UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MATTIE HALLEY and LETICIA MALAVÉ, **On Behalf of Themselves and all Others Similarly Situated,** **Plaintiffs,** **v.** **PPG INDUSTRIES, INC.,** **Defendants.**	**Civil Action No. 2:10-cv-3345 (ES) (JAD)**

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

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Defendant PPG Industries, Inc. ("PPG") and Plaintiff Leticia Malavé[1] ("Plaintiff") 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.[2]

INTRODUCTORY NOTE

This Settlement, if approved, will resolve fully the decade-old litigation between the Jersey City, New Jersey residential landowner Plaintiffs in Class Areas A, B, and C, and the alleged chromate polluter Defendants, PPG and Honeywell International, Inc. ("Honeywell"). On April 26, 2016, this Court issued its Opinion and Order Granting Joint Motion for Final Approval of Settlement of all Class A and C claims against defendant Honeywell International, Inc. (the

[1] Settlement Class Representative Mattie Halley passed away in April 2020, after executing the Settlement Agreement. Approved Settlement Class Representative Leticia Malavé will continue to represent the interests of the Settlement Class. Having received PPG's written consent pursuant to Fed. R. Civ. P 15(a)(2), Plaintiffs intend to file an Amended Complaint to remove Mattie Halley from the pleadings. "In the absence of prejudice to the defendant, courts have consistently granted plaintiffs leave to substitute new representatives where * * * a class has already been certified and the certified representative becomes unavailable (e.g., dies, decides not to pursue the claim, becomes inadequate for another reason, etc.) * * *." 1 McLaughlin on Class Actions § 4:36 (17th ed.); *In re FleetBoston Financial Corp. Securities Litigation*, 253 F.R.D. 315, 335 (D.N.J. 2008) (holding where the only class representative was deceased, administration of justice and interests of certified class required opportunity for substitution of deceased representative of certified class). Here because (1) the Settlement Class has been provisionally certified (D.E. 491), (2) there is no prejudice to PPG which has consented to the Amendment in writing, and (3) this Court has previously determined that Ms. Malavé "will fairly and adequately protect the interests of the Settlement Class" (D.E. 491), the Amendment is proper, at this time, and it is not necessary to substitute Ms. Halley with a new additional Class Representative for Ms. Halley. Also, during discovery, Ms. Halley devoted extensive time and effort to the prosecution of this action. Counsel for Plaintiffs and PPG respectfully request that the Court award the requested incentive award to Ms. Halley, which will be paid to her estate through the Claims process, thereby leaving her estate in the same financial position as Ms. Halley would have been in had she not passed away after the parties had reached a settlement. However, because an Amended Complaint has not yet been filed, reference is made herein to Plaintiffs in the pleural.

[2] Capitalized terms used in this Memorandum but not defined herein shall have the definitions prescribed in the Settlement Agreement, D.E. 489-2.

"Honeywell Settlement"). D.E. 439. On May 10, 2016, this Court issued its Order and Final Judgment approving the Honeywell Settlement. D.E. 442. The District Court's approval of the Honeywell Settlement was affirmed in *Halley v. Honeywell Int'l, Inc.*, 861 F.3d 481, 501 (3d Cir. 2017) (hereafter "*Halley*").

Like the Honeywell Settlement, the settlement of the Class B claims against PPG now before the Court provides cash payments from a common fund to the owners of 1-4 family residential properties in Class Area B who allege that PPG's generation, disposal, and failure to properly remediate chromate waste interfered with their use and enjoyment of property and caused a diminution in the value of their properties. D.E. 489-2. The settlement proceeds seamlessly with PPG's prior, court-ordered obligation to remediate the chromium waste sites in, and around, their former chromate plant in Disposal Area B. *Id.* The settlement does not resolve any personal injury or medical monitoring claims, or the claims of owners of property other than 1-4 family residential properties. *Id.* This Settlement parallels the Honeywell Settlement, except to the extent that it establishes a proportionately larger fund that is distributed across three zones, as described in the Settlement (D.E. 489-2) and discussed below. This Court's prior Opinion and Order, the Third Circuit's *Halley* Opinion, and Professor Eric D. Green's May 29, 2018 Memorandum and Report and Recommendation (D.E. 476) (hereafter "R&R"), as adopted (D.E. 477) set forth the factual background of this case and controlling legal precedent for this Settlement. For the sake of brevity and the avoidance of duplicative filings, this Memorandum refers to those holdings and prior Docket Entries, where possible.

INTRODUCTION

This Joint Motion seeks final approval of a class action settlement that would resolve the decade-old litigation concerning alleged property damage stemming from chromium operations at the former PPG plant in Jersey City from approximately 1904 to 1963. The settlement provides a

$5,000,000 non-reversionary settlement fund for the benefit of 1-4 family residential property owners in Class Area B within the vicinity of the former PPG plant. If the settlement agreement is approved, given the current number of claims filed, the owners of approximately 613 residential properties will be entitled to a cash payment of approximately $5,615.42 per property in Zone 1, $5,001.58 per property in Zone 2 and $3,164.55 per property in Zone 3, after deduction of reasonable costs, fees, and incentive awards. As discussed below, the three Settlement Zones are based on proximity to the PPG Site, with Zone 1 being nearest and Zone 3 being farthest.

After ten years of litigation, millions of pages of documents produced in discovery, numerous depositions, including each of the named Plaintiffs and class representatives, and substantial motion practice, the settling parties submit that the proposed settlement agreement presents a fair, reasonable, and adequate compromise between the parties given the uncertainties and risks of further litigation. Moreover, the participation by 613 eligible class members with no objectors and only three opt-outs further demonstrates the adequacy of the settlement and supports approval.

FACTUAL AND PROCEDURAL BACKGROUND

A. Background of the Case

Plaintiffs allege, which PPG denies, that PPG is the successor corporation to Pittsburgh Plate Glass Company and Natural Products Refining Company ("NPR") which, from about 1924 to 1963, operated a chromate chemical production facility located at 880 Garfield Avenue in Jersey City, New Jersey (the "Plant"). D.E. 488, ¶15. The Plaintiffs further allege that the Plant produced chromium chemicals for industrial use and generated a residual waste material known as chromium ore processing residue ("COPR"), which waste was disposed of on several properties in the vicinity of the Plant that have come to be known as the Garfield Avenue Sites (Sites 114, 121, 132, 133, 135, 137, 143, 186, and 207, as well as sites known as Fishbein Property (816 Garfield Avenue),

Ten West Apparel (800 Garfield Avenue), Halstead Corporation (78 Halladay Street), Forrest St. Properties (84, 86-90, 98-100 108 Forrest St.), Al Smith Moving (33 Pacific Ave), Carteret Avenue, Pacific Avenue/Caven Point Avenue; Garfield Avenue; Halladay Street North, and Forrest Street. *Id.* ¶60. PPG has denied those allegations, including that it is a successor to NPR.

Plaintiffs further allege that, as a result of PPG's and its predecessors' generation, emission, disposal, and historical failure to properly remediate COPR and alleged hexavalent chromium contamination from the Plant, at the Garfield Avenue Sites and within the proposed Settlement Class B boundaries, Plaintiffs have suffered damage to their properties, loss of use and enjoyment of their properties, annoyance and inconvenience, and diminution in property value. *Id.* ¶¶12-13.[3]

PPG denies that Plaintiffs have suffered any damages, including but not limited to invasion of their properties, any loss of use of enjoyment of their properties, annoyance and inconvenience, or diminution in their property values as a result of COPR and/or alleged hexavalent chromium contamination from the Plant or Garfield Avenue Sites. PPG further contends that pursuant to several administrative orders, and under the supervision of the New Jersey Department of Environmental Protection ("NJDEP"), PPG has been conducting environmental remediation at each of the Garfield Avenue Sites. PPG contends that remediation of these sites is in various stages, with some phases complete and others scheduled to be completed in 2023.

In the Seventh Amended Complaint (D.E. 488), Plaintiffs allege causes of action for trespass, private nuisance, negligence, and strict liability on behalf of Class B members. The Seventh Amended Complaint defines Class B as follows (¶56):

> **Class B**: All persons who, on or after May 17, 2010 and up to and including June 5, 2019, owned or own real property identified as Class 2 Residential Property (1-4 Family) located

[3] Plaintiffs also originally sought medical monitoring related to PPG's alleged acts and omissions, but all medical monitoring claims were abandoned in 2012 and not included in subsequent complaints, including the current operative Seventh Amended Complaint.

> within the area identified as "Class B" on the attached map. Class B is generally bounded by Ocean Avenue between Bayview Avenue and Grand Street; Grand Street between Ocean Avenue and Communipaw Avenue; Communipaw Avenue between Grand Street and before Communipaw turns northeast; Suydam Avenue, Pine Street, and Whiton Street southwest of Communipaw Avenue; Distillery Drive; Pacific Avenue from Communipaw Avenue to Caven Point Avenue; Caven Point Avenue between Pacific Avenue and Garfield Avenue; Garfield Avenue between Caven Point Avenue and Bayview Avenue; and Bayview Avenue between Garfield Avenue and Ocean Avenue. Class B includes properties located on both sides of the boundary streets contained in the class definition, as indicated on the attached map. Ex. 1.

Class B relates to Class 2 Residential Properties (1-4 family[4]) within the vicinity of the Garfield Avenue Chromium Sites near the former Plant on Garfield Avenue for which PPG has remediation responsibility. The proposed Settlement Agreement resolves all current claims by owners of Class 2 Residential property within Class B.

Plaintiff and proposed Settlement Class B Representative Leticia Malavé owns Residential property at 74 Union Street, which is within Class B. Ms. Malavé alleges a trespass and that, as a result of the chromium contamination, her use and enjoyment of her property has been interfered with and the value of her property has declined.[5]

B. Development of the Record

Prior to reaching settlement, the settling parties engaged in extensive discovery into class certification and related merits issues over the course of nearly ten years. This discovery has included, among other things, the production of over one million pages of documents by PPG regarding the history of contamination, status of remediation efforts, sampling and monitoring data, hundreds of photographs, real estate records, depositions and exhibits from prior chromium-related litigations, regulatory reports and correspondence with regulatory agencies, and other materials for all of the Garfield Avenue Sites at issue in the litigation; significant third-party

[4] New Jersey Administrative Code 18:12-2.2(b).

[5] Malavé also owns property at 81 and 82 Union Street, also within Class B.

document and deposition discovery, including the depositions of the key authors of the studies referenced in the Complaint; depositions of regulators at the NJDEP; depositions of PPG's environmental contractors; depositions of the NJDEP Site Administrator for the Garfield Avenue Sites, as well as his technical professionals; and other discovery on issues related to the history and extent of chromium contamination, remedial investigations and remediation efforts, and correspondence with the public about remediation, among other topics. There also has been significant motion practice, including an initial motion to dismiss, and several discovery motions and informal discovery letter applications.

Moreover, since the inception of the case over ten years ago, Plaintiffs' claims have been challenged, more fully developed, and narrowed. For example, Plaintiffs' original complaint filed in May 2010 brought claims for both medical monitoring and property damages and covered over 100 chromium sites. Since then, Plaintiffs have amended their complaint several times, and as a result, Plaintiffs' case has been considerably narrowed since the case's inception. Plaintiffs have withdrawn their claims for medical monitoring, have eliminated nearly 2/3 of the chromium sites at issue, and have more precisely defined the geographic scope of the putative classes. Thus, the extensive discovery and motion practice have provided the parties with sufficient evidence to evaluate the merit and value of the Plaintiffs' case against PPG and have enabled the Settling Parties to reach a fair, reasonable, and adequate settlement.

C. History of Settlement Negotiations

As detailed in D.E. 493-1, p. 4, the parties engaged in lengthy arms-length negotiations leading up to the Settlement Agreement. Plaintiffs and PPG participated in five separate rounds of settlement negotiations. *Id.* The first settlement discussions began in 2011 and included all parties, including Honeywell and PPG. *Id.* This attempt at an early resolution of the case was unsuccessful. *Id.* In September 2015, Plaintiffs and PPG engaged in an intense, but ultimately unsuccessful, mediation

session with Professor Eric D. Green, who successfully mediated the Honeywell Settlement (and would later serve as Special Master in connection with the Honeywell costs). *Id*. Additional unsuccessful settlement efforts were made in December 2017 and March 2018. *Id*. In May 2019, Plaintiffs and PPG reached a settlement in principle, without the benefit of a mediator. *Id*.

D. The Proposed Settlement

The Settlement Agreement's material terms are summarized below. These terms are set out fully in the Settlement Agreement (D.E. 489-2), attached hereto as Attachment A for convenience.

Settlement Classes: The PPG Settlement Class is divided into three geographic sub-classes based on their distance from the Garfield Avenue Facility; Zone 1 (nearest), Zone 2, and Zone 3 (farthest). Zone 1 will receive 2.5 shares; Zone 2 will receive 2 shares; and Zone 3 will receive 1 share of the Net Settlement funds. D.E. 489-2, p15. Solely for purposes of settlement, this Court certified (D.E. 491) the following Settlement Class and Sub-Classes under Fed. R. Civ. P. 23(b)(3):

Settlement Class B:

> Persons who, on or after May 17, 2010 and up to and including June 5, 2019, own or owned any real property identified as Class 2 Residential Property (1-4 Family) located within the area identified as "Class B" on the attached map. Settlement Class B is generally bounded by Ocean Avenue between Bayview Avenue and Grand Street; Grand Street between Ocean Avenue and Communipaw Avenue; Communipaw Avenue between Grand Street and before Communipaw turns northeast; Suydam Avenue, Pine Street, and Whiton Street southwest of Communipaw Avenue; Distillery Drive; Pacific Avenue from Communipaw Avenue to Caven Point Avenue; Caven Point Avenue between Pacific Avenue and Garfield Avenue; Garfield Avenue between Caven Point Avenue and Bayview Avenue; and Bayview Avenue between Garfield Avenue and Ocean Avenue. Settlement Class B includes Class 2 Residential Property (1-4 Family) properties located on both sides of the boundary streets contained in the class definition.
>
> Settlement Class B Subclass Zone 1: Persons who, at any time during the Class Ownership Period, owned or own real property identified as Class 2 Residential Property (1-4 Family) located within the area identified as "Class B Subclass Zone 1" on the attached map.
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> Settlement Class B Subclass Zone 2: Persons who, at any time during the Class Ownership Period, owned or own real property identified as Class 2 Residential

> Property (1-4 Family) located within the area identified as "Class B Subclass Zone 2" on the attached map.
>
> Settlement Class B Subclass Zone 3: Persons who, at any time during the Class Ownership Period, owned or own real property identified as Class 2 Residential Property (1-4 Family) located within the area identified as "Class B Subclass Zone 3" on the attached map.

The Class Ownership Period constitutes the period beginning on May 17, 2010 and ending on June 5, 2019. *Id*.

Settlement Amount: The settlement provides for a non-reversionary Settlement Fund of Five Million Dollars ($5,000,000), which represents the total limit and extent of PPG's monetary obligations under the Settlement Agreement. On October 14, 2020, PPG funded an escrow account in the amount of the Settlement Fund. The Settlement Fund is being administered by the Claims Administrator, Epiq Class Action and Claims Solutions, Inc. ("Epiq") and is a Qualified Settlement Fund within the meaning of Treasury Regulation §1.468B-1. The Settlement Fund will be used to provide monetary payments to each owner of eligible Class 2 Residential (1-4 Family) property who has timely filed a claim and release form demonstrating valid ownership of the subject settlement class property.

Initial Distributions: The Settlement Agreement provides that initial distributions from the Settlement Fund will be made, subject to court approval, for: (a) Claims Administration Expenses; (b) attorneys costs and expenses (including any pro-rata share of costs to be redistributed and payable to the Honeywell Settlement Class claimants); (c) attorneys' fee award; and (d) incentive awards of $10,000 to each of Malavé and Halley for their efforts in bringing and prosecuting this matter. On October 16, 2020, Settlement Class Counsel separately filed a Motion Seeking an Award of Reasonable Costs, Attorneys' Fees and Incentive Awards in Connection with the PPG Settlement (the "Fee Motion", D.E. 493), and the settling parties understand that Epiq will shortly be filing an application for payment of Claims Administration Expenses.

Redistribution of litigation costs to the Honeywell Settlement Classes A and C claimants must be included in the initial distribution computation. This Court has ordered that if the action against PPG is resolved with a recovery for such class, then "a *pro rata* allocation shall be made in the form of a reimbursement to the Honeywell Class and subsequently distributed to the Honeywell Class." D.E. 477. As Professor Green explained in the context of the *Honeywell* Settlement:

> I recommend that the Court grant Class Counsel's Motion Seeking an Award of Reasonable Costs, and approve Class Counsel's requested expenses in the amount of $1,140,023.77 as adequately documented and reasonably and appropriately incurred * * *. These costs were advanced to pursue claims against both Defendants as alleged co-conspirators and as joint and several tortfeasors.
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> * * *
>
> The costs for which Class Counsel seeks recovery from the Settlement Fund are not clearly and exclusively attributable to PPG, and the claims against PPG were not legally and factually independent from the claims against Honeywell. Thus, they are properly recoverable as part of the Class settlement with Honeywell. The Court should further order that if and when the PPG Class case is resolved with a recovery for the Class from which common expenses that benefited both the putative PPG Class and the Honeywell Class may be allocated, a fair, pro rata allocation back to the Honeywell Class of the PPG share of such expenses should be made and distributed.

$1,085,869.58 of these costs were "advanced to pursue claims against both Defendants as alleged co-conspirators and as joint and several tortfeasors" (D.E. 455-1, p.6; D.E. 476, p.27), and each property in each of the Honeywell and PPG Settlement Classes enjoyed the benefits of Class Counsel advancing these costs on their behalf.[6]

Assuming, for illustrative purposes only, that every Class A, B, and C property participated in the Settlement, then a total of 4,984 eligible properties (A + C = 3,497; B = 1,487) would have participated. $1,085,869.58 in commingled expenses divided by 4,984 eligible properties yields a

[6] $54,154.19 in costs were isolated Honeywell costs. D.E. 455-1, p.6.

pro rata commingled expense contribution of $217.87 that each eligible property *should* pay. By having had these expenses already deducted from the Honeywell Settlement fund, each Honeywell property has *already* paid $310.51 in such commingled costs ($1,085,869.58 / 3,497). These Honeywell properties are now entitled to a redistribution of a portion of these costs from the PPG fund. D.E. 477. By subtracting $217.87 from $310.51, the Court can arrive at a fair *pro rata* allocation back of $92.64 to each Honeywell property, representing the PPG share of such expenses for distribution from the PPG fund. It is important to reiterate that this model assumes all properties participate in the Settlement, which we know is not the case. As of the time of this filing, a total of 2149 Class A and C properties and 613 Class B properties participated in the respective Settlements. Applying the above formula, a total of 2762 eligible properties have participated. $1,085,869.58 in commingled expenses divided by 2762 participating properties yields a *pro rata* commingled expense contribution of $393.15 that each participating property *should* pay. *Id*. By having had these expenses already deducted from the Honeywell Settlement fund, each Honeywell participating property has *already* paid $505.29 in such commingled costs ($1,085,869.58 / 2149). These Honeywell participating properties are now entitled to a redistribution of a portion of these costs from the PPG fund. D.E. 477. By subtracting $393.15 from $505.29, the Court can arrive at a fair *pro rata* allocation back of $112.14 to each of the 2149 Honeywell participating properties for a total of $240,998.86 (2149 * $112.14), representing the PPG share of such expenses for distribution from the PPG fund.[7]

[7] The per property final redistribution will have to be adjusted *pro rata* by the Claims Administrator based on the total number of participating properties in Settlement Classes A, B, and C. Where multiple individuals owned Settlement Class Property over the course of the Class Ownership Period, consistent with the Settlement Agreement, each owner who filed a claim will be entitled to a time-weighted *pro rata* amount of the share of redistributed joint costs reimbursement.

If the Court grants the Fee Motion, and based on the settling parties' understanding of the estimated Claims Administration Expenses and the redistribution of joint costs to the Honeywell Class, the estimated initial distributions from the Settlement Fund will be as follows:

Settlement Fund	$5,000,000.00
Attorney's Fees	$1,250,000.00
Attorneys' Costs – PPG Only	$315,251.43
Redistribution of Joint Costs to Classes A and C	$240,988.86
Incentive Awards ($10,000 to Each Settlement Class Representative)	$20,000.00
Claims Administration Expenses – PPG Only	$70,000.00
Settlement Class Funds	$3,103,759.71

Allocation of Settlement Class Funds: After the initial distributions are made, the remaining Settlement Class Funds of $3,103,759.71 will be available for distribution to the PPG settlement class members, as described below. Settlement Class Properties in Subclass Zone 1 will receive 2.5 shares; Settlement Class Properties in Subclass Zone 2 will receive 2 shares; and Settlement Class Properties in Subclass Zone 3 will receive 1 share. Epiq has identified, based on best publicly available data, a combined 1,487 properties in Settlement Class B, including 646 properties in Subclass Zone 1; 601 properties in Subclass Zone 2; and 240 properties in Subclass Zone 3. For example, if the Settlement Class Funds consist of $3,103,759.71, each Settlement Class Property in Subclass Zone 1 will be allocated $2,538.24 for a total of $1,639,702.95 allocated to Subclass Zone 1; each Settlement Class Property in Subclass Zone 2 will be allocated $2,030.59 for a total of $1,220,385.73 allocated to Subclass Zone 2; and each Settlement Class Property in Subclass Zone 3 will be allocated $1,015.30 for a total of $243,671.03 allocated to Zone 3.[8] The method for determining shares per property per zone and initial allocation per property per zone is as follows:

[8] The calculations herein contain some rounding errors, which will be addressed by the Claims Administrator in the final accounting once all claims have been submitted and accounted for.

$$1\ Share = \frac{\text{Settlement Class Funds}}{2.5(\text{Properties in Zone 1}) + 2.0(\text{Properties in Zone 2}) + 1.0\ (\text{Properties in Zone 3})}$$

$$1\ Share = \frac{\$3{,}103{,}759.71}{2.5(646) + 2.0(601) + 1.0\ (240)}$$

$$1\ Share = \$1{,}015.30$$

	A	B	C	D
Zone	Properties per zone	Shares per property	Initial allocation per property	Total allocation per zone (= A x C)
1	646	2.5	$2,538.24	$1,639,703.04
2	601	2.0	$2,030.59	1,220,384.59
3	240	1.0	$1,015.30	$243,672.00
Total	1487			$3,103,759.71

As of the date of this filing, valid claims have been submitted for 613 Settlement Class Properties (a take-rate of over 41% for all Settlement Class Properties). *See* Affidavit of Katherine E. Kicinski, on behalf of Epiq, ¶17 ("Epiq Aff."), attached hereto as Attachment B. Allocating $3,103.759.71 to the Settlement Class Properties for which claims have been submitted amounts to $1,314,808.14 of the Settlement Class Funds.

	A	B	C	D	E
Zone	Claims per zone	Initial allocation per property	Initial allocation per zone (= A x B)	Total allocation per zone	Remaining Unclaimed Funds per zone (= D - C)
1	292	$2,538.24	$741,166.08	$1,639,702.95	$895,536.87
2	244	$2,030.59	$495,463.96	1,220,385.73	$724,921.77
3	77	$1,015.30	$78,178.10	$243,671.03	$165,492.93
Total	613		**$1,314,808.14**	$3,103,759.71	$1,788,951.57

The remaining $ 1,788,951.57 are funds allocated to Settlement Class Properties for which no claim was submitted ("Unclaimed Funds"). Consistent with the Settlement Agreement, Unclaimed Funds are redistributed to those class members that have filed eligible claims. Unclaimed Funds shall be distributed among the eligible Class B Members in the same Subclass

Zone in which the Settlement Class Property for which no claim was made is located. For example, if a claim is not made for a property in Subclass Zone 1, the unclaimed proceeds will be distributed among the eligible Settlement Class Properties in Subclass Zone 1 for which an eligible claim has been submitted. Those proceeds will not be distributed to Settlement Class Properties in Zones 2 or 3. After such redistribution, each Settlement Class Property will be entitled to a monetary payment of approximately: Zone 1 - $5,615.42; Zone 2 - $5,001.58; Zone 3 - $3,164.55.[9]

	A	B	C	D	E
Zone	Claims per zone	Unclaimed Funds per zone	Redistribution of unclaimed funds per property (= B / A)	Initial allocation per property	Final allocation per property (= C + D)
1	292	$895,536.87	$3,077.18	$2,538.24	**$5,615.42**
2	244	$724,921.77	$2,970.99	$2,030.59	**$5,001.58**
3	77	$165,492.93	$2,149.26	$1,015.30	**$3,164.55**
Total	613	$1,788,951.57			

Settlement Class Funds	**$3,103,759.71**
Class B Properties Zone 1, Zone 2, Zone 3	646, 601, 240
Multiplier per Property Zone 1, Zone 2, Zone 3	2.5, 2.0, 1.0
Initial Allocation Per Property Zone 1, Zone 2, Zone 3	$2,538.24, $2,030.59, $1,015.30
Number of Properties for Which Valid Claims Have Been Filed Zone 1, Zone 2, Zone 3	292, 244, 77
Claimed Funds	$1,314,808.14
Unclaimed Funds	$1,788,951.57
Final Allocation Per Valid Claims Property Zone 1, Zone 2, Zone 3	$5,615.42, $5,001.58, $3,164.55

Where multiple individuals owned Settlement Class Property over the course of the Class Ownership Period, consistent with the Settlement Agreement, each owner who filed a claim will be entitled to a time-weighted *pro rata* amount of the share allocated for that property. For

[9] The final amount allocated to each Class Member will likely decrease slightly as it depends upon the number of valid claimants, and thus it is impossible to discern the exact amount each Class Member in each Zone will receive until the final approval hearing, at which time the deadline for the submission of claims will have passed. In any event, each Subclass Settlement Zone Property will be allocated the same amount, respectively, by Zone.

example, if the Class Ownership Period is four-and-one-half years and owner X owned Settlement Class Property for 27 months and Y owned the same Settlement Class Property for 27 months, each would receive one-half of the single share allocated to that property.

Release of Claims: Upon the Effective Date (as defined in the Settlement Agreement), all Settlement Class members who have not timely opted out of the Settlement Class will release PPG from:

> any and all manner of actions, causes of action, suits, debts, judgments, rights, demands, damages, compensation, loss of use and enjoyment of property, expenses, attorneys' fees, litigation costs, other costs, rights or claims for reimbursement of attorneys' fees, and claims of any kind or nature whatsoever arising out of the ownership of Class 2 Residential Property (1-4 Family) in Settlement Class B in the Seventh Amended Complaint, including without limitation punitive damages, in either law or equity, under any theory of common law or under any federal, state, or local law, statute, regulation, ordinance, or executive order that any Class Member ever had or may have in the future, whether directly or indirectly, that arose from the beginning of time through execution of this Agreement, WHETHER FORESEEN OR UNFORESEEN, OR WHETHER KNOWN OR UNKNOWN TO ALL OR ANY OF THE PARTIES, that arise out of the claimed release, migration, deposition, or impacts or effects of COPR, hexavalent chromium, or any other chemical contamination present on, originating from or released, emanating, or migrating at or from (a) the Garfield Avenue Facility; (b) Hudson County Chromium Sites 114, 121, 132, 133, 135, 137, 143, 186, and 207; or (c) the following properties: 33 Pacific Avenue, 800 Garfield Avenue, 816 Garfield Avenue, 78-104 Halladay Street; 84, 86-90, 98-100 and 108 Forrest Street, 457 Communipaw Avenue, Pacific Avenue/Caven Point Avenue, North and South Halladay Street, Carteret Avenue, Forrest Street, Garfield Avenue, at any time through the date of this Agreement, including but not limited to property damage, remediation costs, diminution of value to property, including stigma damages, loss of use and enjoyment of property, fear, anxiety, or emotional distress as a result of the alleged contamination. Released Claims also include claims for civil conspiracy asserted by the members of Settlement Class B. Personal injury, bodily injury, and medical monitoring claims (if any) are not included in Released Claims.

As expressly stated in the Release, personal injury, bodily injury, and medical monitoring claims (if any) are not being released.

No admission of liability: The settlement is not an admission by any party of liability or the lack thereof.

E. Preliminary Approval of the Settlement Agreement

On February 12, 2020, PPG and Plaintiffs filed their Joint Motion for Preliminary Approval of Class Action Settlement. D.E. 489. On September 16, 2020, the Court issued an Order Certifying Settlement Class, Preliminarily Approving Class-Action Settlement and Approving Form and Manner of Notice. D.E. 491. On September 16, 2020, this Court entered an Order preliminarily approving the Settlement Agreement, finding that the "proposed settlement is fair and reasonable" and that the proposed Settlement Class meets all of the applicable requirements under Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, appointing Settlement Class Counsel, appointing Epiq Class Action and Claims Solutions, Inc. as Claims Administrator, and approving the forms and procedures for class notice. ("Preliminary Approval Order," D.E. 491).

F. Notice to the Class and the Response to Same

As described in more detail below and in the attached declaration from Epiq, pursuant to the Preliminary Approval Order, Epiq began notification to eligible class members on October 19, 2020, via a combination of individual mailings, publication notice, and posting the notices on a dedicated settlement website.

The deadline for class members to submit claims, opt-out requests, and objections was December 15, 2020. A Court-approved 14-day extension established a December 29, 2020 deadline to submit claims. D.E. 497. As documented in D.E. 499, pursuant to December 23rd and December 27th requests from certain property owners to further extend the Claims deadline, a subsequent Court-approved 10-day extension established a January 8, 2021 deadline to submit claims. D.E. 501. As of the date of this filing, there have been 613 claims submitted (a take rate of

41% of all eligible class properties), three opt-out requests, and zero objections. *See* Epiq Aff. at ¶¶16-18.[10]

ARGUMENT

I. 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). This Court previously applied the *Girsh* factors in granting final approval to the Honeywell Settlement (D.E. 439, pp. 18-33) which parallels the instant PPG Settlement, except to the extent that the PPG Settlement establishes a proportionately larger fund that is distributed across three zones. This Court found that "the Girsh factors – on balance – weigh in favor approving the proposed [Honeywell] settlement" *Id.* p. 439. The Settling Parties submit that the same rationale applies here and weighs in favor of approval.

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

[10] Epiq has prepared its declaration based on the number of submissions received as of the date of December 29, 2020. Should the Claims Administrator receive any residual but timely claims or opt-out requests, the settling parties respectfully request that the Claims Administrator be permitted to file a supplemental declaration or present updated figures at the Fairness Hearing.

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 Agreement is Fair, Reasonable, and Adequate and Meets the *Girsh* Factors for Class Action Settlement Approval

As discussed below, the proposed Settlement Agreement 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).

The first *Girsh* factor is clearly satisfied here. As in Honeywell (D.E. 439, p.19), this case is considerably complex and involves highly technical areas of environmental science, geochemistry, toxicology, epidemiology, air modeling, and property valuation, among others. The

case covers over one thousand residential properties. Moreover, although the parties have engaged in nearly ten years of fact discovery, the case is still in the pre-class certification, fact-discovery stage. Thus, continuing to litigate this case through expert discovery, class certification, potential appeal of class certification, 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). As in Honeywell, this factor thus weighs in favor of approval.

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 1,487 class properties, to date there have been only three opt-out requests and zero written objections. By contrast, there were 28 opt-out requests and three objectors in Honeywell. *See* D.E. 439, p.20. Moreover, claims have been submitted for 613 of the eligible class properties, representing a response rate of over 41%. 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).

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

The 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 in Honeywell (D.E. 439, p. 22), this factor clearly supports approval here. Both Plaintiffs and PPG have undertaken extensive discovery in this litigation, which has enabled each side to evaluate properly the merits and limitations of their respective positions. Prior to reaching settlement, the parties engaged in extensive discovery into class certification and related merits issues over the course of nearly ten years. This discovery included the production of over one million pages of documents by PPG regarding the history of contamination, status of remediation efforts, sampling and monitoring data, hundreds of photographs, real estate records, depositions

and exhibits from prior chromium-related litigations, regulatory reports and correspondence with regulatory agencies, and other materials for all of the Garfield Avenue Sites at issue in the litigation; significant third-party document and deposition discovery, including the depositions of the key authors of the studies referenced in the Complaint; depositions of regulators at the NJDEP; the deposition of a remediation contractor of PPG; depositions of the NJDEP Site Administrator for the Garfield Avenue Sites, as well as his technical professionals; and other discovery on issues related to the history and extent of chromium contamination, remedial investigations and remediation efforts, and correspondence with the public about remediation, among other topics. Each of the Class Representatives for Class B also gave deposition testimony, in addition to responding to thirty interrogatories and over seventy document requests. Finally, the settling parties had retained and consulted with experts and litigated several dispositive and discovery-related motions. Thus, when the settlement was reached, the Settling Parties had "conducted extensive discovery, retained and used experts, and litigated pre-trial motions." *Cendant Corp.*, 264 F.3d at 235. This lengthy and well-developed record meant that "the parties understood the merits of the class action and could fairly, safely and appropriately decide to settle." *Id.*

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.

Here, as in Honeywell (D.E. 493, p. 23), the proposed Settlement Agreement resolves hotly 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. Numerous disputed questions would need to be resolved, including, among others: (1) whether hexavalent chromium is in fact present outside of the Garfield Avenue Sites; (2) whether PPG or an alleged predecessor is the source of any chromium; (3) whether class members' properties declined in value; (4) if so, how much of the alleged decrease in property values is due to the regional and national economy as opposed to chromium allegedly from the Garfield Avenue Sites; (5) whether Plaintiffs suffered annoyance, discomfort and inconvenience as a result of the presence of any chromium contamination; and (6) 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 chromium. The case must first be certified to proceed as a class, and then these questions must be addressed on the merits at either summary judgment or trial. Although Settlement Class Counsel and PPG 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 could ultimately prevail.

(i) *PPG's Position*:[11]

For its part, PPG contends that Plaintiffs will face considerable difficulties in establishing both liability and damages as to the claims relating to their own and thousands of disparate individual properties in the Class B area, and that Plaintiffs will be unable to do so on a class-wide basis. As an initial matter, PPG notes that thousands of air, soil, and groundwater samples have been collected in an around the properties in the Class B area in connection of the State-approved remediation of the Garfield Avenue Sites. In PPG's view, and that of the NJDEP, this robust set of data demonstrates that neither COPR nor chromium from the Garfield Avenue Sites has migrated into or onto the individual properties in the Class B area or otherwise contaminated Plaintiffs' properties. PPG also believes that a series of governmental studies supports its view that Class B properties have not been injured.

(a) There is No Evidence that Plaintiffs' Properties are Contaminated.

Neither Plaintiff has any evidence of hexavalent chromium contamination (let alone COPR) on her property. Plaintiff Mattie Halley testified that in 2008 or 2009, she participated in a dust study where her home was sampled, and the samples were found to be negative for chromium. (Halley I Depo. at 39-41, attached hereto as Attachment C.) Likewise, Ms. Malavé testified with respect to both of her Jersey City properties that she had no evidence of any chromium of any kind in or under her property. (Malavé Depo. at 89-90, attached hereto as

[11] Settlement Class Counsel does not join or adopt any of the assertions made in the section of the brief entitled "PPG's Position" and specifically reserves all of their rights to demonstrate the falsity and defend against the assertions made therein if the proposed Settlement Agreement is not approved or does not become final for any other reason. Furthermore, though Plaintiff intends to file an Amended Complaint removing Mattie Halley as a named plaintiff, reference is made to her because in the event final approval is not granted, PPG would cite evidence related to Halley in future pleadings in opposition to class certification.

Attachment D.) In fact, the named Plaintiffs are not aware of any evidence of hexavalent chromium on their neighbors' properties, their blocks, their neighborhoods, or any other areas in Class Area B. (Halley III Depo. at 64-66, attached hereto as Attachment E; Malavé Depo. at 172.) Various studies, as outlined below, have confirmed that there is no scientifically valid evidence of hexavalent chromium from the Garfield Avenue Sites on or under the residential properties in the Class B area.

(b) Chromium dust sampling fails to identify levels in homes from the Sites

Numerous health studies of the Jersey City community have focused on measuring chromium, and then hexavalent chromium, in household dust. In 2000, a study of homes near COPR sites that had been remediated showed that indoor chromium levels were at "background levels." (*See* Health Exposure Study Recommendation, at 5, D.E. 415-9.) Subsequently, in 2006, New Jersey's Environmental and Occupational Health Sciences Institute ("EOHSI") initiated a two-phase study of potential hexavalent chromium exposure ("EOHSI Study"). In Phase I, the study analyzed household dust samples from 100 Jersey City homes. In Phase II, the study compared levels of hexavalent chromium found in New Brunswick, New Jersey homes, an urban setting that had not been affected by COPR sites. (*Id.*) The results showed that "the concentration of hexavalent chromium found in nearly all of the [Jersey City] samples ... was below the current NJDEP site remediation soil criterion of 20 µg/g." (Final Report: Chromium Exposure and Health Effects in Hudson County: Phase I, p. 13, attached hereto as Attachment F.) The study authors concluded that the findings suggested that "COPR was not a major source of hexavalent chromium in house dust in Jersey City," and that the primary sources in the home samples came from ***inside*** the homes themselves, from historical sources such as paints and stains. (Health Exposure Study

Recommendation, at 6; *see also* O'Connell II Depo. at 478-79, attached hereto as Attachment G; Gochfeld I Depo. at 113-14, 160, 243, attached hereto as Attachment H.)

In Phase II, as between the sampled homes in New Brunswick and those in Jersey City, researchers found ***no*** significant difference in the hexavalent chromium concentrations found in household dust. (Health Exposure Study Recommendation, at 6.) Rather, hexavalent chromium was found to be "ubiquitous in house dust samples" taken from homes in New Brunswick, and in fact, the New Brunswick homes actually had ***higher*** concentrations of hexavalent chromium than the Jersey City homes located near COPR sites in the Garfield Avenue area. (Gochfeld II Depo. at 271-72, attached hereto as Attachment I.) Simply, despite years of discovery, Plaintiffs have been unable to adduce any facts linking background levels of hexavalent chromium in Class B (if any) to the Garfield Avenue Sites because there are numerous alternative sources of detectable hexavalent chromium in any urban setting, such as Jersey City, including: pollution from coal burning power plants; traffic emissions; historical usage of coal and coal ash (from furnaces or fill); dust from cement, cinder blocks and concrete; historical use of paints, stains, and varnishes in homes or on decks; leather tanning products; wolmanized wood; and welding emissions. (O'Connell II Depo. at 400-02; McPeak I Depo. at 331, attached hereto as Attachment J; McPeak II Depo. at 543-47, attached hereto as Attachment K; McCabe II Depo. at 378, attached hereto as Attachment L; Gendron Depo. at 99-100, attached hereto as Attachment M; Gochfeld I Depo. at 113-14; Faranca Depo. at 236, 241-45, attached hereto as Attachment N.) Thus, to show even the possible presence of hexavalent chromium in the residential properties, property-by-property testing would be necessary. (Cozzi II Depo. at 475-76, attached hereto as Attachment O; McPeak I Depo. at 339-41.) Even then, there is no evidence that any hexavalent chromium originated from the Garfield Avenue Sites.

(c) The Residential Inspection Program fails to identify properties and homes with COPR from the Sites

Similarly, there is no evidence of COPR or hexavalent chromium from the Garfield Avenue Sites in residential soil at the individual properties in Class B. In 2009, a Residential Inspection Program, instituted by the State's Site Administrator, began evaluating properties in a defined area near the Garfield Avenue Sites with a goal of determining if there is any evidence of COPR contamination on those residents' properties. Participation in the Residential Inspection Program was voluntary for the property owner and was open upon request to any resident within 400 feet of PPG cleanup sites in Jersey City and Bayonne, or in a larger defined area near the Garfield Avenue Sites. (Halley III Depo. at 64-66; Malavé Depo. at 172.) The program, available to thousands of properties and property owners, was extensively publicized to the community through postcards soliciting participation, as well as through numerous community meetings and newsletters. (McPeak I Depo. at 312-14; McCabe II Depo. at 529-32.) Yet, fewer than 6% of the eligible residents took advantage of the program, which is itself evidence of a lack of the alleged "fear" in the neighborhoods surrounding the Garfield Avenue Sites. Nevertheless, no results or observations identified any COPR or hexavalent chromium attributable to the Garfield Avenue Sites in the Residential Inspection Program analysis. (McPeak II Depo. at 616, 658, 670, 768-69; Salazar Depo. at 62-63, attached hereto as Attachment P.)

(d) NJDEP and AECOM sampling fails to find COPR

Additional widespread soil and groundwater sampling by the NJDEP and PPG provides no evidence of COPR or hexavalent chromium from the Garfield Avenue Sites on or under any individual property in Class B. From August 2006 to June 2011, the NJDEP conducted its own extensive soil-sampling program in Jersey City to further evaluate potential concentrations of hexavalent chromium in public areas, such as sidewalks, roadways, and public parks that were not

subject to site remediation. The sampling locations were determined by their proximity to known COPR sites, recommendations by people in the site remediation program who knew where contaminants might be located, and requests and inquiries from the public. (Hazen Depo. at 11-12, attached hereto as Attachment Q). The NJDEP program failed to detect any hexavalent chromium in soil samples in the residential areas immediately west of Garfield Avenue, or in the numerous other properties tested within the Class B area. (Id. at 23-25, 28-35.)

In addition, AECOM, PPG's remediation contractor, determined that no hexavalent chromium-contaminated groundwater from the Garfield Avenue Sites has migrated under any residences in the putative Class B area. (Spronz Depo. at 74-75, attached hereto as Attachment R.) Moreover, AECOM conducted soil sampling around the Garfield Avenue Sites to delineate the nature and extent of off-site hexavalent chromium migration in the soil, and found that soils west of Garfield Avenue, towards the bulk of the residential area of Class B, were not impacted. (Id. at 96-97.)

(e) Blood test studies of residents were normal

Blood samples of residents in the Class B area have confirmed no evidence of elevated levels of chromium in the tested residences. In addition to the Residential Inspection Program, the Site Administrator instituted a Community Health Exposure Prevention and Testing Program, which included offering blood tests to residents in the Residential Inspection Program boundary in order to measure whether any changes in chromium blood levels occurred during PPG's remediation of the Garfield Avenue Sites. (O'Connell I Depo. at 130, attached hereto as Attachment S.) Six successive rounds of diagnostic blood testing to date confirmed that residents participating in the voluntary program have ***not*** been exposed to elevated levels of chromium from the Garfield Avenue Sites during remediation. (Id. at 132.)

(f) Air monitoring before and during remediation fails to identify elevated levels of hexavalent chromium

There is no evidence of elevated levels of hexavalent chromium in the air in Class B from the Garfield Avenue Sites or the remediation of those sites. In order to assure that PPG's remediation of the Garfield Avenue Sites did not itself pose any adverse health effects to area residents via airborne hexavalent chromium leaving the sites, the NJDEP established an Acceptable Air Concentration ("AAC") for the Garfield Avenue Sites of 49 nanograms per cubic meter of air, continuously measured by monitoring stations set up at the applicable fence-lines. The NJDEP established the AAC with advice from its own scientific staff and from Weston Solutions, the independent technical consultant for the Site Administrator. (Cozzi II Depo. at 441-42, 484.) Results of the continuous integrated hexavalent chromium sampling and analysis confirm that during remediation, average airborne concentrations at the Garfield Avenue Sites have at all times been and have remained well below the AAC guideline level. (Gendron Depo. at 104-05, 120.) Even if any hexavalent chromium were to leave the site via wind, the wind-direction data from the meteorological station at Site 114 confirms that the predominant wind directions, relative to the putative Class B area, are from the north-northwest and northwest, which would blow any "airborne particles" of any kind leaving the Garfield Avenue Sites *away* from the residential Class B areas. (Gendron Depo. at 111-14, 121-24, 127-29.)

Viewed in context rather than in isolation, the numerous studies demonstrate that the presence of COPR and/or chromium at the Garfield Avenue Sites, even during active remediation, have no impact, economic or otherwise, on surrounding individual properties within the Class B area. Indeed, these studies demonstrate that chromium exposure levels in Jersey City are at or below background levels that are found in communities far away, with no historic chromium waste sites. Thus, PPG contends that any purported fear or "stigma" regarding the presence of chromium

at the Garfield Avenue Sites is not reasonable and is contradicted by other discovery obtained in the case; these and other issues, like causation and injury, present substantial obstacles for certifying a litigation class. *See, e.g.*, *Powell v. Tosh*, No. CIV.A. 5:09-CV-00121, 2013 WL 4418531, at *7 (W.D. Ky. Aug. 2, 2013) (noting that the subjective component of a nuisance claim "is not capable of resolution by a common, classwide answer").

(g) There is No Evidence Plaintiffs Have Suffered Any Economic Damages.

No evidence of property diminution.

Neither of the named Plaintiffs have any evidence that any conduct of PPG resulted in diminution of their respective property values (or that of any other putative class member). Ms. Malavé conceded that she has ***no*** evidence that the fair market value of her properties, or that of any other putative class member, had diminished as a result of PPG's conduct or because of chromium in general, and that "anything could affect the value of a property." (Malavé Dep. at 170-71, 283.) Ms. Halley admitted that her property diminution claim is entirely premised on a 2008 report issued by the U.S. Agency for Toxic Substances and Disease Registry ("ATSDR"), which she admitted that she never saw until her lawyers showed it to her just days before her deposition. (Halley I Depo. at 28-31.) Despite years of discovery, Plaintiffs produced no evidence of the value of their properties, or any properties in Class B, being diminished in value as a result of proximity to the Garfield Avenue Sites or that any houses did not sell as a result.

Moreover, Plaintiffs filed their complaint in May of 2010, at the height of the recession which itself significantly impacted Jersey City. It would be nearly impossible, if not entirely so, to distinguish any diminution in value that resulted from alleged contamination from or proximity to the Garfield Avenue Sites from the diminution in value that was caused by the severe economic conditions during the recession. In addition, the residential properties in Class B vary from single

family homes, to duplexes, to owner-occupied rentals, requiring different methodologies to determine alleged diminution in value of those properties. PPG, if required, would produce expert testimony to demonstrate a lack of any scientifically valid diminution in property values in Class B as a result of the Garfield Avenue Sites.

No evidence of community "fear" or "stigma" related to chromium.

Despite their claims of purported class-wide "fear" based on the "presence" of chromium, and chromium's supposed impact on the value of their property, neither Ms. Halley nor Ms. Malavé tried to sell their homes and leave her respective neighborhood. (Halley I Depo. at 142-45.) Significantly, Ms. Halley never even mentioned the possibility of chromium contamination to any of her tenants over the years, nor did she ever talk to her neighbors about chrome issues in the neighborhood, other than an attempted conversation with one neighbor, who refused to get involved with this lawsuit. (Halley I Depo. I at 91-92; Halley II Depo. at 380-88, attached hereto as Attachment T.) Similarly, Leticia Malavé never discussed her claimed fear of chromium with any counselors, psychiatrists, priests, pastors, or psychologists. (Malavé Depo. at 278-80.) Nor has Ms. Malavé told her tenants of her alleged concerns about chromium, nor has she ever talked to her neighbors about the ATSDR article or heard her neighbors say that there is hexavalent chromium on all properties in the Class B area. (Malavé Depo. at 171-72, 214.) In fact, Malavé's brother purchased a house in the Class area and she purchased an additional house after the ATSDR publication. (Malavé Depo. at 42-43, 201).

The ATSDR Publication does not support Plaintiffs' claims.

A study titled "Analysis of Lung Cancer Incidence near Chromium-Contaminated Sites in New Jersey" ("ATSDR Study"), was carried out by the New Jersey Department of Health and Senior Services ("NJDHSS") under a cooperative agreement with the ATSDR. (ATSDR Study,

D.E. 415-8.) Plaintiffs contend the ATSDR Study, which there is no evidence that anyone in the Class actually read before the litigation, states that the incidence of lung cancer increases as a result of living near COPR contaminated sites and that its release has led to "concern" or "fear," which has reduced the value of their property, for which they seek damages. However, the ATSDR Study itself, as well as the sworn testimony of its primary author, Dr. Jerald Fagliano, confirms that the study actually shows nothing about whether living in proximity to a COPR site causes an increased incidence of lung cancer. (Fagliano I Depo. at 130, attached hereto as Attachment U.) Thus, the ATSDR Study provides no valid basis for Plaintiffs' suggestion that the incidence of lung cancer and/or the ATSDR Study have caused "fear" in the class area, and somehow resulted in "community fear" that has impacted the value of their individual properties and those of all Class B members.

Specifically, the ATSDR Study attempted to evaluate "the relationship between historical exposure to chromium from [COPR] sites and the incidence of lung cancer in Jersey City" over a 25-year period, from 1979-2003. (ATSDR Study at 1, 2.) The authors of the ATSDR Study, however, acknowledged that their "findings do not prove a cause-effect relationship" between living "closer to COPR sites" and developing lung cancer. (ATSDR Study at iv.) Dr. Fagliano testified that "we're not drawing inferences related to whether or not residents in close proximity to historical chromium sites *caused* the increase in cancer – lung cancer incidence in that population." (Fagliano I Depo. at 130.) Moreover, in assessing the incidence of lung cancer in the studied census block groups, Dr. Fagliano acknowledged several critical scientific limitations to the study, including not investigating the effect of race, economics, or smoking habits. (Id. at 117-128.) Finally, the primary finding of the ATSDR Study was not "statistically significant." (Id. at 130.) That is, although the study authors found some increased incidence of lung cancer "for

populations living in close proximity to historical COPR sites," they could not rule out that the result is explainable by mere chance. (Fagliano I Depo. at 122-23, 125.) And the study authors make no claim that any cancer was caused by chromium from any chromate site for which PPG is responsible. (Id. at 121.) The authors further noted that "since a significant amount of remediation of the chromium slag has occurred, the historical potential exposures noted in this investigation do not represent the current conditions in the city." (ATSDR Study at 9.)

(h) Remediation of the Garfield Avenue Sites.

PPG further notes that pursuant to a federal court order and several different state orders, and under the supervision of both the New Jersey Department of Environmental Protection and various Site Administrators over time, PPG has been conducting extensive environmental remediation at each of the Garfield Avenue Sites, including soil and groundwater remediation. That remediation is in various stages of completion, with redevelopment occurring at some sites. PPG contends that these substantial remediation and redevelopment efforts are likely to increase surrounding property values.

(i) Additional Procedural and Evidentiary Hurdles.

Expert testimony is required for Plaintiffs to prove their individual claims as well as to satisfy the requirements of class certification. Given the absence of evidence of any contamination at the vast number of properties in the Class B area and the absence of evidence of any diminution of property value for the properties in the Class B area, PPG contends that any expert opinions offered by Plaintiffs would be excluded in accordance with F.R.C.P. 702 and *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) and its progeny.

Finally, although Plaintiffs survived a motion to dismiss on statute of limitations grounds, PPG contends that considerable evidence of public awareness of the chromium issue in Jersey City may preclude Plaintiffs' claims, and defeat certification, based on statute of limitations grounds.

Multiple witnesses testified that chromium testing and remediation efforts were known in the Hudson County community for decades before this action was ever filed. (*See, e.g.*, McPeak II Depo. at 603-04, 608-09; McCabe II Depo. at 361-65, 412-13, 605.) People living around the former Garfield Avenue Sites would even approach NJDEP representatives on the street in the late 1980's to the mid-1990's to voice their issues. (Faranca Depo. at 129-30.) Ms. Malavé herself acknowledged that there were "plenty" of newspaper articles reporting on the problems of chromium in Jersey City before 2004, when she bought her property at 74 Union Street, and she could have found these articles if she had done any research before buying the property. (Malavé Depo. at 291-92.)

In light of the significant challenges Plaintiffs will face establishing liability and damages on an individual, let alone class-wide basis, coupled with PPG's substantial remediation and redevelopment efforts to date, PPG submits that the proposed Settlement Agreement, which will provide immediate, substantial monetary relief to residential property owners in Class B, is adequate, fair, and reasonable and should be approved.

(ii) *Settlement Class Counsel's Position*:[12]

For their part, Settlement Class Counsel contends that PPG will face considerable challenges defending against Plaintiffs' claims. U.S. District Judge Dennis Cavanaugh has already found Honeywell strictly liable for the disposal of chromium waste in densely populated Jersey City (*Interfaith Cmty. Org. ("ICO") v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 851 (D.N.J. 2003), *aff'd*, 399 F.3d 248 (3d Cir. 2005), and Plaintiffs believe this strict liability precedent would

[12] PPG does not join or adopt any of the assertions made in the section of the brief entitled "Settlement Class Counsel's Position" and specifically reserves all of its rights to defend against the assertions made therein if the proposed Settlement Agreement is not approved or does not become final for any other reason.

apply equally to PPG's disposal of chromium waste in Jersey City. Moreover, the Third Circuit recently affirmed this District Court's finding that PPG is liable for its waste disposal practices leading to its chromium pollution in Jersey City. *PPG Industries, Inc. v. United States of America*, 957 F.3d 395 (3rd Cir. 2020).

Plaintiffs contend that numerous factors support Plaintiffs' claims of property damage. For example, Plaintiffs believe a series of studies support their nuisance, negligence, and strict liability claims based on a theory that the named Plaintiffs, as well as normal residents in Class B, have expressed the types of reasonable fears and concerns that result in an unreasonable interference with the use and enjoyment of property from the presence of hexavalent chromium contamination from plant operations and the waste disposal sites. *See Rowe v. Dupont*, 262 F.R.D. 451, 460-61 (D.N.J. 2009) (citing *Rest. of Torts (2d)* § 821 cmt. f; *Prosser and Keeton on the Law of Torts*, § 88 at 629 (5th ed. 1984)). Plaintiffs further believe this evidence supports their claims of annoyance, discomfort and inconvenience. Specifically, in September 2008, the U.S. Agency for Toxic Substances and Disease Registry ("ATSDR"), in conjunction with the N.J. Department of Health ("NJDOH") and the NJDEP, determined that residents living near these chromium sites had as high as a 17% increase in the incidence of lung cancer, compared with other populations both inside and outside of Jersey City.[13] A November 2008 study by the University of Medicine and Dentistry of New Jersey/Robert Wood Johnson Medical School and Environmental & Occupational Health Sciences Institute ("EOHSI") found hexavalent chromium dust inside all homes sampled in Jersey City.[14] And, in April 2009, the NJDEP determined, for the first time, that

[13] ATSDR Study at p. iv. (D.E. 415-8).

[14] Final Report: Chromium Exposure and Health Effects in Hudson County: Phase I, Nov. 24, 2008 ("2008 Dust Study") (D.E. 415-9 at p. 9).

hexavalent chromium is carcinogenic via ingestion.[15] Based on this new scientific analysis, the NJDEP conducted an updated, peer-reviewed risk assessment on the carcinogenicity of hexavalent chromium via ingestion and determined that the appropriate residential cleanup criteria is one part per million (1 ppm)[16] of hexavalent chromium in soil – orders of magnitude below the existing levels surrounding Plaintiffs' homes.[17] Plaintiffs contend that Dr. Michael Gochfeld, principal author of the household chromium dust studies, testified that scientists who conducted the studies believed that the chromium waste sites were a source of household hexavalent chromium in Jersey City homes.[18]

Based on this District's prior findings, the ATSDR Study, the dust studies and the voluminous documents and testimony ascertained through discovery (and the expert testimony that would be proffered), Plaintiffs believe that a jury could find in favor of Plaintiffs on their nuisance, negligence, and strict liability claims. In conjunction with testimony from an air modeling expert, Plaintiffs contend that these facts will also support Plaintiffs' trespass claim.

Plaintiffs further contend that property values in the Settlement Class have been negatively affected by the presence of historic and ongoing chromium contamination in Disposal Area B from plant operations and the disposal sites. If this case were to proceed, Plaintiffs would proffer expert testimony demonstrating that the contamination has caused a class-wide diminution in property. Consistent with widely accepted economic principles and peer-reviewed literature concerning the

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[15] Derivation of Ingestion-Based Soil Remediation Criterion for Cr^{+6} Based on the NTP Chronic Bioassay Data for Sodium Dichromate Dihydrate, NJDEP Office of Science, April 8, 2009 (D.E. 415-10).

[16] A 1 ppm standard has not yet been formally adopted through rulemaking.

[17] Office of Science, Research Project Summary, Derivation of an Ingestion-Based Soil Remediation Criterion for Cr^{+6} Based on the NTP Chronic Bioassay Data for Sodium Dichromate Dihydrate, June 2009 (D.E. 415-11).

[18] Gochfeld, Tr. 509:17-510:6; 331:11-16; 359:5-13; 379:24-380:5 (D.E. 415-12).

impact of hazardous waste sites on nearby property values, Plaintiffs contend such testimony would demonstrate that this diminution in value is caused by the presence of chromium contamination, independent of any other factors. Plaintiffs contend that such testimony will also demonstrate that even after PPG undertakes its court-ordered remediation at the Disposal Area, large quantities and high concentrations of hexavalent chromium will remain and that the chromium contamination has been so severe and widespread that its impacts on property values will have long-lasting impacts.

Finally, Plaintiffs believe their claims are not time-barred. Indeed, citing the representations of the NJDEP, NJDOH and defendants themselves concerning chromium in Jersey City, U.S. District Judge Susan D. Wigenton has already denied a motion to dismiss the complaint based on statute of limitations. *Smith v. Honeywell Int'l Inc.*, No. 2:10-CV-03345 SDW, 2011 WL 810065, at *1 (D.N.J. Feb. 28, 2011), *recon. denied*, 2011 WL 1870598 (D.N.J. May 13, 2011).

Nevertheless, Settlement Class Counsel is also cognizant of a possible defense by PPG as to the issue of causation, given PPG's assertion that any alleged presence of hexavalent chromium on class members' properties are consistent with background levels and are consistent with what is seen in other areas of New Jersey with no history of chromium production. Plaintiffs' Counsel is further mindful of likely challenges on statute of limitations as well as challenges to some, or all, of their experts pursuant to *Daubert v. Merrell Down Pharm., Inc.*, 509 U.S. 579 (1993).

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 and PPG has reserved the right to challenge class certification in the event that the Proposed Settlement is not approved. As in Honeywell (D.E. 439, p. 26), Settlement Counsel acknowledges that PPG intends to challenge class certification in a litigated context and recognizes that there is no guarantee that this Court will certify all, or any, of Plaintiffs' claims. *See Comcast Corp. v.*

Behrend, 133 S. Ct. 1426, 1433 (2013); *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 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).

Settlement 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 Agreement 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 held in the context of the Honeywell Settlement, "[t]he District Court did not abuse its discretion in approving the settlement without specifically identifying the best possible recovery for the class. As we have explained, 'precise value determinations are not required' in evaluating a class action settlement." *Halley*, 861 F.3d at 492 quoting *Pet Food Products*, 629 F.3d at 355.

For its part, and as discussed more fully above, PPG contends that if this case were to proceed, PPG would proffer expert testimony that there has been no discernable diminution in

property value attributable to the Garfield Avenue Sites and that additional evidence demonstrates that Plaintiffs and Class Members have not been damaged at all. Class Counsel disagree with PPG's assessment and believe a damages award would be significantly more than PPG's estimate of no damages at all.

In addition, as demonstrated at length above, continuing to litigate this case through class certification, summary judgment, and trial will be a lengthy, complicated, and expensive process. Further, 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 PPG. However, although Plaintiffs have alleged substantial damages, 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 the settlement given that the Settlement Agreement provides substantial and immediate relief to the Settlement 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.'"). Because of this, the ability of PPG to withstand a greater judgment is of diminished importance here. *AT & T Corp.*, 225 F.R.D. at 151. As this Court explained in Honeywell, "Even if Honeywell could afford a greater amount than the Settlement would require, that doesn't support 'rejecting an otherwise reasonable settlement.'" D.E. 439, p. 27 quoting *Saini 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. 439, p. 33. 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." *Id.* at p. 34, quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). This Rule 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).

D.E. 439, p. 34.

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. Like the Honeywell Settlement Notice which this Court found to be satisfactory, 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. The Notice also explains the nature of the claims covered under the Settlement Agreement and the possible relief available. 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. *See* Epiq Aff., ¶¶3-8.

The method of Notice also complied with Rule 23. On October 16, 2020, individual notice was sent by First Class Mail directly to each property owner at his or her mailing address as reflected in county property records. Prior to mailing, Epiq ran all of the addresses through the

United States Postal Services' National Change of Address Database to obtain the most current addresses for Class Members. *Id.* ¶¶5-6.

On or about November 24, 2020, Epiq mailed an additional round of notices and claims forms via first class mail to any eligible class member at his or her mailing address as reflected in county property records that had not yet filed a claim form, in order to increase the likelihood that eligible class members were apprised of the Settlement Agreement. *Id.* ¶8. That supplementary notice was in the same form as the original mailing and included Epiq's toll-free number, the address for the settlement website, a claim and release form, and reminded eligible class members of the original December 15 deadline. *Id.*

On October 27, 2020 Settlement Class Counsel held a Zoom video conference with the leadership of the GRACO Community Organization[19] to answer any questions regarding the Settlement Agreement for subsequent dissemination to the GRACO membership. In the aggregate, Garden City mailed or e-mailed approximately 2,816 individual notices to eligible class members. *Id.* ¶¶6-8.

In addition to individual notices, the Notices were also published in the *Jersey Journal* (printed and on-line editions), which is a newspaper of general circulation in Jersey City, New Jersey. *Id.* ¶9-12. The Publication Notice ran once a week for four consecutive weeks beginning on October 19, 2020. *Id.* The Publication Notice provided similar information as the more detailed individual mailed Notices and directed potential class members to a dedicated settlement website, ppgjerseycitysettlement.com, for further information and to obtain copies of the Claim and Release Form. *Id.* After the Court extended the claims deadline to December 29, 2020, Epiq prominently

[19] GRACO is a long-standing, Jersey City community organization representing the interests of residents living on Garfield, Randolph, Arlington, Claremont, and Ocean Avenues in the heart of the Settlement Class. GRACO has been involved in Jersey City chromium issues for over a decade.

displayed that fact on the homepage of the settlement website and continued to accept online submissions of claim and release forms through the December 29, 2020 deadline. *Id.* ¶10. In addition, notice of the extended deadline was published for one day as a full-page advertisement in the *Jersey Journal* (print and on-line editions). The supplemental Notice provided similar information as the more detailed individual mailed Notices and directed potential class members to the settlement website. *Id.* ¶10. In addition, notice of the extended deadline was published for one day as a full-page advertisement in the *Jersey Journal* (print and on-line editions). After the Court extended the claims deadline to January 8, 2021, Epiq again prominently displayed that fact on the homepage of the settlement website and will continued to accept online submissions of claim and release forms through the January 8, 2021 and Epiq also arranged for notice of the extended deadline to published in the *Jersey Journal* (print and on-line editions). *Id.* ¶10.

In addition, an estimated 1,328,119 digital geo-targeted internet banner impressions were run across the Google Display Network for Jersey City zip codes 07305 and 07304, including, but not limited to, the Jersey City Patch, Fox News local, ABC news local, NewJerseyNews12.com, Hudsonreporter.com, and other websites of local interest. *Id.* ¶11. The banner advertisements provided notice of the Settlement, its geographic area, and claims deadline, and directed potential class members to the Settlement website for further information. *Id.* The banner advertisements will continue through the second claim extension of January 8, 2021. *Id.* ¶12.

As documented in D.E. 499, pursuant to December 23rd and December 27th requests from members of the Morris Canal Coalition ("MCC"), an ostensible organization of Jersey City residents with members in the Settlement Class, the deadline to submit a Claim and documentation of property ownership was further extended to January 8, 2021. D.E. 501. During a two-hour informational conference during which Settlement Class Counsel answered resident questions

about the settlement, certain members of MCC represented that some residents required additional time to submit their Claims and that certain others did not receive notice of the Settlement (i.e., one claim packet out of 1,487 mistakenly was marked with the name of a former property owner), thus requiring this extension. Although Settlement Class Counsel was not provided evidence of any particular resident needing such an extension, of any resident not receiving notice, or of any deficiency in the Court-approved Notice procedure, the Settling Parties advocated for this additional extension to the extent it would increase participation in the Settlement. *See* D.E. 499.[20] Class Counsel are in the process of providing notice of this extension via an advertisement in the *Jersey Journal* and on-line. Epiq Aff., *Id.* ¶10-12.

As demonstrated, the notices and supplemental 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.

Finally, on September 22, 2020, PPG 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. 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.

[20] While certain members of MCC requested even lengthier extensions of three months, or greater, the Settling parties were, and remain, unpersuaded that such a protracted Claims administration process is warranted based on the facts before the Court.

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 Settlement Class Property in each zone equally by allocating the same *pro rata* amount of the Settlement Class Funds to that property. And given that the zones are based on distance away from the former Garfield Avenue Facility, it is fair and reasonable to allocate a greater share of settlement proceeds to the homes nearest the former Garfield Avenue Facility. This treatment is fair given that all of the Settlement Class Properties are classified in the same way: as Class 2 Residential Property (1-4 Family). In the case of multiple owners, the plan of allocation provides that each owner is entitled to a time-weighted *pro rata* distribution of the settlement funds allocated to that property. 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.

II. 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. 491. The settling parties contend that the Court's determination regarding the Rule 23 requirements is still binding and thus do not repeat their previous Rule 23 arguments here. However, should the Court find it necessary at final approval for the settling parties to demonstrate that the requirements of Rule 23(a) and (b)(3) are satisfied, for settlement purposes only, the settling parties incorporate by reference the arguments made in support of class certification in their joint motion for preliminary approval. *See* D.E. 489-1, pp.12-18. The settling parties further note that the Honeywell Settlement Classes were approved on the nearly identical bases as those presently before this Court. *See* D.E. 439, pp. 10-17.

CONCLUSION

For the reasons stated above, the Settling Parties jointly request that the Court enter a Final Order approving the proposed Settlement Agreement.

Respectfully submitted this 30th day of December, 2020.

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