**Case No.: 2:14-CV-01374** **Hon. John T. Copenhaver, Jr.** **Consolidated with:** **Case No. 2:14-11011** **Case No. 2:14-13164** **Case No. 2:14-13454**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT AND FOR FINAL APPROVAL OF ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS

Plaintiffs, individually and on behalf of all others similarly situated, respectfully submit this memorandum of law in support of the Joint Motion ("Joint Motion") filed by Plaintiffs and West Virginia-American Water Company, American Water Works Service Company, Inc., American Water Works Company, Inc., (collectively, the "American Water Defendants") and Eastman Chemical Company ("Eastman") (collectively, "Defendants") under Rule 23(e) of the Federal Rules of Civil Procedure for final approval of (1) class certification for purposes of settlement; (2) the proposed class action settlement ("Settlement"); and (3) an award of attorneys' fees, reimbursement of litigation costs and incentive payments to the Class Representatives.

INTRODUCTION

This matter arose out of an interruption in the potable tap water supply for approximately 225,000 residents in Charleston and surrounding areas supplied water by the Kanawha Valley Treatment Plant for several days beginning on January 9, 2014. The interruption was caused by a spill into the Elk River of a mixture containing Crude MCHM from a facility owned by Freedom Industries, Inc. ("Freedom" or "Freedom Facility"). In this civil action, Plaintiffs contended that Defendants could have prevented or avoided the interruption event by taking better precautions, complying with applicable regulations and through the use of reasonable care. The Court has jurisdiction over this action under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d).

After several years of hotly contested litigation, the parties have achieved a settlement. The Settlement, as set forth in the Amended Settlement Agreement dated August 25, 2017 [Doc. 1163-1] was preliminarily approved by this Court by order dated September 21, 2017 (the "Preliminary Approval Order") [Doc. No. 1166].[1] The Preliminary Approval Order preliminarily certified the proposed settlement class for settlement purposes only and appointed Class Representatives, Lead Settlement Class Counsel and Settlement Class Counsel, and directed notice of the Settlement to the class members. The Preliminary Approval Order also appointed a Settlement Administrator and Notice Administrator and established a deadline for opt outs and objections. In addition, the Preliminary Approval Order preliminarily approved payment of a 25% award in attorneys' fees to Settlement Class Counsel, in addition to reimbursement of litigation expenses and payment of incentive fee awards to plaintiffs representing the class in federal and state courts.

[1] In the Preliminary Approval Order, the Court found that it has jurisdiction over this matter under CAFA. *See* Order at 2 n.1.

As discussed below, this case has been in litigation for nearly four years. Defendants have asserted aggressive defenses at every stage of the litigation and consistently maintained that Plaintiffs could not prevail on the claims asserted. Prior to reaching the settlement, Settlement Class Counsel had, *inter alia*, (a) conducted an extensive investigation of Plaintiffs' claims, and underlying events and transactions alleged in the pleadings; (b) conducted legal research of the claims and defenses asserted in this action; (c) drafted pleadings and successfully opposed motions to dismiss; (d) engaged in extensive discovery, including over 100 depositions and review of approximately 500 hundred thousand pages of documents exchanged between the parties; (e) participated in numerous meet and confer discussions with defense counsel concerning case management and discovery; (f) conducted significant expert discovery; (g) achieved certification of a Rule 23(c)(4) litigation class as approved by this Court's Order of October 8, 2015 [Doc. 470]; (h) attended numerous in-person hearings before this Court; (i) filed and opposed motions for summary judgment and motions *in limine* on critical issues in the case; (j) submitted carefully articulated Trial Plans and prepared until the eve of trial for a complex and multi-phased trial of this matter; (k) participated in hard fought negotiations with defense counsel, including additional negotiations in July and August 2017 after the Court identified certain concerns to be addressed before preliminarily approving the Settlement, *see* Memorandum Opinion and Order dated July 6, 2017 [Doc. 1146] ("July Settlement Order"); and, (l) negotiated and drafted the settlement-related documents. Since reaching the settlement, Settlement Class Counsel have successfully coordinated with counsel for Defendants on the Class Notice Program and other matters related to effectuation of the Settlement.

In accordance with the Preliminary Approval Order, the Class has received mail, email and publication notice of the settlement and the right to exclude themselves from or object to the

settlement. There have been no objections to the settlement from class members and only a very few class members have elected to opt out. The Settlement Administrator received only 76 opt out notices – a very small number, well under ½ of one percent of the settlement class. Thus, consistent with the schedule set by the Court in its Preliminary Approval Order, the Parties have submitted a Joint Motion for final approval of the Amended Settlement Agreement as fair, adequate and reasonable, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND AND TERMS OF THE SETTLEMENT

This litigation arose out of an interruption in the tap water supply for a very large number of Charleston area residents in January 2014, when a mixture colloquially known as "Crude MCHM" spilled into the Elk River from the Freedom facility. The principal component of Crude MCHM was sold and distributed by Eastman, and was mixed and stored at the Freedom facility. In the aftermath of the spill, dozens of civil actions were filed in this Court and in the West Virginia state courts. As detailed in the Amended Settlement Agreement, the proposed settlement is intended to accomplish a global resolution of all federal and state claims and litigation by class members against Defendants, and achieves a favorable result for all potential class claimants who allege damages against Defendants as the result of the Freedom Industries spill.

Pursuant to the Amended Settlement Agreement, Defendants will contribute up to $151 million (up to $126 million by the American Water Defendants and up to $25 million by Eastman). As set forth in the Amended Settlement Agreement the funds will be used to pay eligible claims, attorneys' fees and litigation costs approved by the Court[2] and necessary Administrative Expenses.

[2] The Court has preliminarily concluded that Class Counsel is entitled to a fee award of 25% of the amounts actually paid through the settlement. The Court has further preliminarily found that the litigation expenses submitted to date by Settlement Class Counsel are reasonable. By this Memorandum, Plaintiffs and Class Counsel provide a final accounting of cost expenditures,

As detailed in the preliminary approval process, the Settlement provides for simple claim payments so that eligible residential and business class members can receive set payments without having to submit documentation of losses. The parties expect that $101 million (less attorneys' fees and expenses) of the settlement amount will be allocated for simple claim payments. The proposed Simple Claim Forms for residential and business claimants are attached as Exhibit 4 to the Amended Settlement Agreement [Doc. 1163-1]. The Parties have estimated that eligible residential claimants who file simple claim forms could receive up to $550 per household (including one resident) plus an additional $180 for each additional resident. A family of four could therefore receive a payment of $1,090. The estimated compensation amounts for eligible Business claimants that elect the Simple Claim Form Process are based in part on whether the Business was Shut Down and on the annual revenue of the Business. Eligible Business claimants who elect the Simple Claim Form option could receive payments ranging from $1,875 to an estimated $64,000. *See* Amended Settlement Agreement [Doc. 1163-1], Exh. 3 (Settlement Fund Distribution Protocols), at §V.[3]

Additionally, the American Water Defendants will make available up to $50,000,000 (less attorneys' fees and expenses) for payment of claims for documented losses under the Individual Review Option. Eligible residential and business claimants who believe they can document losses greater than the applicable simple claim payment may forgo such payments and elect to pursue an

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including experts, and petition the Court to finalize a fee award and reimbursement of costs to date.

[3] Under the Amended Settlement Agreement, the formula for computing Simple Claim payments for Business claims is based on a uniform percentage of the historical annual revenue of the Business – up to a specified maximum payment amount. Under the Simple Claim option, therefore, the recovery amount will vary only as the result of the amount of revenue of the Business. Those Businesses with documented losses that exceed the amount of recovery based on the percentage of revenue formula have the option of submitting an Individual Review Option Claim and seeking a higher payment.

Individual Review Option claim.[4] Settlement Class Members opting to pursue an Individual Review claim will submit an Individual Review Claim Form for the appropriate type of claim, either Residential, Business or Government, along with supporting documentation showing the claimed loss. Individual Medical, Wage Earner and Pregnancy Claimants, whether they choose to file a simple or individual review claim for residential payments, may also file documented Individual Review Medical Claim Forms and/or Pregnancy Claim Forms and Wage Earner Claims Forms. The Claim Forms will provide the Settlement Administrator with appropriate objective documentation to allow for a determination.

Finally, as a term of the settlement, West Virginia-American Water Company ("WVAW") has agreed that it will not seek rate recovery from the Public Service Commission of West Virginia ("PSC") for certain response costs incurred by the company relating to the Elk River spill of approximately $4,000,000. Nor will WVAW will seek rate recovery from the PSC for amounts paid pursuant to this settlement. WVAW also agreed to coordinate access to a gas chromatograph by the West Virginia Bureau for Public Health during emergencies and other water quality investigations (an agreement that is currently in place.)

In its prior review of the Settlement, this Court found the Amended Settlement Agreement to be "sufficiently fair, reasonable and adequate" such that notice should be provided to the class. Preliminary Approval Order [Doc. 1146] at 3. Given the Court's own initial judgment that the Amended Settlement Agreement is fair and reasonable as well as the strong confirmation of that view shown by the positive reaction to the Settlement by class members, Plaintiffs respectfully

[4] Any money remaining from the Simple Claim Form Option funds after all claims and other applicable payments have been paid shall be used to pay claims made for Individual Review Option payments, or will be distributed as additional pro rata payments to class members who accepted standard payments under the Simple Claim Form Option. All of the $76 million American Water Guaranteed Settlement Fund will be expended through the settlement.

request that the Court enter an order granting final approval of the Amended Settlement Agreement.

ARGUMENT

I. THE NOTICE PROVIDED TO CLASS MEMBERS SATISFIED RULE 23 AND DUE PROCESS REQUIREMENTS.

Rule 23(c)(2) requires the "best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). In its Preliminary Approval Order, the Court directed that Notice of the Settlement in the form proposed by the Parties, which covered all relevant topics including the substantive terms of the proposed settlement and the effect of the proposed settlement and release of claims, be distributed to all potential Class members consistent with the Notice Program recommended by Dr. Shannon Wheatman of Kinsella Media, appointed by the Court as Notice Administrator. Plaintiffs have complied with the Court's direction and implemented the approved Notice Program as described in the Declaration of Shannon R. Wheatman, Ph. D. on Implementation of the Notice Program ("Wheatman Decl."), attached hereto as Exhibit B to the Joint Motion.

The Settlement Notice, as approved by the Court in its Preliminary Approval Order, at 9-10, apprised Class members of the Settlement and their options with respect thereto, and fully satisfied all requirements of Rule 23(c)(2)(B) and established norms of due process. In easily understandable language, it fairly and adequately described the nature of the action and the nature of the claims and defenses, the definition of the class certified, and the binding terms and effect of the Amended Settlement Agreement. The Notice also explained the date and time of the final Fairness Hearing, the proposed plan for the filing of claims, Settlement Class Counsel's intention to seek attorneys' fees and be reimbursed for litigation expenses out of the Settlement proceeds, and Settlement Class Counsel's intention to seek incentive awards on behalf of the representatives

who acted on behalf of the Class and who assisted in achieving the excellent result. The Notice also sufficiently outlined the procedures that Class members should follow to object to any of these matters or to opt out of the Settlement.

In the Preliminary Approval Order, at 9, the Court found that "the form, content, and manner of notice proposed by the Parties and approved herein meet the requirements of Fed. R. Civ. P. 23(c) and (e), are the best notice practicable under the circumstances, constitute sufficient notice to all persons entitled to notice, and satisfy the Constitutional due process requirements of notice." Plaintiffs have implemented the approved Notice Program. On or around October 11, 2017, Rust Consulting disseminated the Notice, along with residential and business simple claim forms, by first class mail to a total of 88,373 Residential Customers of WVAW, to 6,929 Business Customers of WVAW and to another 31,546 individuals identified by research of affected zip codes. *See* Declaration of Jason M. Stinehart Regarding Notification ("Stinehart Declaration" or "Stinehart Decl.") at ¶¶5-7, attached to the Joint Motion as Exhibit A. In addition, the Notice was electronically mailed to those Class members whose email addresses were known to WVAW – and over 96% of the over 62,000 emails were successfully delivered. *Id*. at ¶¶10-11. Rust Consulting was also responsible for remailing the Notice and claim forms, and was able to successfully re-mail over 9,500 of the Notices that were returned without a forwarding address, after it obtained updated addresses through an advanced address search. *Id*. at ¶9. Rust also responded to 1,632 requests for remailing, with all requests being re-mailed. *Id*. at ¶13.

The mailed (and emailed) notice was supplemented by an extensive media campaign that included television, radio, newspaper, online marketing, and a nationwide press release. Additional media outreach has been employed to encourage Class members to file claims. *See* Wheatman Decl., Exh. B to Joint Motion. Moreover, the Amended Settlement Agreement and all

pertinent documents were also posted on a website (www.wvwaterclaims.com) so that the Settlement Class Members had (and continue to have) ready access to the detailed provisions of the Settlement. As of December 29, 2017, there have been 71,600 unique visits to the website. Wheatman Decl., ¶37.

In addition, Settlement Class Counsel will be implementing Stage Two media efforts to continue to encourage class members to file claims. The supplemental media efforts include mailing reminder postcards (including postcards with 'tear off' claim forms), emails, direct telephonic communication, and additional broadcast, print, outdoor and internet advertising. This supplemental campaign will be conducted primarily in mid-January to mid-February to remind class members of the final claims deadline of February 21, 2018. *See* Revised Declaration of Shannon R. Wheatman, Ph. D. on Adequacy of the Notice Program, Exh. 7 to the Amended Settlement Agreement [Doc. 1163-1], at ¶¶47-48.

Prior to preliminary approval, pursuant to 28 U.S.C. §1715, the Notice Administrator had served all required notices on State Attorneys General. The period for objection or other input from these Attorneys General has passed without comment. These same Attorneys General were notified of the final approval hearing. *See* Stinehart Decl., ¶5. To date, no objection has been received, and there has not been any indication that any appearance will be made at the Final Fairness Hearing.

II. THE CLASS AS DEFINED IN THE PRELIMINARY APPROVAL ORDER SHOULD BE FINALLY CERTIFIED FOR SETTLEMENT PURPOSES.

Defendants have consented to certification of the Settlement Class to effectuate the Settlement. "The propriety of certifying plaintiff classes for the purposes of implementing settlements is well-recognized." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 338 (D.S.C. 1991). To certify a class for settlement purposes, the Court must find that all requirements of Rule 23(a) and

at least one of the provisions of Rule 23(b) are satisfied. *See Amchem Prod., Inc. v. George Windsor*, 521 U.S. 591, 620 (1997). In determining whether to certify a settlement class, any issue of whether the case, if tried, would present trial management problems is excluded, because the settlement precludes any trial. *Id.*

In the Preliminary Approval Order, the Court preliminarily certified a Class for settlement purposes, pursuant to Rule 23, consisting of:

a. All natural persons, including adults and minors (including in utero), who resided in residential dwellings that were supplied tap water by West Virginia American's Kanawha Valley Water Treatment Plant ("KVTP") on January 9, 2014.

b. All businesses, and non-profit and governmental entities, that operated in real property locations that were supplied tap water by the KVTP on January 9, 2014.

c. All natural persons who were regularly employed as hourly wage earners for businesses that operated in real property locations that were supplied tap water by West Virginia American's KVTP on January 9, 2014.

d. The Settlement Class includes all persons and entities who are Exhibit A Plaintiffs as specified at Section 5.3.2 of the Amended Settlement Agreement.

Excluded from the Settlement Class are:

a. West Virginia-American Water Company and its officers, directors, and employees and any affiliates of West Virginia American and their officers, directors, and employees;

b. Eastman and its officers, directors, and employees and any affiliates of Eastman and their officers, directors, and employees;

c. Judicial officers assigned to this case and their immediate family members and associated court staff assigned to this case, other than court reporters;

d. Settlement Class Counsel and attorneys who have made an appearance for the Defendants in this case;

e. The Settlement Administrator, Notice Administrator, Guardian ad Litem, or other consultants and associated staff assigned to this case; and

f. Persons or entities who exclude themselves from the settlement class (Opt Outs).

The Settlement Class satisfies all requirements of Rule 23 and should be finally certified and approved.

A. The Requirements of Fed. R. Civ. P. 23(a) Are Satisfied.

To satisfy Rule 23(a), each of its four prerequisites must be met: (1) under Rule 23(a)(1) the class must be so numerous that joinder of all members is impracticable; (2) under Rule 23(a)(2), there must be questions of law or fact common to the Class; (3) under Rule 23(a)(3), the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) under Rule 23(a)(4), the representative parties must be in a position to fairly and adequately protect the interests of absent class members. Each of these requirements of Rule 23(a) has been satisfied here, as the Court previously recognized in the July Settlement Order, at pp. 32-34.

1. Numerosity.

Rule 23(a) permits class treatment where "the class is so numerous that joinder of all members is impracticable." "There is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied. The issue is one primarily for the District Court, to be resolved in light of the facts and circumstances of the particular case." *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978); *Thomas v. Louisiana-Pacific Corp.*, 246 F.R.D. 505, 508 (D. S.C. 2007). Here, the Settlement Class consists of over 224,000 residents and 7,000 businesses, non-profits and governmental entities, making joinder of all class members plainly impracticable. Accordingly, Rule 23(a)(1) is met.

2. Commonality.

The Settlement Class also satisfies Rule 23(a)(2), which requires "questions of law and fact common to the class." Fed. R. Civ. P. 23(a)(2). The "common questions must be dispositive and over-shadow other issues." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

Commonality "requires little more than the presence of common questions of law and fact." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

Here, there existed a considerable number of common issues of law and fact, including whether the American Water Defendants were liable to the Class for allegedly negligently failing to prepare for a spill such as this and failing to prevent contamination of the water supply following the release of Crude MCHM, and whether Eastman was liable for alleged negligence in failing to conform to industry standards of care and in failing to warn customers of the hazard posed by the Crude MCHM release. Moreover, commonality was satisfied here because the scope of the harm covered by the case and by the Settlement arose from a single common event. Therefore, Rule 23(a)(2) is satisfied.

3. Typicality.

Plaintiffs' claims are also typical of the claims of the Class, as required by Rule 23(a)(3). Rule 23(a)(3)'s typicality requirement asks whether the representative plaintiffs and putative class members' claims arose from the same practice or course of conduct engaged in by the defendants and whether their claims are based on the same legal theory. "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *See Gen. Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 155 (1982). The essence of this requirement "is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006) (quoting *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998)).

Here, because the Plaintiffs and the class at large seek damages resulting from a water loss event that resulted from a single discrete incident, based on overlapping legal theories, the Plaintiffs stand in the same position as other Settlement Class members and the legal claims that

flow from the allegations against Defendants are identical for the named Plaintiffs and other Settlement Class members. The proof of Defendants' liability would be presented on the basis of common facts underlying these claims. The fact that some plaintiffs may have been damaged to a slightly greater or lesser extent does not defeat typicality. "Rule 23 contains no suggestion that the necessity for individual damage determinations destroys . . . typicality . . . In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations." *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 437-38 (4th Cir. 2003). Therefore, Rule 23(a)(3) is satisfied.

4. Adequacy of Representation.

Rule 23(a)(4) requires that the class representatives will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The principal factor in determining the adequacy of class representatives is whether the plaintiffs have the ability and commitment to prosecute the action vigorously. This inquiry involves two issues: (i) the named plaintiffs must not have interests antagonistic to those of the class; and (ii) the plaintiffs' attorneys must be qualified, experienced and generally able to conduct the litigation. *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 224 (S.D. W. Va. 2005). Together, these elements require that both counsel and representatives be able to zealously represent and advocate on behalf of the Class as a whole.

Here, both prongs of the adequacy requirement are met. The class representatives' interests are fully aligned with those of the entire class and there is nothing in the record that suggests otherwise. Indeed, Plaintiffs bring the same claims for the same remedies under the same legal theories, as would any given member of the rest of the Class. There is no antagonism between the Plaintiffs and the Class.

The second prong of the adequacy requirement is also met. The inquiry into the adequacy of legal counsel focuses on "whether counsel is competent, dedicated, qualified, and experienced enough to conduct the litigation and whether there is an assurance of vigorous prosecution." *Serzone*, 231 F.R.D. at 238. Here, Class Counsel have extensive experience in class actions on behalf of victims of environmental toxic torts, as the Court observed with the Declarations submitted in the preliminary approval process. *Good v. Am. Water Works Co*., No. 2014 WL 2481821, at *5-7 (S.D.W. Va. June 3, 2014) ("The court has reviewed the proposed lawyers' qualifications to serve in the role requested. Mr. Thompson, Mr. Calwell, and Mr. Bunch possess extensive expertise and experience in complex litigation in West Virginia and elsewhere. They appear well suited for the task."). Similarly, the Court has found adequate the three other attorneys serving as Settlement Class Counsel. Preliminary Approval Order at 7 ("The Court preliminarily finds that Mr. Majestro, Mr. Bailey, and Mr. Masters also meet the standards of FED.R.CIV.P. 23(g) and that they will fairly and adequately represent the interests of the Settlement Class such that it is appropriate to appoint them as Settlement Class Counsel."). Settlement Class Counsel have sufficient knowledge about the applicable law of both class actions in general and environmental negligence actions such as this case. Class Counsel have vigorously prosecuted this action as described herein, and Settlement Class Counsel have devoted ample resources to advancing the interests of the named Plaintiffs and the Settlement Class. As described herein and previously, Settlement Class Counsel's efforts in this proceeding included investigating Plaintiffs' claims, successful motion practice, conducting discovery, retaining experts and negotiating the Settlement along with protecting the interests in the Settlement Class in parallel litigation in other forums. Therefore, Rule 23(a)(4) is satisfied.

B. The Requirements of Rule 23(b)(3) Are Satisfied.

In addition to meeting the four prerequisites of Rule 23(a), the proposed class action must also be "maintainable" under one of the three categories found in Rule 23(b)(1), (2) or (3). *See Peoples*, 179 F.R.D. at 496. Here, Plaintiffs seek to certify the Settlement Class under Rule 23(b)(3).

The Settlement Class is appropriate for Rule 23(b)(3) certification, as the Court previously determined in the Preliminary Approval Order, at 4-5. Rule 23(b)(3) asks whether: (1) issues of law and fact common to members of the class predominate over questions only affecting individual members (Predominance); and (2) whether a class action is the superior method of resolving the dispute (Superiority). In mass tort litigation where a single accident gives rise to damages, as here, the Fourth Circuit holds that the mass tort action for damages may "be appropriate for class action, either partially o[r] in whole." *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993). Here, the alleged liability stems from the same event, and thus, common issues predominate over individual differences in damages. The predominance requirement of Rule 23(b)(3) is therefore met.

Additionally, it was not economical for Class members to bring claims using individual litigation. In this context, most Class members' simple claims involving loss of use of potable water were not substantial enough to fund individual litigation against Defendants. Thus, the class mechanism of Rule 23 is a far superior path to relief. The superiority element of Rule 23(b)(3) is readily satisfied.

III. THE PROPOSED SETTLEMENT SHOULD BE FINALLY APPROVED.

A. Approval of the Proposed Settlement is Within the Sound Discretion of the Court and is Favored by Strong Judicial Policy.

The judicial policy in favor of settlement is particularly strong in class actions and other complex litigation. *See In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 862 (11th Cir. 2009) ("Public policy strongly favors the pretrial settlement of class action lawsuits."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context"). The "law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995); *see also* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions §11.41, at 87-88 (4th ed. 2002) ("Newberg") ("The compromise of complex litigation is encouraged by the courts and favored by public policy . . . By their very nature, because of the uncertainties of outcome, difficulties of proof, and length of litigation, class action suits lend themselves readily to compromise.").

B. The Proposed Settlement Meets the Standards for Judicial Approval.

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, any compromise or settlement of a class action must be approved by the court. *See* Fed. R. Civ. P. 23(e); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). The primary purpose of Rule 23(e) is the protection of absent class members whose interests were not directly represented during the settlement negotiations. *Jiffy Lube*, 927 F.2d at 158.

Under Rule 23(e), although the Parties have agreed to settle on a class-wide basis, the Plaintiffs still must prove that the proposed class settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2); *Serzone*, 231 F.R.D. at 241. In determining whether a given settlement

meets this standard, the court should avoid transforming the hearing on the settlement into a trial on the merits. As the Fourth Circuit has stated:

> The trial court should not . . . turn the settlement hearing into a trial or rehearsal of the trial nor need it reach any dispositive conclusions on the admittedly unsettled legal issues in the case. It is not part of its duty in approving a settlement to establish that as a matter of legal certainty . . . the subject claim or counterclaim is or is not worthless or valuable.

Flinn v. FMC Corp., 528 F.2d 1169, 1172-73 (4th Cir. 1974)

The applicable standard is "whether the settlement is fair, reasonable and adequate, not whether it is perfect." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 131 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). The trial court "should not make a proponent of a proposed settlement justify each term of a settlement agreement against a hypothetical or speculative measure of what concessions might have been gained." *Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 WL 3094955 at *10 (E.D. Va. Sept. 28, 2009).

The Fourth Circuit has identified a number of factors that a district court should consider in determining whether a proposed settlement is "fair, reasonable and adequate" and has bifurcated this analysis into two principal components: (1) considerations of *fairness*, which focus on whether the proposed settlement is the result of good faith, arms' length negotiations, and (2) considerations of *adequacy*, which focus on substantive terms of the settlement and, in particular, whether the settlement consideration provided to class members is sufficient in light of the risks and costs of continued litigation. *See Jiffy Lube*, 927 F.2d at 158-59; *In re Microstrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001); *Kidrick v. ABC Television & Appliance Rental*, 1999 WL 1027050 (N.D.W. Va. May 12, 1999) (settlement approval within discretion of trial court after evaluation of *Jiffy Lube* factors).

The factors to be considered in assessing the *fairness* of a proposed settlement are:

> (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel.

Jiffy Lube, 927 F.2d at 159; *see also United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383-84 (D. Md. 1983).

The factors to be considered in determining the *adequacy* of a proposed settlement are:

> (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

Jiffy Lube, 927 F.2d at 159; *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 492 (S.D.W. Va. 2002).

Ultimately, the final approval of a proposed class action settlement is "committed to the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of relevant circumstances." *MicroStrategy*, 148 F. Supp. 2d at 663; *Jiffy Lube*, 927 F.2d at 158; *Scardelletti v. Debarr*, 43 Fed. Appx. 525, 528 (4th Cir. 2002). This Court found the Amended Settlement Agreement to be fair and adequate in the Preliminary Approval Order, at 3, and nothing has occurred to change that determination. Indeed, the overwhelming acceptance of the settlement (as discussed below) underscores that determination.

1. The Proposed Settlement is Fair.

a. The Posture of the Case at the Time Settlement Was Proposed.

The first *Jiffy Lube* factor directs the court to consider the stage of the litigation at the time settlement was reached and to evaluate how far the case has come from its inception. *See Muhammad v. Nat'l City Mortg., Inc.*, 2008 WL 5377783 at *3 (S.D.W. Va. Dec. 19, 2008).

Where, as here, the case has been developed through motion practice, briefing and argument on legal issues, and the completion of expert and formal discovery, the court should be more inclined to favor approval of the settlement. *Microstrategy*, 148 F. Supp. 2d at 664. The parties seek final approval of this Settlement after nearly four years of intense litigation and mediation efforts and negotiations, and reached the Settlement terms after years of litigation and on the eve of trial of liability issues. *Flinn*, 528 F.2d at 1174 (approving settlement that followed "protracted discussions and was reached on the eve of trial after prior negotiations had failed").[5]

b. The Extent of Discovery Conducted.

A second, closely related factor in evaluating the fairness of a proposed settlement is the extent of discovery that has been conducted in the case. *See Jiffy Lube*, 927 F.2d at 159. There is, however, "no minimum or definitive amount of discovery that must be undertaken" in order to find that this factor supports settlement. *Muhammad*, 2008 WL 5377783 at *3 (quoting *Serzone*, 231 F.R.D. at 224). Indeed, *Jiffy Lube* itself affirmed a settlement that was "reached at a very early stage in the litigation and prior to any formal discovery." *Jiffy Lube*, 927 F.2d at 159. Rather than requiring a specific amount of formal discovery, the central inquiry for the Court is whether the parties and their counsel have "sufficiently developed the case such that they can appreciate the merits of the claims." *Muhammad*, 2008 WL 5377783 at *3.

Here, extensive discovery was completed before the parties were able to successfully negotiate a resolution. Over 100 depositions, including 20 expert depositions, were conducted, giving the parties a firm grasp on the relevant facts and ensuring that the legal and factual issues were explored in considerable detail before the various details concerning settlement could be

[5] The Court convened a settlement conference the day before jury selection and trial were to commence, and carefully monitored the parties in their negotiations, which lasted several days.

adequately addressed. In addition, significant discovery was produced to Settlement Class Counsel in proceedings in bankruptcy court and before the West Virginia Public Service Commission. Accordingly, by virtue of the extensive motion practice and discovery, Settlement Class Counsel were well informed of the strengths and weaknesses of their case at the time the parties entered into the Amended Settlement Agreement. This factor strongly supports the fairness of the Settlement.

c. The Circumstances Surrounding the Settlement Negotiations.

Courts should also consider the circumstances surrounding the settlement negotiations in considering the fairness of the proposed settlement. This factor focuses on the nature of the parties' settlement negotiations and whether the negotiations were free from fraud or collusion. *See, e.g. Microstrategy*, 148 F. Supp. 2d at 665. In the absence of any evidence to the contrary, the court "may presume that settlement negotiations were conducted in good faith and the resulting agreement was reached without collusion." *Muhammad*, 2008 WL 5377783 at *3; *see* Newberg §11.51 at 158 (courts "presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered").

Among the specific circumstances that courts have identified as supporting a finding that settlement negotiations were conducted at arms' length and without collusion is the fact that the discussions were "hard fought and always adversarial." *S.C. Nat'l Bank*, 139 F.R.D. at 339. Here, the litigation was hard fought by able counsel, and the settlement discussions were no different. Many of the same issues that were contested in the litigation, including the amount of recoverable damages and the viability of the Class's claims, were the subject of extensive consideration and debate in the settlement process as well. In short, the Amended Settlement Agreement was

negotiated by the parties in good faith, at arms' length and without collusion, and as such, the Settlement is appropriate for final approval. *See Mid-Atl. Toyota*, 564 F. Supp. at 1383-84.

d. The Experience of Counsel is Demonstrated.

The final *Jiffy Lube* "fairness" factor looks to the experience of class counsel in the particular field of law involved in the case. Courts in the Fourth Circuit have recognized that when class counsel are nationally recognized members of the litigation bar, it is appropriate for the court to give significant weight to their judgment in negotiating, approving and recommending the proposed settlements. *Muhammad*, 2008 WL 5377783 at *4 ("The opinion of class action counsel, with substantial experience in litigation of similar size and scope, is an important consideration.").

Here, counsel for all parties have a substantial amount of class action experience and experience with mass tort litigation and lawsuits arising out of environmental disasters. Settlement Class Counsel, together and separately, have litigated numerous similar class action and mass tort cases, and have recovered substantial amounts for plaintiff classes. The Court is familiar with the considerable efforts exerted by all counsel in this case on behalf of their respective clients.

For all these reasons, the Court may conclude that the proposed Settlement is fair, as it was reached in good faith and without collusion. Plaintiffs respectfully submit that the proposed Settlement is in the best interests of the Class. *Henley*, 207 F. Supp. 2d at 493.

2. The Proposed Settlement is Adequate.

As detailed above, the question of adequacy of a settlement focuses on the substantive terms of the settlement and whether the consideration provided to class members is sufficient considering the risks and costs of continued litigation. Here, the Settlement provides substantial compensation to eligible claimants and multiple and flexible settlement options. Claimants can choose a simple 'set' payment that requires no documentation or can opt to pursue a higher

payment based on substantiated losses. The projected set amounts payable to residential claimants is $550 for the first claimant in an eligible residence and $180 for each additional claimant in the same eligible residence. Settlement Class Members with documented medical expenses or physical injury claims or lost hourly wage claims may also pursue reimbursement pursuant to criteria and documentation requirements for Medical Claims or Pregnancy Claims and Wage Earner Claims set forth in the Distribution Protocols.

The Court has found that the proposed Settlement is a "strong result" which "entitles class members to substantial compensation" that "few claimants could expect to recoup" in the absence of class litigation. July Settlement Order [Doc. 1146] at 50. Moreover, the Court has also found that the Settlement's Individual Review process is "an outstanding result for class members." *Id.* at 50-51. The Court should make a final determination that the Settlement is a reasonable and adequate result for the Class based on an examination of *Jiffy Lube* adequacy factors as further discussed below.

a. The Relative Strength of Plaintiffs' Case on the Merits and Existence of Any Difficulties of Proof or Strong Defenses.

"Perhaps the most important factor in evaluating the adequacy of a class action settlement is the relative strength of plaintiffs' case and the existence of any defenses or difficulties of proof." *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 831 (E.D.N.C. 1994). Consideration of the strengths and weaknesses of plaintiffs' case is essential because the adequacy or inadequacy of a settlement can only be measured "in light of the strength of the case presented by the plaintiffs." *Flinn*, 528 F.2d at 1172; *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009) (court should examine how much class sacrificed in settling a potentially strong case in light of how much class gains in avoiding uncertainty of potentially difficult case). In conducting this analysis, the Court should bear in mind that a "settlement is by nature a compromise between

the maximum potential recovery and the inherent risks of litigation. The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *Muhammad*, 2008 WL 5377783 at *5.

Here, Plaintiffs have entered into the Amended Settlement Agreement with a thorough understanding of the strengths and weaknesses of their claims, as detailed above. Settlement Class Counsel, in assessing the merits of the proposed Settlement, considered the risks and uncertainties of proceeding with the litigation and ultimately prevailing at trial in light of various factors. Plaintiffs believed that WVAW faced significant risks from the Class Members' breach of contract claims, given the court's ruling on summary judgment that "[a] utility's broad failure to carry out its main function for an entire metropolitan area, for several days at a time, certainly serves as a breach of its obligation even when individual, momentary interruptions in service may not." *Good v. Am. Water Works Co., Inc*., No. CV 2:14-01374, 2016 WL 5441035, at *4 (S.D.W. Va. Sept. 27, 2016). Similarly, plaintiffs believed Eastman faced significant risk. *Good v. Am. Water Works Co*., 2015 WL 3540509 (S.D.W. Va. June 4, 2015) (Denying Eastman's motion to dismiss); *Good v. Am. Water Works Co., Inc*., 2016 WL 6024324, at *1 (S.D.W. Va. Oct. 13, 2016) (Plaintiffs' "expert opinions on the toxicological studies of Crude MCHM are relevant to the issue of Eastman's negligence and the standard of reasonable care applicable to the sale of Crude MCHM, that testimony will not be excluded.").

On the other hand, establishing liability was fraught with serious risks, including overcoming Defendants' defenses. The fairness and adequacy of the Settlement is underscored by taking into account the obstacles Plaintiffs would face in order to ultimately succeed on the merits.[6]

[6] The Amended Settlement Agreement further provides for a Guardian ad Litem to review the adequacy of the Settlement as it pertains to minors and other persons who lack legal capacity.

See Jiffy Lube, 927 F.2d at 159. Even if Plaintiffs overcame Defendants' defenses to liability, they would then also face the challenge of calculating and proving damages, which here would have been subject to complications and risks. In short, continued litigation of the action against Defendants could result in a judgment or verdict greater or lesser than the recovery under the Amended Settlement Agreement, or in no recovery at all with a judgment or verdict in favor of the Defendants.

b. The Anticipated Duration and Expense of Litigation.

In addition to the risks of establishing liability and damages, the Court should balance the immediacy and certainty of a substantial recovery against the "anticipated duration and expense of additional litigation." *Jiffy Lube*, 927 F.2d at 159. Here, due to the many factual and legal complexities involved in this case, continued litigation would necessarily be extremely complex, expensive and time-consuming.

Although the parties have already engaged in extended litigation at considerable expense, in the absence of a Settlement, the members of the Class would have to wait for a considerably longer period of time before they obtain relief (if any), as trial of this matter would be accomplished in stages, beginning with a Phase I fault trial and followed by subsequent remedial phases of trial, and ultimately any verdict at trial could likely result in appeals. There is no question that, were trial to proceed, significant costs of continuing the litigation in federal and state court would be incurred by all involved, and there would be a risk that results of bellwether trials on damages or individual damage trials could reduce or eliminate whatever could be recovered through continuing litigation. In addition to these substantial risks and certain increase in litigation expenses, a multi-phased trial of this nature would present a significant burden upon the Court. Plaintiffs whose actions were pending before the West Virginia Mass Litigation Panel would have

been subject to further delay as well. Those plaintiffs actively participated in the proposed resolution of all claims as set forth in the Amended Settlement Agreement.

The proposed Settlement provides guaranteed payments to class member claimants in a case fraught with serious risks with respect to proving liability and damages. The Amended Settlement Agreement contains provisions that may allow payments to be made to certain claimants pending resolution of appeals. The Settlement explains the types of losses that may be claimed and the method for analyzing the losses – so that claimants may evaluate their claim options, make informed decisions and submit the relevant documentation. Further, the Settlement provides claimants with procedures intended to foster appropriate results: claimants have the option of appealing determinations to an Appeal Adjudicator – who will review the record and evaluate the initial decision. (The decision of the Appeal Adjudicator is final so there is no right to appeal the decision to the Court, conserving and further protecting the Court's resources.)

In weighing the potential benefits of the Settlement against the risks and delays of continued litigation, the Court should also give weight to the fact that Settlement Class Counsel, who are fully familiar with the facts herein and have substantial expertise litigating precisely this type of case, favor the Settlement and believe that it is in the best interests of the Class. The Fourth Circuit has said that "while the opinion and recommendation of experienced counsel is not to be blindly followed . . . such opinion should be given weight in evaluating the proposed settlement." *Flinn*, 528 F.2d at 1173. Here, Settlement Class Counsel did not even commence settlement discussions until after they had engaged in substantial motion practice, discovery, consulted with experts on the damages issues in the case, and prepared for trial. Moreover, class counsel joined with counsel with ongoing cases pending before the West Virginia Mass Litigation Panel in an attempt to reach a global resolution of claims arising from the January 9, 2014 Freedom Chemical

spill. Thus, Plaintiffs entered into the settlement discussions fully apprised about the legal and factual issues presented as well as the strengths and weaknesses of their cases and able to make a well-informed decision to enter into the proposed Amended Settlement Agreement. *Jiffy Lube*, 927 F.2d at 158-59. In these circumstances, the opinion of Class Counsel is entitled to great weight.

c. The Solvency of Defendants and Likelihood of Recovery of a Litigated Judgment.

This *Jiffy Lube* factor assesses the reasonableness of a proposed settlement in light of the defendants' ability to pay a greater judgment and the likelihood of recovery on a litigated judgment. *S.C. Nat'l Bank*, 139 F.R.D. at 341. However, even where defendants' solvency is not in issue and a settling defendant has the ability to pay greater amounts, this fact alone will not weigh against approval of the settlement, where other factors support approval of the settlement. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 291 F.3d 516, 538 (3d Cir. 2004) (affirming district court's conclusion that a defendant's "ability to pay a higher amount was irrelevant to determining the fairness of the settlement"); *Serzone*, 231 F.R.D. at 239 ("Since the remaining factors weigh in favor of finding the Settlement to be adequate, this factor may be given little weight.").

d. The Class's Reaction to the Proposed Settlement.

The reaction of class members to the proposed settlement "as expressed directly or by failure to object" is also "a proper consideration for the trial court." *Flinn*, 528 F.2d at 1173. In accordance with the Preliminary Approval Order, a detailed individual Notice was mailed to Class Members by United States mail and also by electronic mail where possible, and additionally, the details of the Settlement were published online, with instructions to Class Members on specifically how to opt out or object to the Settlement. Despite this extensive notice, as of the date of this filing

there are no substantive class member objections[7] to the Settlement. The absence of any objections very strongly favors approval of the settlement. *See, e.g.*, *Bell Atlantic Corp v. Bolger*, 2 F.3d 1304, 1314 n.15 (3d Cir. 1993) (silence is "tacit consent" to settlement); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *Kay Co. v. Equitable Production Co.*, 749 F. Supp. 2d 455, 461, 465 (S.D.W. Va. 2010) (failure to raise objections equals implicit agreement with settlement terms).

Moreover, even in advance of the Court's final approval of the Settlement, nearly 48,000 individual and business claims have been filed with the Settlement Administrator, both by mail and on-line. *See* Wheatman Decl., ¶40 (stating number of claims filed as of December 29, 2017).[8] In contrast, only 76 opt out notices were filed by the deadline, with the substantial majority of those associated with the American Water Defendants' Charleston law firm. *See Kay Co.*, 749 F. Supp.2d at 465 ("minute number" of exclusions after individual notice "suggests that the class members are overwhelmingly pleased with the settlement result"). This initial reaction from class members further confirms that the Court is justified in concluding that the terms and conditions of the $151 million Settlement are fair, reasonable and adequate and that the Settlement is in the best interest of the Class.

[7] The Charleston Gazette filed a "limited" objection requesting clarification of the information that will be made available to the public during implementation of the Settlement. [Doc. No. 1173]. The Gazette's partial objection has been addressed by the Court through an Order dated December 19, 2017 [Doc. No. 1175], providing for periodic reports to be filed by the Settlement Administrator summarizing the claims process. One class member, after opting out of the settlement, submitted a letter proposing additional forms of notice but did not object to the settlement. Neither of these documents technically constitutes a valid objection to the settlement, such that there are no valid objections to the settlement that could form the basis for a valid appeal.

[8] The December 29, 2017 Periodic Report of the Settlement Administrator, filed under separate cover, identifies the number of claims filed as of December 19, 2017.

C. The Distribution Protocols and Process for Filing of Claims by Class Members is Reasonable and Should Be Approved.

The Distribution Protocols outline the detailed terms for submission and documentation of claims and for calculating recovery amounts. The protocols include, as noted, a Simple Claim process that will provide set payments without the need for documentation of loss. The Notice contained the estimated amount of recovery for Simple Claims. The protocols also include individual review options that allow Settlement Class Members to seek greater recoveries or recoveries for lost wages and medical or pregnancy claims. The claims submissions are ongoing – and the final deadline for submissions is February 21, 2018. The claim process is straightforward, reasonable and fair and the fact that the Settlement Administrator has already received nearly 48,000 claims demonstrates the reasonableness of the process. Wheatman Decl., ¶40. The Court has previously granted preliminary approval to the process, and as discussed above, the Notice distributed to the Settlement Class fully described the proposed settlement terms and estimated recoveries and fully details the process for the submission of claims by members of the Settlement Class. As further noted above, no objections by Settlement Class members have been filed to date. The Court should grant final approval to the Settlement including the protocols for claims filing and administration.

IV. THE COURT SHOULD APPROVE AN AWARD OF ATTORNEYS' FEES, AND APPROVE REIMBURSEMENT OF LITIGATION COSTS AND THE PROPOSED INCENTIVE AWARDS TO BE PAID TO THE NAMED PLAINTIFFS.

In the July Settlement Order [Doc. 1146], the Court concluded that a 25% fee award was appropriate in this case, based on the public benefit obtained and the scope of the litigation. *See* July Settlement Order at 83. The Class Notice, in accordance with the Court's Preliminary Approval Order, was provided to the members of the Settlement Class, and informed them that Settlement Class Counsel would seek an award of attorneys' fees of 25% of amounts paid out of

the American Water Guaranteed Settlement Fund and Contingent Settlement Fund and the Eastman Fund. The deadline for filing objections has passed, and no objections to the Court's award of these attorneys' fees have been filed.

The Court should therefore now finally approve the 25% fee award as a reasonable attorneys' fee in this matter. As demonstrated above, Settlement Class Counsel have vigorously and successfully prosecuted this action and related state court litigation on behalf of Plaintiffs and the Settlement Class for almost four years. As compensation for their efforts on behalf of the Settlement Class, Settlement Class Counsel respectfully request a percentage-of-the-recovery award of 25% of amounts paid out of the American Water Guaranteed Settlement Fund and Contingent Settlement Fund and the Eastman Fund which, as the Court has noted, represents (when a lodestar cross-check is employed) approximately a 1.5 multiplier on Settlement Class Counsel's lodestar, "a figure squarely within the empirical literature's normal range." *See* July Settlement Order at p. 83. Settlement Class Counsel's fee request is supported by, *inter alia*, the time and effort they have expended (and will expend through settlement fruition – driving the approximate multiplier of 1.5 even lower), the significant risks undertaken, the quality of the services rendered, the efficiency of Settlement Class Counsel's efforts, and the results achieved, and is fully supported by the case law in this Circuit.

In addition, the Court should grant final approval to Settlement Class Counsel's request for reimbursement of their out-of-pocket litigation expenses. Settlement Class Counsel request reimbursement of costs actually expended in prosecution of this case and parallel litigation to the extent those efforts helped bring about global resolution. Of this total, $2,377,376.93 has been detailed in the original fee petition filed on May 8, 2017 [Doc. 1140]. This sum does ***not*** include any firm's Litigation Fund contributions – even though some such contributions are referenced in

attorney declarations filed on May 8, 2017 – because when the accounting of the $2,377,376.93 total was conducted, these contributions were specifically excluded except to the extent they added to the total amount sought for Litigation Fund expenses. *See* Supplemental Declaration of Van Bunch in Support of Reimbursement of Costs ("Bunch Declaration" or "Bunch Decl.), ¶7, attached hereto as Exhibit C to the Joint Motion.

By the Bunch Declaration and the Supplemental Declaration of Anthony J. Majestro in Support of Reimbursement of Costs, attached as Exhibits C and D respectively to the Joint Motion, Settlement Class Counsel hereby provides supplemental and updated total expense figures and petition the Court to approve reimbursement of an additional $129,267.28 in out-of-pocket litigation costs. This brings the total amount of requested reimbursement of out-of-pocket litigation expenses to $2,506,644.21.

The Court should also grant final approval of incentive awards of $15,000 each to the Class Representatives in this action[9] and $10,000 each to the plaintiffs named in *In re Water Contamination Litigation*, No. 16-C-6000[10], pending in the West Virginia Circuit Court before the West Virginia Mass Litigation Panel (the "MLP Action") for a total of $290,000. Settlement Class Counsel has previously submitted Declarations [Doc. 1163-3 and 1163-4] explaining why each is entitled to the awards.

The Class's reaction to the request for reimbursement of out-of-pocket expenses and for incentive awards is identical to its reaction to the 25% fee award – there has been no objection at

[9] Crystal Good; Melissa Johnson; Mary Lacy; Joan Green; Summer Johnson; Wendy Renee Ruiz; Kimberly Ogier; Roy J. McNeal; Georgia Hamra; Maddie Fields; Brenda Baisden, d/b/a Friendly Faces Daycare; Aladdin Restaurant, Inc.; R. G. Gunnoe Farms LLC; and Dunbar Plaza, Inc., d/b/a Dunbar Plaza Hotel.

[10] Craig Cook; Ann Perrine; Joanna Gibson; Krisi Ord; Nicholas Shahoup, DDS; Scott Miller/Bar 101, LLC, d/b/a Bar 101 and Ichiban; Better Foods, Inc.; and Capitol Hotels, Inc.

all to these items, or to any other aspect of the Settlement for that matter.

V. CONCLUSION

The Settlement Class meets all requirements of Rule 23 and should be finally certified. Furthermore, the proposed Settlement should be approved because it is a fair and reasonable result, given the significant risks in proving liability and damages, the stage of the litigation, the presence of skilled counsel, the arms' length settlement negotiations, the considerable risk, expense, and delay if the litigation were to continue, and the substantial, certain and immediate benefit of the Settlement to members of the Settlement Class. The Distribution Protocols are fair, reasonable, and adequate and should be approved.

Additionally, an award of attorneys' fees of 25% of the amounts paid to the Settlement Class out of the common fund is fair, reasonable and adequate, and should be finally approved, and Settlement Class Counsel should be reimbursed for $2,506,644.21 in litigation expenses. Finally, incentive payments should be approved as detailed above.

Dated: December 29, 2017.

By Counsel,

/s/ Van Bunch

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Settlement Class Counsel

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CRYSTAL GOOD, et al., **Plaintiffs,** **v.** **WEST VIRGINIA-AMERICAN WATER COMPANY, et al.,** **Defendants.**	**Case No.: 2:14-CV-01374** **Hon. John T. Copenhaver, Jr.** **Consolidated with:** **Case No. 2:14-11011** **Case No. 2:14-13164** **Case No. 2:14-13454**

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs hereby certifies that on December 29, 2017, the foregoing "Plaintiffs' Memorandum in Support of Joint Motion for Final Approval of the Proposed Class Action Settlement and for Final Approval of Attorneys' Fees, Costs and Incentive Awards" was served on all counsel of record through the CM/ECF system which will send notification of the filing to all counsel of record.

DATED: December 29, 2017.

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