UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BLAKE CHAPMAN, et al.	§	
Plaintiffs	§	
	§	No. 2:17-cv-174; consolidated with
	§	2:19-cv-32 and 2:19-cv-34
	§	
Vs.	§	
	§	
voestalpine Texas Holding, LLC, *et al.*	§	
Defendants	§	

PLAINTIFFS' UNOPPOSED MOTION TO APPROVE ATTORNEYS' FEES AND COSTS

Plaintiffs—Blake Chapman, Ricky Stephens, Gary Thurmond Jr., Carolyn Thurmond; Hortensia Martinez, Charles Garrett, and Roel Garcia individually and on behalf of all others similarly situated ("Representative Plaintiffs" or "Plaintiffs")—respectfully move this Court approve the negotiated award of attorneys' fees and costs included in the Settlement Agreement between the Parties.

Date: May 25, 2022

Respectfully submitted,

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I.
SUMMARY OF ARGUMENT

Plaintiffs seek to recover their attorneys' fees and costs pursuant to the common benefit doctrine. By and through their counsel ANDERSON ALEXANDER, PLLC, LILES WHITE, PLLC, and FRAZER, PC (collectively, "Class Counsel"), Plaintiffs have tactically and aggressively litigated this matter since May 22, 2017, the inception of litigation against voestalpine Texas, LLC, voestalpine Texas Holding, LLC, and voestalpine US Holding, LLC ("Defendants"). Based on their legal acumen, Class Counsel positioned the litigation for a class-wide resolution that confers significant financial value to the Participating Settlement Class Members. Class Counsel will show that the requested amount for attorneys' fees and costs is reasonable under the "percentage of the fund" theory utilized by this Court and the benchmark percentage of 7.6 percent (7.6%) of the Total Settlement Value is not only appropriate, but is justified by the relevant *Johnson* factors, as confirmed by performing a lodestar cross-check.

II.
LITIGATION HISTORY

On May 22, 2017, Class Counsel filed the first of three lawsuits against Defendants for damages allegedly caused by metallic particulate ("black dust" or "dust") migrating from Defendants' La Quinta Plant. *See Chapman, et al. v. voestalpine Texas LLC, et al.*, No. 2:17-cv-00174, ECF No. 1 (S.D. Tex.) ("*Chapman* Litigation"). On January 29, 2019, Class Counsel filed a separate class action against

Defendants seeking injunctive relief along with individual claims for damages to real and personal property on behalf of 149 individuals residing in Portland, Texas and Gregory, Texas. *Abben, et al. v. voestalpine Texas LLC, et al.*, No 2:19-cv-32, ECF No. 1 (S.D. Tex. 2019) ("*Abben* litigation"). The next day, on January 30, 2019, Class Counsel filed a third lawsuit, *Thurmond, et al. v. voestalpine Texas LLC, et al.*, No. 2:19-cv-34, ECF No. 1 (S.D. Tex.) ("*Thurmond* litigation"), as a representative action alleging vehicle damage caused by Defendants' activities at the La Quinta Plant, along with individual claims for injunctive relief. These three filings have now been consolidated into one action before this Court, for settlement purposes only.

During the pendency of these Consolidated Actions, counsel for both Plaintiffs and Defendants (hereinafter referred to as the "Parties") engaged in significant factual discovery and expert investigations. Specifically, the Parties exchanged over 360,343 pages of documents through formal written discovery, over 82,611 documents were subpoenaed from third parties, and an additional 1,677 documents were obtained through Freedom of Information Act requests from third-party entities. The Parties also scheduled a site inspection of Defendants' La Quinta Plant, whereby Class Counsel and Plaintiffs' experts were granted access to the Plant. During that site inspection, Plaintiffs' experts took considerable sampling and documented production activities. In addition to inspecting Defendants' La Quinta Plant, Class Counsel arranged for regular and extensive inspection and sampling from residences and vehicles located within the Class Area over a one-year period.

Defendants likewise retained experts who performed their own independent investigations and sampled evidence from residences and vehicles within the Class Area. In total, the Parties retained twenty-two (22) experts—Plaintiffs retained ten (10) and Defendants retained twelve (12). These experts each subsequently provided comprehensive reports on both liability and damages.

In addition to fully engaging in written and expert discovery, both parties took multiple depositions. Plaintiffs deposed five (5) of Defendants' representatives, including executive officers and department managers of the facility and including one manager of the voestalpine steel division company from Austria, and Defendants deposed thirteen (13) individual plaintiffs from the *Chapman* Matter. It was only after both sides provided their expert reports (and after Class Counsel filed the Opposed Motion for Class Certification in the *Thurmond* Matter) that the Parties agreed to participate in mediation.

The Parties selected John W. Perry, Jr. with Perry, Balhoff, Mengis, and Burns, L.L.C. to serve as the neutral third-party mediator. The Parties' initial conference with Mr. Perry occurred on June 18, 2019. During that conference the Parties appraised Mr. Perry of the current case posture and created a plan whereby they would work toward formal mediation. Both Plaintiffs and Defendants subsequently had one-on-one meetings with Mr. Perry to discuss the outstanding legal issues they respectively believed would impact the mediation and future case settlement. The Parties engaged in a two-day formal mediation with Mr. Perry in Houston, Texas in September 2020. Although the

Parties did not resolve the pending matters during mediation, they continued to maintain further settlement discussions. On September 24, 2020, Mr. Perry provided a Mediator's Proposal to the Parties, which the Parties accepted on September 29, 2020.

On October 11, 2021 the Parties executed the Class Settlement and Release Agreement ("Agreement") before the Court for final approval. *See* ECF No. 84-1. Through that Agreement, Class Counsel seeks compensation for substantial work performed in these cases and reimbursement for the necessary expenditures to bring this consolidated action to the resolution before the Court. Specifically, Class Counsel seeks to recover $6,730,000.00 in fees—an amount that is less than 8% of the Total Settlement Value to the Class Members.

III.
ARGUMENT & AUTHORITIES

A. CLASS COUNSEL ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES

"[W]hen a representative party has conferred a substantial benefit upon a class, counsel is entitled to attorneys' fees based upon the benefit obtained." *Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 306 (S.D. Miss. 2014) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). The common benefit doctrine provides an exception to the "American Rule," permitting the creation of a common fund for the purpose of paying reasonable attorneys' fees. *See* Eldon E. Fallon, COMMON BENEFIT FEES IN MULTIDISTRICT LITIGATION, 74 La. L. Rev. 371, 374–75 (2014). The common benefit doctrine serves the "twin goals of removing a potential financial obstacle to a plaintiff's pursuit of a

claim on behalf of a class and of equitably distributing the fees and costs of successful litigation among all who gained from the named plaintiff's efforts." *Jenkins*, 300 F.R.D. at 306 (quoting *In re Gould Sec. Litig.*, 727 F. Supp. 1201, 1202 (N.D.Ill.1989) (citation omitted)). It stems from the premise that "those who receive the benefit of a lawsuit without contributing to its costs are 'unjustly enriched' at the expense of the successful litigant." *Id.* (quoting *Van Gemert*, 444 U.S. at 478). Accordingly, the Supreme Court (and the Fifth Circuit) recognized that "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Id.* at 306–07 (quoting *Barton v. Drummond Co.*, 636 F.2d 978, 982 (5th Cir. 1981). As such, the common benefit doctrine is applied in the class action context "to compensate attorneys whose work benefits others similarly situated." *See id.* Fallon, *supra* p. 3 at 375 (recognizing that "[i]n class actions the beneficiary of the common benefit work is the claimant").

Courts also have recognized that common fund recoveries based on contingency fee representation are especially beneficial to employee plaintiffs who may not possess the financial resources to hire counsel on an hourly basis to pursue their claims:

> Common fund recoveries are contingent on a successful litigation outcome. Such contingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation . . . and transfer a significant portion of the risk of loss to the attorneys taking a case. Access to the courts would be difficult to achieve without compensating attorneys for that risk. Many individual litigants, including the class members here, cannot afford to retain counsel at fixed hourly rates . . . yet they are willing to pay a portion of any recovery they may receive in return for successful representation.

Capsolas v. Pasta Res. Inc., No. 10-cv-5595, 2012 WL 4760910, *8 (S.D.N.Y. Oct. 5, 2012) (internal citation and quotation omitted); *see also* 2019 EMPLOYEE BENEFITS CAS. (BNA) 97998 (4th Cir. 2019) (recognizing that employee that benefits from a lawsuit without contributing to its costs, would be unjustly enriched at the successful litigant's or lawyer's expense).

In common fund cases such as this one, district courts typically use one of two methods for calculating attorneys' fees:

> (1) the percentage method, in which the court awards fees as a reasonable percentage of the common fund; or (2) the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier.

Duncan v. JPMorgan Chase Bank, N.A., No. SA-14-CA-00912-FB, 2016 WL 4419472, at *13 (W.D. Tex. May 24, 2016), *report and recommendation adopted*, No. SA-14-CA-912-FB, 2016 WL 4411551 (W.D. Tex. June 17, 2016) (quoting *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642–43 (5th Cir. 2012) (joining the majority of circuits in allowing district courts the flexibility to choose between the percentage and lodestar methods in common fund cases, with their analyses under either approach informed by the *Johnson* considerations)).

Here, Class Counsel ask this Court to apply the percentage fee method and award approximately 7.6%[1] of the Total Settlement Value as attorneys' fees.

[1] The requested fee award of $6,730,000.00 is 7.6% of the Total Settlement Value of $88,413,036.00 and 40% of the Total Cash Settlement Amount of $16,825,000.00.

B. THE "PERCENTAGE OF THE FUND" METHOD IS THE APPROPRIATE METHOD FOR DETERMINING COMMON BENEFIT FEES

Rule 23 requires that district courts presiding over a class action "must scrutinize the attorneys' fees of class counsel to assure that they are reasonable." *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d 456, 497 (E.D. La. 2020). "Most courts use the percentage of the fund method in awarding fees in common fund class actions." *Di Giacomo v. Plains All Am. Pipeline*, No. CIV.A.H-99-4137, 2001 WL 34633373, at *5 (S.D. Tex. Dec. 19, 2001) (citing *Camden I Condominium Assoc., Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir.1991)("Henceforth in this circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class."); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993) (holding that in common fund class actions, percentage of the fund method is the only permissible method of award of attorney fees)). The Supreme Court has long recognized that the percentage fee method is a proper method of calculating attorney fees in a common fund case. *See id.* (citing *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984); *Boeing Co. v. Van Gemert*, 444 U.S. at 478 ("[A] lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.")).

Prominent judges and practitioners explained why attorney fee awards in common fund cases should be based on the percentage fee method in a 1985 Third Circuit Task Force Report. *Di Giacomo*

v. Plains All Am. Pipeline, No. CIV.A.H-99-4137, 2001 WL 34633373, at *6 (S.D. Tex. Dec. 19, 2001).

The Report identified a number of deficiencies with the lodestar method, including:

> (1) increasing the workload of the judicial system; (2) lack of objectivity; (3) a sense of mathematical precision unwarranted in terms of the realities of the practice of law; (4) ease of manipulation by judges who prefer to calculate the fees in terms of percentages of the settlement fund; (5) encouraging duplicative and unjustified work; (6) discouraging early settlement; (7) not providing judges with enough flexibility to award or deter lawyers so that desirable objectives, such as early settlement, will be fostered; (8) providing relatively less monetary reward to the public interest bar; and (9) confusion and unpredictability in administration.

Id. (citing Task Force Report, 108 F.R.D. 237, 246–49 (1986)). In 2001, a subsequent Third Circuit Task Force issued a draft report again concluding that attorney fee awards in common fund cases should be based on the percentage of fund, rather than lodestar, approach. *Id.* Despite the apparent advantages of the percentage fee method over the lodestar method in common fund cases, the law in the Fifth Circuit is not clear in which method is approved. *In re Combustion, Inc.*, 968 F. Supp. 1116, 1135 (W.D. La. 1997).

That said, district courts in the Fifth Circuit have applied a hybrid approach, "using some combination of a percentage and a 'lodestar check.'" *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 751 (S.D. Tex. 2008) (quoting *In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7–12 Litig.*, 447 F.Supp.2d 612, 629 (E.D. La. 2006) ("Under Fifth Circuit law, the Court has the flexibility to calculate fees based on the percentage method as long as it combines its determination with some analysis under the lodestar method.").

"A cross-check is performed by dividing the proposed fee award by the lodestar calculation, resulting in the lodestar multiplier." *Id.* (quoting *In re AT & T Corp.*, 455 F.3d 160, 164 (3d Cir. 2006)). "The multiplier represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *Id.* (quoting *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004)). The "multiplier need not fall within any predefined range as long as the district court justifies the award." *Id.*

> The lodestar cross-check serves the purpose of alerting the trial judge that when the multiplier is too great, the court should reconsider its calculation under the percentage-of-recovery method, with an eye toward reducing the award. Even when the lodestar method is used only as a cross-check, courts must take care to explain how the application of a multiplier is justified by the facts of a particular case.

Id. (quoting *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998)).

C. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

1. Valuation of Benefit to the Class and Determination of Benchmark Percentage

Class Counsel have negotiated settlement terms immensely favorable to the Class Members. In addition to a Total Cash Settlement Amount of $16,825,000.00[2] to be divided among the Participating Settlement Class Members who timely returned their claim forms, Class Counsel also

[2] Out of the Total Cash Amount will also come Class Counsel's attorneys' fees and costs, the Service Awards for the Representative Plaintiffs, and the Special Master's fees (to the extent they are not covered by the separate $250,000.00 Defendants paid toward the administration of the Settlement Agreement.

obtained significant remedial measures to alleviate (if not eliminate) the emission of black dust from Defendants' facility in the future. Specifically, and as outlined in Exhibit H to the Agreement, Defendants have spent $50,740,967.00 performing Remedial Measures[3] since Plaintiffs filed this lawsuit in May of 2017. *See* 84-1, at Ex. H. Pursuant to the Parties' negotiated Agreement, Defendants have agreed to incur an additional $20,847,069.00 in expense performing further remediation and mitigation projects for the benefit of all Class Members through 2023. *Id.* In total, these remediation expenses add an additional $71,588,036.00 in value to the settlement before this Court. *Id.* Moreover, the remedial benefits apply to the Class Members as a whole, by stopping the problem at its literal source. In total, the Total Cash Settlement Amount and the Remedial Measure Value provide a $88,413,036.00 benefit to the Class Members.[4] Class Counsel seek 7.6% of that amount, or $6,730,000.00, in fees.

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[3] Remedial Measures is defined to include "those past, present, and future improvements, modifications, and procedures that Defendants have taken, are taking, and/or will continue to take to minimize, mitigate, or eliminate the migration of Dust from the Facility offsite, including to the Class Area. *See* ECF No. 86-1, at Ex. H.

[4] It is appropriate to include the Remedial Measure Value in consideration of the common fund because it conveys a concrete benefit on the Class Members. *See In re Heartland Payment Sys., Inc. Cust. Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1080 (S.D. Tex. 2012) (recognizing that the fee award should be based only on benefits delivered to Class Members, including benefits not directly paid to Class Members); *Fitzhenry-Russell v. Coca-Cola Co.*, No. 5:17-cv-00603-EJD, 2019 WL 11557486, at *8 (N.D. Cal. Oct. 3, 2019) (recognizing that the benchmark should include monetary and non-monetary benefits to the class) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2012) ("[W]here the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained . . . courts [may] include such relief as part of the value of a common fund for purposes of applying the percentage method . . . ."); *Harris v. Chevron USA, Inc.*, No. 6:19-cv-00355-SPS, 2020 WL 818764, at *3 (E.D. Okla. Feb. 27, 2020); *Fager v. Centurylink Comm'cns*, No. 14- cv-00870, 2015 WL 13357867, at *3 (D.N.M. June 25, 2015) (collecting cases), *aff'd by* 854 F.3d 1167 (10th Cir. 2016); *see also Boeing Co. v. Van Gemert*, 444 U.S. at 479. (explaining

"No general rule can be articulated on what is a reasonable percentage of a common fund." *Jenkins*, 300 F.R.D. at 307 (quoting *Bethea v. Sprint Commc'ns Co. L.*P., No. 3:12-CV-322-CWR-FKB, 2013 WL 228094, at *3 (S.D. Miss. Jan. 18, 2013)). Nonetheless, it is typical for fee awards to fall between a lower end of 20% and an upper end of 50%. *See id.* Fifty percent "is the upper limit on a reasonable fee award to assure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented." *Torregano v. Sader Power, LLC*, No. CV 14-293, 2019 WL 969822, at *3 (E.D. La. Feb. 28, 2019) (quoting *Combustion, Inc.*, 968 F. Supp. at 1133 (citing *Camden I Condominium Assn. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991)); *see also Wolfe v. Anchor Drilling Fluids USA Inc.*, Cause No. 4:14-cv-1344, 2015 WL 12778393 (S.D. Tex. Dec. 7, 2015) (approving an award of 40% of the common fund). "Further, cases in which courts have found considerably lower percentage awards appropriate tend to be 'mega cases,' with common funds exceeding $100 million." *See Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 791 (N.D. Ohio 2010), *on reconsideration in part* (July 21, 2010).

Here, the requested benchmark percentage of 7.6% is *well* below percentages awarded in class actions in the Fifth Circuit, even were it to qualify for in the "mega fund" context. The requested

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that, in common fund cases, the fee to be awarded should be based on "the full value of the benefit to each absentee member").

percentage is therefore reasonable and appropriate for this case.[5] The Class Members are receiving a ***significant*** value and will benefit from Defendants' mitigation and remediation activities and—for those Class Members who returned their Claim Forms—a cash award ranging from $500.00 to over $10,000.00. *See* ECF No. 87-1.

2. The Johnson Factors Reinforce the Benchmark Percentage

Upon determining the appropriate benchmark percentage, district courts apply the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, to determine whether an adjustment to the benchmark is warranted. *See In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d at 500.

a. Time and Labor Required

Class Counsel have logged approximately 9,468.5 hours of work litigating these complex consolidated actions over the previous five years. *See* Declaration of Austin Anderson, filed at ECF No. 87-2 at p. 7; *See* Declaration of Stuart White, filed at ECF No. 87-8. Litigating complex environmental class actions like this one involves scrutiny of hyper-fact intensive issues that require a large time investment and substantial discovery and expert evaluation, in addition to counsel's skill and experience.

[5] Even looking only at the Total Cash Settlement Amount, Class Counsel's requested fee of $6,730,000.00 is 40%, and well within the range of acceptable percentages awarded in the Fifth Circuit. *See Torregano v. Sader Power, LLC*, No. CV 14-293, 2019 WL 969822, at *3 (E.D. La. Feb. 28, 2019) (quoting *Combustion, Inc.*, 968 F. Supp. at 1133 (W.D. La. 1997) (citing *Camden I Condominium Assn. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991)).

As previously discussed, Class Counsel aggressively litigated these consolidated actions from the outset to place them in a position for class-wide resolution. Beginning in May 2017, Class Counsel responded to the general outcry from the citizens of the Gregory/Portland area and took decisive legal action—filing a comprehensive class action complaint in this Court. *See* ECF No. 1. Class Counsel then simultaneously began working with the community members to ascertain the full scope of the harm inflicted while pressing Defendants on critical issues related to facility inspections and discovery.

Plaintiffs amended their complaint multiple times to reflect the additional insight obtained through discovery and ensure that all possible avenues of liability were fully explored. To that end, in 2019, Class Counsel filed two additional actions against Defendants seeking separate relief—the *Thurmond* litigation sought certification of a class action for damage to vehicles and the *Abben* litigation included the individual claims of those members who had reached out to Class Counsel as a result of their community outreach.

Over the course of the litigation, the Parties retained a combined twenty-two (22) experts on both liability and damages and engaged in independent and intensive testing and inspections throughout the Class Area. While the expert discovery was underway, the Parties also engaged in full written discovery. Class Counsel propounded comprehensive discovery on Defendants and responded to extensive discovery Defendants served on certain Plaintiffs. In all 360,343 pages documents were

exchanged by the parties through formal discovery and another 84,288 relevant documents were obtained through third parties, either through subpoenas or Freedom of Information Act Requests. These documents were reviewed, analyzed, and indexed in preparation for the ensuing depositions of Defendants' corporate representative(s) and key employees at Defendants' facility, expert evaluation, and with an eye toward trial on the merits. During the discovery period Defendants also took the depositions of thirteen (13) Plaintiffs. The Parties took eighteen (18) depositions, total.

After the close of discovery Class Counsel utilized the comprehensive discovery conducted to date to move for the certification of a Rule 23 class action in the *Thurmond* litigation. It was after Class Counsel formally moved to certify the class that settlement discussions ramped up and the Parties eventually negotiated the Agreement before this Court today. For the five years that Class Counsel has been litigating these consolidated actions against Defendants, there were little to no times of inactivity. Instead, Class Counsel worked relentlessly to position this case for resolution—either through settlement or trial.

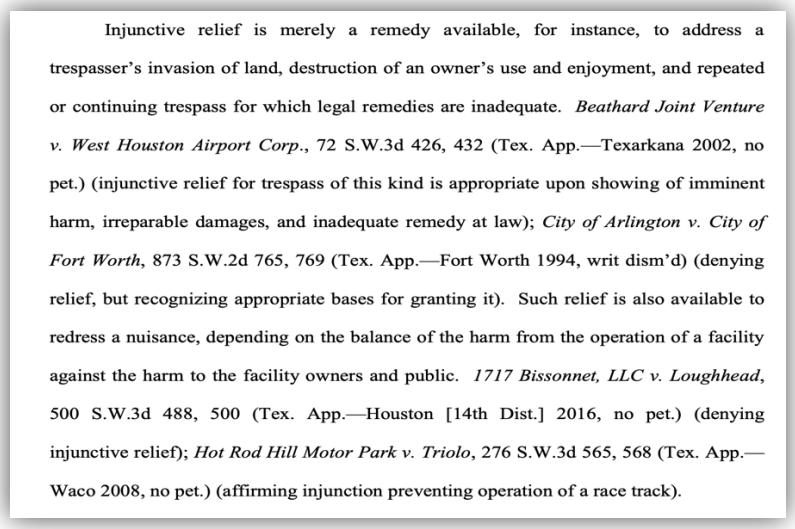
b. Novelty and Difficulty of Question Presented by the Case

The legal issues in this case presented unique questions of law arising in the environmental emission context. Specifically, Representative Plaintiffs, on behalf of the Class Members, sought both injunctive relief and actual damages for Defendants' allegedly tortious actions related to the emission

of black dust from its Facility. Both forms of relief include complex legal hurdles that Class Counsel was (and would have continued to be) required overtime to obtain success on the merits.

Looking first to the requested injunctive relief, Class Counsel defended this Court's jurisdiction to *entertain* the availability of a permanent injunction in light of the highly complex regulatory framework maintained by the Texas Commission on Environmental Quality ("TCEQ"). *See* ECF Nos. 58–59 (Defendants' Motion to Dismiss or Alternatively Stay, Plaintiffs' Permanent Injunction Claim and Memo in Support); ECF No. 65 (Plaintiffs' Response to Defendants' Motion to Dismiss/Stay); ECF No. 66 (Defendants' Reply) and ECF No. 67 (Order denying Defendants' Motion).

There, this Court addressed the Parties weighty legal arguments including challenges to its jurisdiction, ripeness, and the availability of injunctive relief. *See* ECF No. 67. In finding that Plaintiffs' claims for injunctive relief were viable, the Court recognized that they encompassed many of the legal arguments Plaintiffs made since the inception of the lawsuit—changing only the measure of relief sought.



> Injunctive relief is merely a remedy available, for instance, to address a trespasser's invasion of land, destruction of an owner's use and enjoyment, and repeated or continuing trespass for which legal remedies are inadequate. *Beathard Joint Venture v. West Houston Airport Corp.*, 72 S.W.3d 426, 432 (Tex. App.—Texarkana 2002, no pet.) (injunctive relief for trespass of this kind is appropriate upon showing of imminent harm, irreparable damages, and inadequate remedy at law); *City of Arlington v. City of Fort Worth*, 873 S.W.2d 765, 769 (Tex. App.—Fort Worth 1994, writ dism'd) (denying relief, but recognizing appropriate bases for granting it). Such relief is also available to redress a nuisance, depending on the balance of the harm from the operation of a facility against the harm to the facility owners and public. *1717 Bissonnet, LLC v. Loughhead*, 500 S.W.3d 488, 500 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (denying injunctive relief); *Hot Rod Hill Motor Park v. Triolo*, 276 S.W.3d 565, 568 (Tex. App.—Waco 2008, no pet.) (affirming injunction preventing operation of a race track).

Id. at p. 3. While a decision regarding the propriety of a permanent injunction was nullified by the Parties' settlement, the subsequent remedial measures Defendants have implemented (and have agreed to implement in the future) provide much of the injunctive relief sought by Plaintiffs. *See* ECF No. 84-1, Ex. H.

In addition to their claim for a permanent injunction, Plaintiffs also sought to recover damages for their trespass and nuisance claims. The Texas Practice Series on Environmental Law highlights some of the complexities Plaintiffs would face navigating these claims to their conclusion—and potentially defending their verdict on appeal. *See generally* 46 TEX. PRAC., ENVIRONMENTAL LAW § 32:8 (2d ed.).

To prevail on their nuisance claims (and uphold their damages on appeal), Plaintiffs would have to show that Defendants "actually intended or desired to create an interference on the [Plaintiffs'] land that they claim was a nuisance or actually knew or believed that an interference would result." *See*

Aruba Petroleum, Inc. v. Parr, No. 05-14-01285-CV, 2017 WL 462340, at *2 (Tex. App.—Dallas, Feb. 1, 2017, no pet.). (reversing a jury verdict and rendering in favor of defendants upon finding that there was no legally sufficient evidence that the defendant intentionally created or maintained a condition that interfered with the plaintiffs use and enjoyment of their property).

There is also a distinction between permanent and temporary nuisances that affects the measure of available damages. "Generally, when a nuisance is temporary, the landowner may recover only lost use and enjoyment that has already accrued. Conversely, if a nuisance is permanent, the owner may recover lost market value—a figure that reflects all losses from the injury, including lost rents expected in the future. *See, e.g., Crosstex N. Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 610 (Tex. 2016) (internal quotations omitted). While Plaintiffs plead their claims in the alternative, in the likely event a jury found Defendants' operations create permanent nuisance, Plaintiffs would be left trying to establish their "lost market value" as their measure of damages, which may prove difficult due to the rise of home values in the real estate market. *See id.*

The path to success on Plaintiffs' trespass claims was equally fraught with legal pitfalls. In Texas, trespass is defined as "an intentional physical interference with the exclusive possession of property." 46 TEX. PRAC., ENVIRONMENTAL LAW § 32:8(c). "Trespass is a tort that requires a showing of intent before a court will impose liability. *Id.* Although the Fifth Circuit has held that, under Texas law, contamination of property by emission of airborne particulates constitutes a trespass, subsequent

legislation required plaintiffs to prove "actual and substantial damages," in addition to the other elements of trespass in order to prevail on a trespass claim where the trespass was caused by "migration or transport of any air contaminant." *Id.*

In sum, the complexity of the legal issues (even aside from the viability of the pending class action) in this litigation support the requested attorneys' fee award.

c. Skill Required and Ability of Plaintiffs' Counsel

Class Counsel are well-versed in litigating complex representative actions, including class actions, across the United States. *See generally* ECF Nos. 87-2 and 87-8. Class Counsel thereby had the requisite reputation, skill, and specialized experience to perform the legal services required in this complex litigation. Class Counsel are comprised of three law firms: ANDERSON ALEXANDER, PLLC, LILES WHITE PLLC, and FRAZER LAW, PC. Each firm brought a unique skill-set and to the table, to the benefit of the Class Members.

ANDERSON ALEXANDER, PLLC focuses its practice on representing clients in complex multi-party and representative class and collective actions across the United States. As such, the attorneys at ANDERSON ALEXANDER have extensive experience litigating class and mass actions against corporate defendants on behalf of individuals and are aware of the unique challenges that arise in large representative actions. Mr. Austin Anderson, a founding partner of ANDERSON ALEXANDER, PLLC, was intimately involved in the *In re GMO Rice Litigation* pending in the Eastern District of Missouri.

As one of the trial counsel representing thousands of farmers, Mr. Anderson obtained a remand of his client's claims to Arkansas state court where he, and the trial team, tried to verdict two of the bellwether cases and subsequently settled the litigation as a mass action. *See id.* The unique skills and experiences of the ANDERSON ALEXANDER, PLLC trial team are set forth more fully in Mr. Andersons' declaration, on file with this Court. *See* ECF No. 87-2.

Likewise, LILES WHITE, PLLC has a national reputation for trying—and winning—complex cases against sophisticated defendants. Founded in 2016, LILES WHITE, PLLC is a plaintiff's-side law firm that specializes in representing individuals in catastrophic injury and complex litigation. *See* ECF No. 87-8. What sets LILES WHITE, PLLC apart from other firms is its history of success in high-stakes litigation. Since its inception in 2016, LILES WHITE, PLLC has secured over fifty (50) settlements and/or verdicts over one million dollars on behalf of its clients. *See id.* The firm has what it takes to get large and complex cases to trial and has a proven track-record of success once in front of the jury. *See id.* The specific skills and experiences of the LILES WHITE PLLC trial team are more fully set forth in Mr. White's declaration, on file with this Court. *See id.*

FRAZER LAW, PC has also provided invaluable assistance in the litigation of this matter. FRAZER LAW, PLLC specializes in handling complex representative actions, including environmental contamination cases, across the nation. This background ensures that the attorneys at FRAZER LAW, PC and fully understand the preliminary work that must be performed at the discovery level, through

experts and otherwise, to ensure the affected Class Members' claims both reach, and persuade, a jury of their peers. The specific skills and experiences of the FRAZER LAW, PC trial team are more fully set forth in Exhibit A to Austin Anderson's declaration, on file with this Court at ECF No. 87-3.

d. Preclusion of Other Employment by the Attorneys due to Acceptance of the Case

Class Counsel undertook significant risk in agreeing to represent Plaintiffs in this case. Environmental contamination cases involving injunctive claims and claims of nuisance and trespass are complicated and time-consuming matters on an individual level. Once the additional procedural challenges of bringing these actions on a representative basis are included, the time commitment is exponentially increased. Any attorney undertaking these types of cases must be prepared to make tremendous investments of time, energy, and financial resources in order to appropriately pursue them. Class Counsel is comprised of attorneys from small firms who are limited by time and cannot pursue all viable claims. Instead, they must necessarily choose which clients they will be able to represent, considering the time and expense inherent in every case. Here, Class Counsel's investment of over nine thousand hours in this litigation further supports this point. This factor weighs in favor of approval of the fee award. *See Claudet*, 2020 WL 3128611, at *12.

e. The Undesirability of the Case

Likewise, "[t]he point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Jenkins,* 300 F.R.D at

309 (quoting *Skelton v. Gen'l Motors Corp.*, 860 F.2d 250, 258 (7th Cir.1988), cert. denied, 493 U.S. 810 (1989)). "Undesirability" and relevant risks must be evaluated from the standpoint of plaintiffs' counsel as of the time they commenced the suit—not retroactively, with the benefit of hindsight. *Id.* (citing *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 112 (3d Cir.1976)).

When Class Counsel filed this action, they understood the legal challenges faced in pursuing these consolidated matters. Had the Parties not reached this settlement agreement, it is possible that the efficiencies obtained in litigating this lawsuit on a representative basis would have disappeared and the class would devolve into hundreds, if not thousands, of individual actions. The scope of the class aside, Class Counsel also faced a complex and convoluted body of state law applicable to their claims. Counsel confronted these issues without any assurances as to how the Court would rule when they accepted the case and the risks that accompanied it.

f. Customary Fee Awards in Similar Cases

Plaintiffs' requested fee award is on par with other fee awards in similar related cases, as addressed above in setting the benchmark percentage. *See supra* § III.C.1

g. Plaintiffs' Contingency Fee Agreement

Class Counsel prosecuted this action entirely on a contingent fee basis. *See* ECF Nos. 87-2 and 87-8. In undertaking to prosecute this complex class action on that basis, Class Counsel assumed a

significant risk of nonpayment or underpayment. *See id.* Class Counsel has also carried all litigation related expenses in this matter for the past five years. In a complex representative action such as this one, involving allegations that Defendants' emissions harmed Plaintiffs and Class Members, the expenses have been significant. Specifically, to date Class Counsel have incurred approximately $766,387.00 in out-of-pocket expenses. *See id.* In the event Plaintiffs did not prevail, Class Counsel would not only loose the thousands of hours of time invested in this matter, but also hundreds of thousands of dollars. *Id.*

"Recognizing the contingent risk of nonpayment in [class action] cases, courts have found that class counsel ought to be compensated . . . for risk of loss or nonpayment assumed by carrying through with the case." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 859–60 (E.D. La. 2007) (citing *In re Combustion, Inc.*, 968 F.Supp. at 1132); *see also King v. United SA Fed. Credit Union*, 744 F. Supp. 2d 607, 618 (W.D. Tex. 2010) (finding the fact that "[c]lass counsel undertook [the] case on a contingency fee basis" relevant to the *Johnson* analysis). "Public policy concerns—in particular, ensuring the continued availability of experienced and capable counsel to represent classes of injured plaintiffs holding small individual claims—support the requested fee." *Jenkins*, 300 F.R.D. at 310.

> Generally, the contingency retainment must be promoted to assure representation when a person could not otherwise afford the services of a lawyer . . . . A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this "bonus" methodology did not exist, very few lawyers could take on the representation of a class

> client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing.

Id. (citing *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 546 (S.D. Fla. 1988), aff'd, 899 F.2d 21 (11th Cir.1990)).

The risks borne by Class Counsel in taking this case have already been discussed. It is uncontroverted that the attorney time spent on this case was time that could not be spent on other matters. *See id.* Consequently, this factor supports the requested fee.

h. Amount Involved and Results Obtained

The negotiated settlement amount provides for a significant financial recovery to the Participating Settlement Class Members and the Remedial Measures that Defendants have undertaken (and will continue to perform) benefits *all* Class Members—and all residents of San Patricio County, Texas. Initially, the financial award for those individuals who returned a claim form is truly outstanding—especially in the class action context. Depending on their proximity to Defendants' Facility and the duration of time the resided in the Class Area, Participating Settlement Class Members are set to receive anywhere from $500.00 to over $10,000.00 for their claims, with even higher awards issued by the Special Master upon a finding of exceptional circumstances. *See* ECF No. 87-1. Even the average award for the Participating Settlement Class Members has them set to receive over $5,000.00.

In addition to the financial awards for the Participating Settlement Class Members—all Class Members will benefit from Defendants remedial activities, as outlined in Exhibit H to the Settlement Agreement. The financial expense to Defendants in effectuating these changes totals over $71,000,000.00, and is a benefit shared equally amongst all Class Members.

In sum, the $88,413,036.00 Total Settlement Value constitutes an amazing result in this action and supports the requested award of attorneys' fees.

i. Any Time Limitations Imposed by the Client or the Circumstances

Class Counsel acted with utmost urgency in both bringing this matter before the Court and aggressively litigating it. The continuous nature of Defendants' emissions, coupled with Plaintiffs' challenges using and enjoying their property, required Class Counsel to act decisively when the claims arose. Class Counsel did not wait to bring these claims despite having years on Plaintiffs statutes of limitations. Instead, Class Counsel filed this action immediately in their efforts to eliminate, or at a minimum, mitigate, the damages suffered by Plaintiffs and the Class Members. As such, the time limitations imposed as a result of the circumstances support Plaintiffs requested fee award.

3. Lodestar Cross-Check

Out of an abundance of caution, Class Counsel address the lodestar cross check, although it is not explicitly required by the Fifth Circuit. Instead, this Court has the discretion to award the requested fee amount by analyzing the percentage of the fund method in conjunction with a rigorous

application of the Johnson factors, alone. *See Dell, Inc.*, 669 F.3d at 644 (determining "the district court did not abuse its discretion by using the percentage method with a meticulous Johnson analysis").

Here, Plaintiffs will confirm the reasonableness of the requested fee award by "cross-check[ing] the benchmark percentage with an abbreviated lodestar analysis." *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d at 503 (citing *In re Oil Spill by the Oil Rig Deepwater Horizon, MDL 2179*, 2016 WL 6215974, at *19 (E.D. La. Oct. 25, 2016)) (citing *In re Vioxx*, 760 F. Supp. 2d at 659) ("[T]he loadstar cross-check is a streamlined process, avoiding the detailed analysis that goes into a traditional lodestar examination."); *Claudet*, 2020 WL 3128611, at *13 (same).

"The lodestar is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate for the work performed." *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d at 503; *Claudet*, 2020 WL 3128611, at *13. Courts look to the "prevailing community standards for attorneys of similar experience in similar cases" in weighing in on the reasonableness of the requested rates. *See In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d at 503; *Claudet*, 2020 WL 3128611, at *13.

In this legal community, the market rates for complex litigation—like class actions such as this one—support an hourly rate of upwards of $600.00 for partners, and upwards of $350.00 for junior associate attorneys. *See* ECF Nos. 87-2 and 87-4 through 87-6 and 87-8. ANDERSON ALEXANDER, PLLC and LILES WHITE, PLLC are law firms with their principle office located within this District

and Division. The rates requested herein are in line with the rates customarily charged in this area for large complex representative actions such as the one before this Court. *See id.* Further, these rates are consistent with the rates alleged by other practitioners in State of Texas and have been approved by other Courts to have weighed in on the issue. *See id.* Accordingly, Class Counsel's respective hourly rates are reasonable considering the skill and expertise of the attorneys involved, and are additionally supported by awards from multiple courts throughout the United States. *See id.*

Class Counsel has logged a total of 9,468.5 hours of attorney time during the pendency of the litigation. *See id.* As discussed above, and supported in the Declaration of Austin Anderson and Stuart White, Class Counsel performed extensive work on these consolidated cases over a five-year period to position this matter for the settlement currently before the Court.

Class Counsel suggests using an hourly rate of $600.00 per hour for the hours worked by the partners on the file, and note that it is a rate commensurate with their experience and knowledge and is justified considering their specialized knowledge and nationwide expertise for which there is no applicable prevailing community standard in this District. *See id.* Class Counsel suggests using a rate of $450 to $500 per hour for hours worked experienced associated attorneys, and $350.00 per hour for hours worked by junior associates, as they are reasonable rates for attorneys with comparable skill and experience in the Southern District of Texas. *See id.* Class Counsel lastly suggests that $125.00 to

$150.00[6] per hour is an appropriate rate for the work performed by paralegals and law clerks. *See id.* The following chart provides a summary of the time expended in this matter by each time keeper.

Time Keeper	Hours	Rate	Total
Austin Anderson	2000	$ 600.00	$ 1,200,000.00
Clif Alexander	750	$ 600.00	$ 450,000.00
Lauren Braddy	1,013	$ 500.00	$ 506,500.00
Cliff Gordon	1360	$ 500.00	$ 680,000.00
Carter Hastings	625	$ 400.00	$ 250,000.00
John Garcia	10	$ 350.00	$ 3,500.00
Frances Lopez	1979	$ 150.00	$ 296,850.00
Stuart White	600	$ 600.00	$ 360,000.00
Kevin Liles	475	$ 600.00	$ 285,000.00
Rob George	31.5	$ 450.00	$ 14,175.00
Roe Frazer	424	$ 600.00	$ 254,400.00
Dan Beasley	143	$ 500.00	$ 71,500.00
Paralegal	58	$ 125.00	$ 7,250.00
	9468.5		$ 4,379,175.00

See ECF No. 87-2.

The time expended by Class Counsel was in the furtherance of tasks that were both reasonable and necessary for the prosecution (and successful resolution) of the Class Members' claims. Class Counsel has not included time spent researching and drafting motions that were not successful before the Court. Neither has Class Counsel included time on matters not pertinent to the merits of this lawsuit. *See id.* Class Counsel further contends that these hours are justified by the complexity of the case and nature of the work performed, which included extensive investigation, discovery, correspondence, motion practice, and negotiations. Applying these rates to the hours billed, the

[6] Frances Lopez is a senior paralegal employed by ANDERSON ALEXANDER, PLLC.

lodestar method reveals an award of $4,379,175.00. Utilizing the lodestar cross check, the lodestar confirms a multiplier of 1.54 (dividing the requested fee award by the applicable lodestar), and this small multiplier is well supported by the application of the *Johnson* factors, addressed above. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d at 752 (recognizing authority that "multiples from one to four are frequently awarded in common fund cases when the lodestar method is applied")

This Court has previously noted that "[t]he lodestar analysis is not undertaken to calculate a specific fee, but only to provide a broad cross check on the reasonableness of the fee arrived at by the percentage method." *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 424 F. Supp. 3d at 498 (quoting *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d at 652). Because the lodestar has confirmed that the fee arrived at utilizing the percentage method is reasonable, Plaintiffs ask this Court to approve the requested fee amount of $6,730,000.00

D. COSTS/LITIGATION EXPENSES

"Typically, class action counsel who create a common fund for the benefit of the class . . . are entitled to reimbursement of reasonable litigation expenses from that fund." *Id.* at 504 (*citing In re Pool Prod. Distribution Mkt. Antitrust Litig., MDL 2328*, 2015 WL 4528880, at *18 (E.D. La. July 27, 2015)). "The reimbursement of costs and expenses seeks not to reward attorneys for their work but restore the status quo." *Id.* However, the court must review the estimated expenses for which reimbursement

is sought and determine whether the total requested sum is fair to the settlement class to ensure the requested expenses do not "cannibalize the entire . . . settlement." *Id.*

In addition to the reasonable and necessary attorneys' fees, addressed above, Class Counsel have incurred additional expense in the litigation of this matter. *See* ECF No. 87-2. To date, the expenses in this case total $766,387.00. *Id.* A detailed breakdown of these expenses, by category, is included in Austin Anderson's declaration. *Id.*

Voestalpine Case Expenses

Description	Expenses
Filing /Service Fees	$2,587.16
Copies / Postage / Faxes	$6,630.37
Legal Research / PACER / Secretary of State	$1,096.15
Client Outreach	$1,027.86
Experts	$547,142.51
Mediation / Mediator	$37,822.68
Travel Expenses	$31,684.51
Discovery and Data Management	$138,395.76
TOTAL	**$766,387.00**

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These expenses were reasonably and necessarily incurred and advanced the settlement of this matter in favor of the Class Members. *See id.*

IV.
CONCLUSION

Plaintiffs have submitted evidence before this Court in support of the attorneys' fees and costs requested herein, and have established that 7.6% of the common benefit fund is appropriate based on the blended method. Plaintiffs respectfully pray that this Court recognize their significant and superior contributions to the common benefit fees and enter the requested fee award.

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with Defendants' counsel of record and they are not opposed to the filing of this Motion or the relief requested herein.

/s/ *Austin Anderson*
Austin Anderson

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2022, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ *Austin Anderson*
Austin Anderson