IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

LAURIE FREEMAN, SHARON MOCKMORE, BECCY BOYSEL, GARY D. BOYSEL, LINDA L. GOREHAM, GARY R. GOREHAM, KELCEY BRACKETT & BOBBIE LYNN WEATHERMAN, Plaintiffs, v. GRAIN PROCESSING CORPORATION, Defendant.	)	Case No. LACV021232

JOINT MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT[1]

Pursuant to Iowa Rule of Civil Procedure 1.271, Laurie Freeman, Kelcey Brackett, Bobbie Lynn Weatherman, Sharon Mockmore, Gary and Rebecca Boysel, and Gary and Linda Goreham (Plaintiffs) on behalf of the class (Class or Class Members), and Grain Processing Corporation (GPC or Defendant), move jointly for final approval of a proposed class action settlement (proposed Settlement). (Ex. A). Plaintiffs have contemporaneously filed a separate motion for approval of their attorneys' fees and costs and enhancement awards herewith.

The proposed Settlement would resolve a long and hard-fought class action over emissions from GPC's Muscatine corn wet-milling plant (GPC Plant or Plant), which Plaintiffs claim GPC had operated negligently and constituted a nuisance and trespass throughout the Class Area. Reached at arms-length in a court-ordered mediation on the eve of trial, the proposed Settlement would require both meaningful monetary relief for Class Members and affirmative measures to minimize air pollution going forward. In exchange, GPC would receive certain

[1] All capitalized terms not otherwise defined in this Motion shall have the meaning set forth in the Settlement Agreement.

releases from all Class Members, as discussed in detail below. Class Counsel recommend the proposed Settlement for the Court's approval as a strong resolution of the parties' claims and defenses—and an excellent result for the Class. GPC fully supports the proposed Settlement.

I. HISTORY OF THE LITIGATION

GPC has owned and operated a corn wet-milling plant in Muscatine's South End since the 1950s. The eight representative Plaintiffs, residents of neighborhoods surrounding the Plant, brought this class action in April 2012. An amended petition filed in March 2013 defined the putative class to include all Muscatine residents who had lived within a mile and a half from the Plant since April 24, 2007. The Plaintiffs claimed that, by releasing smoke, odor, and haze into the air without using available control technologies to reduce them, GPC was unreasonably interfering with their right to full use and enjoyment of their properties. Plaintiffs claimed damages on behalf of the Class based on lost use and enjoyment, and in addition, the injunctive relief necessary to prevent its continuation going forward.

The litigation was factually and procedurally complex, and hotly contested. The parties fought over novel issues of procedural and substantive law, including among others: (1) whether the federal Clean Air Act had preempted, or Iowa Code Ch. 455B had displaced, Plaintiffs' state common law claims; (2) whether the variability of the harms suffered by residents across properties and over time, or personal differences among the residents, barred class certification under the Iowa Rules; (3) whether, at trial, Plaintiffs were entitled to use testimony from scores of residents from around the class area to prove class-wide harm; (4) whether Plaintiffs were entitled to use a formula to approximate class members' harms and apportion damages among the class; (5) whether GPC could claim it had acquired a permanent, prescriptive easement to emit the smoke, odor, and haze onto class area properties; (6) whether GPC's relative influence

in the community, in combination with potential jurors' personal knowledge of the facts of the case, warranted a change of venue for trial; and (7) whether and how a post-trial administrative claims process would proceed.

The adversarial and contentious nature of the litigation was evident from the outset. Beginning in May 2012, just a week after the action commenced, GPC brought a series of motions to disqualify original counsel and restrict early discovery[2] and then moved, in December 2012, for summary judgment on preemption grounds. This Court granted the motion in April 2013, dismissing the case in its entirety. Plaintiffs appealed. The Iowa Supreme Court reversed in June 2014, *see Freeman v. Grain Processing Corporation*, 848 N.W.2d 58 (2014), and remanded.

Class-certification proceedings followed the remand in 2014. The parties exchanged scores of interrogatories. GPC produced many hundreds of thousands of pages of documents in response to Plaintiffs' demands. Plaintiffs presented reports from three experts. GPC responded with reports from seven experts. On-site inspections were conducted at both the GPC Plant and the Plaintiffs' homes. Roughly 20 depositions were taken—GPC deposed the representative Plaintiffs, two absent class members, and Plaintiffs' experts; Plaintiffs deposed six GPC executives and engineers, GPC's experts, and the IDNR (some over multiple days). Plaintiffs sought, and moved to compel, discovery about GPC's profits.[3]

Plaintiffs moved for class certification in April 2015. After full briefing and a hearing, the Court granted the motion in October 2015. GPC appealed the ruling, but the Iowa Supreme

[2] In July 2012, the Court revoked the *pro hac vice* admission of original lead class counsel, Texas attorney Tony Buzbee. Thereafter, in late 2012, original Iowa counsel James C. Larew brought in Miner, Barnhill & Galland (MBG) to take on that role.

[3] While this substantive discovery proceeded, Plaintiffs were forced to move for the Court's protection against improper solicitation of class members by a former co-counsel of Plaintiffs, whose activity the Court enjoined in August 2015.

Court unanimously affirmed the class certification in May 2017. *Freeman et al. v. Grain Processing Corp.*, 895 N.W.2d 105 (2017).

The Court set the case for a July 2018 trial and approved Iowa R. Civ. P. 1.266 Notice giving Class Members an opportunity to opt out. A full Notice (Ex. B) was direct-mailed to thousands of class-area residents and former residents; short-form print and broadcast Notices were given as well. In December 2017, the Court ordered a corrective Notice to remedy confusion growing from the dissemination, by lawyers working with Plaintiffs' former co-counsel, of a GPC offer to settle with residents who opted-out.[4]

Merits discovery began in earnest in late 2017. The parties exchanged and reviewed hundreds of thousands of additional pages of documents. Plaintiffs identified and produced reports from four merits experts. GPC identified and produced 12 reports from 17 experts. From December 2017 through early June 2018, the parties deposed a total of 87 lay-witnesses and 19 experts. The Plant and some of the Plaintiffs' homes were inspected a second time, along with the homes of several of the class-member witnesses. The parties litigated motions to compel and quash discovery. In the final months before trial, Plaintiffs moved for a change of venue, which

[4] A substantial number of residents chose to opt-out and take the settlement offered by GPC rather than risk trial. In return for a cash payment, these settlements required the residents to release virtually all claims arising from GPC's operations (in perpetuity), to stipulate that GPC had acquired a prescriptive easement to continue its operation, and for those residents who were owners, to give GPC the right to record permanent easements on their deeds. A smaller number of those opt-outs opted back in following the Corrective Notice.

the Court granted. GPC brought six new summary judgment motions, which Plaintiffs resisted in full briefing.[5] The parties filed competing trial plans. GPC moved to decertify the class.[6]

As of the court-ordered mediation (which began, officially, on June 1, 2018),[7] the decertification motion and five of the six summary judgment motions were still pending.[8] Discovery, including depositions of the parties' damages experts, had just come to an end. The parties' trial briefs, trial preparation, and motions *in limine* were underway.

At the mediation, both parties recognized that in addition to proving liability, proving Class Members' damages would be pivotal at trial, and hotly contested. The claimed losses of use and enjoyment were variable from property to property and (as a matter of law) not susceptible to precise calculation. The parties and their experts had developed competing damages models to present to the jury at trial; and the possibility remained for the jury to reject all damages models and require individual assessment. *See infra.* This created uncertainty for both parties about how members of the jury would evaluate damages if they found GPC liable.

Thus, as mediation began in the midst of preparations for trial, counsel on both sides were well informed about the wide range of potential outcomes and the potential risks and

[5] Specifically, GPC asked the Court to enter summary judgment (1) dismissing Plaintiffs' nuisance claims for lack of evidence to prove the special damages required for a public nuisance; (2) dismissing Plaintiffs' negligence claims for lack of evidence linking emissions caused by alleged negligent acts to Class Members' harms; (3) dismissing Plaintiffs' trespass claims for lack of evidence proving continuous pollutant deposits throughout the class area; and (4) dismissing damages arising from health harms for lack of evidence to demonstrate such harms on a class-wide basis. GPC also sought partial summary judgment on all of Plaintiffs' claims based on (5) the statute of limitations, and (6) prescriptive easement law.

[6] GPC argued that the Class must be decertified because individual issues were far more pervasive than was known at the time of class certification, and because legally cognizable harms caused by GPC, if they existed, could not be proven on a class-wide basis.

[7] The parties had had informal settlement talks at different junctures in the litigation in 2015 and 2016, and an unsuccessful mediation in 2017 after the Iowa Supreme Court affirmed the class certification ruling. In the weeks leading up to the June 1, 2018 mediation, the mediator began "shuttle-mediation" by phone and email.

[8] The Court had denied the summary judgment motion based on prescriptive easement and granted Plaintiffs' cross-motion to bar that defense at trial.

rewards the trial would bring. During a weeks-long series of in-person and telephone sessions with the Mediator, the parties wrangled over the big issues: total dollars to be contributed to a settlement fund; how those dollars would be allocated among claimants; the terms of release; the claims process; and measures to reduce future emissions and odor. In late June, the parties informed the Court that they had reached agreement in principle. The Court suspended the trial date to allow them to further negotiate the details. Negotiations over the final settlement terms, settlement notice, claims protocol, and the claim forms took the parties another three months; but final terms of Settlement were finally reached, and submitted to the Court, on October 8, 2018. Plaintiffs moved for preliminary approval on October 12. The Court granted the motion on October 22, and scheduled hearing on final approval for February 5, 2019.

II. STANDARD OF REVIEW

An Iowa class action may not be settled without the approval of the Court, after hearing. Iowa R. Civ. P. 1.271(1). In considering whether to grant a settlement final approval, the Court must consider "whether the settlement is fair, reasonable and adequate." *City of Dubuque v. Iowa Tr.*, 587 N.W.2d 216, 222 (Iowa 1998) (citations omitted).

Iowa courts have looked to federal authority for guidance on what the reviewing court should consider in deciding these questions. *See, e.g., Wellmark, Inc. v. Iowa Dist. Court for Polk Cty.*, 890 N.W.2d 636, 646 n.6 (Iowa 2017). While there is variation across federal circuits, the Eighth Circuit lists four relevant factors: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *See Marshall v. National Football League*, 787 F.3d 502, 508 (8th Cir. 2015).[9] While other Circuits' lists are

[9] "The single most important factor in determining whether a settlement is fair, reasonable, and adequate is

somewhat longer,[10] the factors all boil down to the same question: *"*whether the settlement is in the best interest of those whose claims will be extinguished." *Zaber v. City of Dubuque*, 902 N.W.2d 282, 287 n.5 (Iowa Ct. App. 2017) (quoting *Iowa Trust*, 587 N.W.2d at 222). Courts generally agree that where a class settlement is "reached in arms-length negotiations between experienced capable counsel after meaningful discovery," there is a "presumption of correctness." *Manual for Complex Litigation 3rd*, §30.42 (1995).[11] Indeed, "[s]ettlement is the offspring of compromise." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998). "The question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *Id.* Courts thus avoid judging settlement in such cases "against a hypothetical measure of what might have been achieved," as "it is the very

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a balancing of the strength of the plaintiffs' case against the terms of the settlement." *Id.* This factor is addressed fully in Section IIIB, *infra.* It strongly supports approval of the Settlement. Two others of the four—the complexity and expense of further litigation," and "the amount of opposition to the settlement"—also support the Settlement. They are addressed, respectively, in Section IIIB and Section IV. The fourth—"the defendant's financial condition"—is neutral. While the Settlement imposes a significant financial burden on GPC, GPC has the resources to meet it.

[10] Other Circuits consider: (1) whether the settlement is the result of arms-length negotiations; (2) the stage of the litigation proceedings at the time of settlement; (3) the opinion of experienced counsel; (4) the range of possible recovery; (5) the risk of maintaining class action status throughout the trial; (6) the amount offered in settlement; and (7) the presence of a governmental participant. *See In re Lorazepam,* 205 F.R.D. at 375; *In re Vitamins Antitrust Litig.,* 305 F.Supp.2d 100, 104 (D.D.C. 2004); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 194 (D.D.C. 2011); *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006); *Gen. Elec. Capital Corp. v. Lease Resolution Corp*., 128 F.3d 1074, 1082 (7th Cir. 1997); *Bennett v. Behring Corp.,* 737 F.2d 982, 986 (11th Cir.1984); *Greco v. Ginn Dev. Co., LLC*, 635 F. App'x 628, 632 (11th Cir. 2015)*; Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 293 (5th Cir. 2017); *Almond v. Singing River Health Sys.*, 138 S. Ct. 1000(2018), citing, *Reed v. Gen. Motors Corp*., 703 F.2d 170, 172 (5th Cir. 1983); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

[11] *See Meijer,* 565 F.Supp.2d at 55 (internal citations omitted); *Jones v. Singing River Health Servs. Found.*, 865 F.3d 285, 293 (5th Cir. 2017); *Almond v. Singing River Health Sys*., 138 S. Ct. 1000, 200 L. Ed. 2d 252 (2018), citing *Reed v. Gen. Motors Corp*., 703 F.2d 170, 172 (5th Cir. 1983); *Gatreau v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982); *Trombley,* 759 F.Supp.2d at 28; *Greco v. Ginn Dev. Co., LLC,* 635 F. App'x 628, 632 (11th Cir. 2015); *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Cotton,* 559 F.2d at 1330; *Officers for Justice*, 688 F.2d 615, 625 (9th Cir. 1982); *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995).

uncertainty of outcome … that induce[s] consensual settlements." *Officers for Justice*, 688 F.2d at 625.

In this case, the proposed Settlement was negotiated at arms-length, under the supervision of an experienced mediator, by skilled counsel on both sides, whose deep knowledge of the case was built on nearly seven years of intensive litigation. Continued litigation, counsel also knew, promised a lengthy, complex, expensive, and risky trial with a wide range of outcomes, an extended post-trial administration claims process, and almost certain appeal. Notice of the settlement and the right to object was given. Only one Class member out of many thousands expressed an objection to its terms—strong evidence in favor of the settlement. Indeed, all of these factors, combined, strongly favor final approval.

III. THE SETTLEMENT IS IN THE BEST INTEREST OF THE CLASS MEMBERS' WHOSE CLAIMS IT RESOLVES AND SHOULD BE APPROVED.

The proposed Settlement merits the Court's approval under either the *City of Dubuque v. Iowa* test, which asks whether the settlement is in the best interests of those whose claims will be extinguished, or the Eighth Circuit factors listed above. It provides Class Members with both meaningful compensation for the claimed harms in controversy and injunctive relief to minimize air pollution going forward. Class Counsel—informed by years of extensive discovery on the benefits of the settlement and the risks of continued litigation—strongly recommend it as in the Class Members' best interests.

In exchange for releases described below, the proposed Settlement requires GPC to: (1) deposit $45 million into a Settlement Fund to cover compensation to eligible Class Members who file claims, the expenses of settlement administration, and such attorneys' fees and expenses and enhancement awards as the Court approves; (2) install, within eighteen (18) months following the Settlement's Effective Date, a regenerative thermal oxidizer at GPC's new Dryer

House 5 (at an estimated cost of $1.5 million); and (3) spend no less than $5 million on new pollution control projects to reduce area pollution—including odor pollution—going forward.

A. Payments to Class Members.

The proposed Settlement provides for a meaningful payment to each individual Class Member who files a valid claim.[12] The parties have developed a Settlement Calculator Spreadsheet, which will be used to allocate total settlement proceeds to individual claimants. For any given property, and a given level of Net Proceeds[13] to be distributed, the Settlement Calculator Spreadsheet calculates a Base Payment amount on an individual basis. Based on the Settlement Calculator Spreadsheet, the parties estimate—assuming residency in the Class Area property for the full damages period,[14] roughly 2.5 claimants per residence (based on census data), and the reasonably expected amount of Net Proceeds—that payments will range from roughly $12,000 to $16,000 per individual claimant in areas with the highest modeled pollutant concentrations, to roughly $6,000 to $8,000 per individual claimant in areas with middle-range pollutant concentrations, to roughly $2,000 to $4,000 per individual claimant in areas with lowest-range pollutant concentrations (farthest out from the GPC Plant). *See* Ex. C to the Settlement Agreement (Class Notice), Estimated Ranges Map.[15] Thus, the Base Payment for a household of four who lived at a property in the highest-concentration area for the entire

[12] Claim validity will be determined by a neutral Settlement Administrator.

[13] Net Proceeds is defined in the Settlement as the amount available for distribution after administration expenses, litigation costs, enhancement awards and attorneys' fees have been subtracted from the Settlement Fund.

[14] Payments to Claimants whose residence tenure was for less than the April 2007 through December 2017 damages period would be prorated.

[15] The ranges are calculated for each class area property based on (1) each residential property's relative concentration of pollutants for each year of the 10-year damages period and (2) the parties' reasonable assumptions regarding settlement administration costs, attorneys' fees, litigation costs, and enhancement awards to be paid from Settlement Fund. *See infra*. Each individual who can show he/she lived at a class area property as owner, renter, or the owner/renter's dependent will be eligible for the Base Payment Amount for the property (subject to adjustment), prorated to reflect his/her duration of residency.

damages period would range from $48,000 to $64,000, while the Base Payment for a household of four in the lowest-concentration area would range from $8,000 to $16,000. For all Class Members, these are meaningful awards. For many of those in the highest concentration areas, they could be life-changing.

These Base Payment Amounts are subject to adjustment, depending on the actual number of validated claims. If the total value of actual validated claims is less than the Net Proceeds available to distribute, then the first $2 million of any remainder in the Settlement Fund will be transferred to a jointly administered (by class-members and GPC representatives) Community Fund to be used for the improvement of the neighborhoods in the Close Proximity Class Area, and any excess above that $2 million will be divided equally between the Class (*pro rata* as an increase in their payments) and GPC.[16] Conversely, if actual claims validated are more than the Net Proceeds available to distribute, then payments to class members will be proportionately reduced.

B. Comparison of Settled Payment Outcomes with Possible Outcomes at Trial.

In the course of negotiations, Plaintiffs (and GPC) recognized the wide range of possible outcomes had the trial gone forward—some favorable to the Class, others not. Furthermore, both parties understood that Plaintiffs were *not* in a position to seek an actual aggregate verdict

[16] The reverter of excess funds, if any, to GPC was a subject of contention in the mediation, resolved by reducing GPC's share of the reverter to less than half. This was seen as a reasonable compromise by both Parties. *See McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 642 (E.D. Pa. 2015) (holding that where the reverter was part of the compromise, it did not render the Settlement unfair or unreasonable); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 812-13 (E.D. Wis. 2009) (holding that a reverter clause, even in combination with a "clear sailing provision" that defendant would not object to Class Counsel's fees did not render settlement unfair or unreasonable when viewed against all other relevant factors: i.e., the court concluded that there was no collusion; the settlement was achieved after arms-length negotiation with assistance of a mediator; and settlement funds would go to pay claimants' full damages and a *cy pres* charity); *Mangone v. First USA Bank*, 206 F.R.D. 222, 230 (S.D. Ill. 2001); *Van Gemert v. Boeing Co.*, 739, 737 (2d Cir. 1984) (approving special master's plan to revert unclaimed funds to defendants); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 815-16 (5th Cir. 1969) (deferring to equitable plan for distributing unclaimed class fund).

against GPC, because the data necessary to such a verdict—that is, data on how many Class Members had actually lived at each property during the damages period and for how long—were not going to be available except through a *post-trial* claims process of the type approved by the Iowa Supreme Court in *Anderson Contracting Inc. v. DSM Copolymers, Inc.*, 776 N.W.2d 846, 850, 851 (2009). *See* Plaintiffs' May 25, 2018 Trial Plan at 10-12. As the parties thus understood, Plaintiffs planned to ask the jury (1) for a verdict on liability and the class-wide scope of harm, (2) a special verdict adopting Plaintiffs' model for approximating damages (to guide the inevitable claims process after trial), and (3) a special verdict setting the "direct-hit hour" value that, under Plaintiffs' model, would convert the relative pollution concentrations at each class area property into a monetary award for each claimant. *Id.* In contrast, GPC planned to seek a verdict of no liability, of course, and even if liability were found, either a special verdict declaring that no damages model could be used (necessitating individual damages trials) or a special verdict declaring that GPC's damage model (not Plaintiffs') be used. Moreover, even if the jury adopted Plaintiffs' damage model, GPC planned to use the post-trial claims process to interpose individualized defenses to each Class Member's claim. GPC Trial Plan at 6-25.

The parties realized that these competing damages models could lead to very different outcomes. Plaintiffs' model was designed to account for the fact that properties closest to the Plant tended to experience more damaging impacts than properties farther out; that nuisance-level impacts at each property were felt when the wind was blowing the pollutants in the property's direction. The model used historical meteorological and emissions data to determine the total number of hours each property was downwind from the GPC Plant (*i.e.*, what Plaintiffs referred to as each property's "direct-hit hours") and measure the relative intensity of the

pollutant concentrations at each property during those hours.[17] Thus, the model was intended to estimate how often and how severely each property was "hit" by pollutants from the GPC Plant and, from these estimates, create ratios of impact from property to property. The final step--converting these ratios into dollars—would be left to the jury, who would be instructed to assign a dollar value (*e.g.*, $6/hour, $10/hour, $15/hour, $20/hour) to a direct-hit hour at the hardest hit class area property (the baseline property). The model would automatically apply this value to each class area property, prorating based on the ratios of impact modeled for each one.

GPC disputed all aspects of Plaintiffs' damages model. GPC's model was intended to distribute compensation based on the level of impact to a particular property. The Defendant's model used the same historical meteorological and emissions data, but added numeric "nuisance concentration" thresholds which awarded differing hourly damages amounts depending on the average pollution level modeled at a specific property during that hour. GPC utilized the concept of EPA's air quality index to divide the levels of air quality into four categories of severity denoted red, orange, yellow, and green for each of three pollutants modeled. Hourly dollar values were assigned to each of the color air quality categories such that total damages could be calculated for each property depending on the modeled air quality at that property over the damages period. GPC also eliminated hours where the average individual would not be present and awake at the home to experience the alleged impact of GPC's emissions. GPC's damages experts also suggested additional factors for reducing damages, such as capping any individual's damages at the assessed value of the individual's home, and reducing damages for renters, for smokers, and for residences with limited usable outdoor space. Plaintiffs disputed GPC's damages model.

[17] GPC refutes the accuracy of this approach at determining the relative intensity of pollutant concentrations.

The range of possible outcomes was extremely wide, even under Plaintiffs' model alone. For example, using Plaintiffs' model, a jury verdict setting a low direct-hit hour value of $1 would have yielded close to $15 million in the aggregate, while a verdict setting a $15/hour direct-hit value would have exceeded $200 million. And *GPC's* model, assuming $0/hour, $1/hour, $3/hour and $5/hour for the green, yellow, orange, and red categories respectively (for each of the three pollutants, $PM_{10,}$ $SO_{2,}$ and VOCs, for a total maximum of $15/hour) with numeric thresholds for their application, would have yielded an aggregate total in the range of roughly $4 million to $8 million.

These models and ranges had been fully explored by the parties' counsel, their experts, and their respective focus groups in advance of mediation. The parties both understood the risks were high. Even assuming favorable outcomes for Plaintiffs on the five pending summary judgment motions, the motion to decertify, both sides were aware that at least four outcomes were possible had the case gone to trial, in order of least to most favorite to Plaintiffs:

- Worst-case for Plaintiffs: a jury verdict on liability for the defense—meaning *no* recovery for the Class;[18]

- Second: a verdict for Plaintiffs on liability, but with a special verdict rejecting both parties' damages models. This would have necessitated contested, individual mini-trials without any damages model to guide them and a lengthy process, where some class members might have recovered nothing;

- Third: a Plaintiffs' verdict on liability, and a special verdict adopting *GPC's* damages model. This would have led to damages awards far lower than the amount in the proposed Settlement;

[18] This was a reasonably possible scenario. One challenge in the case for Plaintiffs, in GPC's view, was that the alleged smoke, odor, and haze were known to the class members when they moved into the class area (e.g., "coming to the nuisance"). Plaintiffs had acknowledged that GPC had "priority of location." *See, e.g., Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, I2l (Iowa 2017). While Plaintiffs intended to argue to the jury that it should weigh other factors in favor of a finding of nuisance, the possibility remained that the jury could balance the factors in GPC's favor.

- Best case for Plaintiffs: a Plaintiffs' verdict on liability *and* a special verdict adopting Plaintiffs' damages model. Even under this outcome, however, the jury's assignment of the "direct-hit hour" value was uncertain, which as described above, would make for a wide range of outcomes. The jury was free to assign values at the high-end or low-end of Plaintiffs' range (and possibly beyond). The post-verdict claims process would have created burdens immeasurably greater than the neutrally administered process the parties have negotiated in settlement, as well as risks and delay. GPC had consistently asserted the right to raise individualized defenses to each Class Member's claim (including by contesting credibility through cross examination);[19] and the resolution of the parties' disputes on these issues, having had not yet been considered by the Court or resolved, were uncertain.

In sum, the agreed $45 million Settlement Fund reflects a reasonable compromise on dollars and provides Class Members the opportunity to claim sizeable awards without the risks or delays associated with trial and appeal. Of necessity, the negotiated claims process requires Class Members to substantiate their status as owners, renters, or dependents of an owner/renter—*i.e.*, to demonstrate their class membership—and the tenure of residency on which their Settlement payment depends. But the Claim Form itself, developed with the aid and expertise of the Settlement Administrator, provides plain-language instruction on the types of documents claimants might use, and offers fallbacks for claimants who cannot obtain them: *e.g.*, third-party declarations or other documents the Settlement Administrator deems reliable. In addition, claimants are being given assistance on request—routine assistance from the Settlement Administrator's call-center, and more extensive assistance from Plaintiffs' legal team by phone, email, or in-person meetings in Muscatine. (Plaintiffs' counsel have already spent more than 300 hours on this work and are certain to spend much more as the March 19th claims deadline nears.) Finally, the claims process is not adversarial, as it would have been after a trial. GPC has given

[19] Plaintiffs vigorously disputed GPC's contentions regarding that process.

up any right to "contest" claims in the process.[20] Claims will thus be resolved on paper (not in mini-trials) by the neutral Settlement Administrator, guided by the detailed protocols negotiated as part of Settlement. The Settlement Administrator will notify claimants of any gaps in documentation and give them time to cure. Claimants will have the right to appeal from the Administrator's final determinations if they believe the Settlement Administrator's determination is inaccurate given the documents provided. GPC will have no right of appeal; and like Plaintiffs, its input in the process will be merely advisory.

C. Additional Pollution Controls.

Over the course of the litigation (and especially early 2015 through the end of 2018), GPC spent close to $100 million on a Plant upgrade that modernized the operation and significantly reduced pollution. Following the first phase of the upgrade in 2015, GPC reported major reductions in emissions of PM_{10} and SO_2; and significant reductions in VOCs (the major source of offending odor, according to Plaintiffs). Despite GPC's recent upgrades, however, some Class Members continued to complain that odor pollution persists. Plaintiffs' experts attribute the alleged continued odor problem, largely, to "fugitive" emissions. As part of the proposed Settlement, GPC has agreed to address Class Member concerns about odor emissions by taking affirmative remedial steps, specifically:

- Engage an independent auditor to perform an audit of fugitive air emissions and recommend appropriate measures to reduce them;

- Install a new regenerative thermal oxidizer (RTO) in Dryer House 5 to reduce VOC emissions at an approximate cost of $1.5 million;

[20] GPC has the right to provide comment on the Settlement Administrator's initial determinations and on Class Members' appeals but the comments are only advisory. Only the claimants have the right to formally appeal. *See* Section 6.6 of the proposed Settlement.

- Install, within five (5) years, additional pollution controls to reduce odor at a cost of no less than $5 million; and

- Establish and publicize a telephone "hotline" and website that will allow community members to identify concerns and submit complaints regarding the Plant's impact directly to GPC.

To ensure compliance, the proposed Settlement imposes daily penalties for non-compliance and conditions the release of certain claims on timely completion of the RTO and the additional $5 million investment in pollution control projects. *See infra.* By completing these additional projects, GPC will continue to reduce its emissions and potential impacts on the residents of Muscatine and provide an avenue for the community members to stay informed and provide feedback.

D. Settlement Release.

In exchange for these commitments from GPC—the $45 million Settlement Fund and roughly $6.5 million in affirmative relief—the proposed Settlement provides for a three-part release. First, the Settlement would release GPC from all known and unknown claims that arose on or before the settlement Effective Date based on air emissions from the GPC Plant.[21] This release includes "any claims that were or could have been asserted in the Litigation including, but not limited to, interference with use and enjoyment of property, diminution in property value, damages to property, personal, nuisance level health annoyances, emotional distress, and personal injury claims[.]" Second, the Settlement provides for a narrower release of claims arising during the five (5) years after the Effective Date. Excluded from this release are claims arising after the Effective Date for (1) harm caused by an unexpected and unintended sudden release of contaminants posing a significant threat to human health or the environment; (2) new

[21] *See* Section 13.4.1 of the proposed Settlement.

claims for diagnosable personal injuries; (3) claims for harms arising from substantially different or substantially greater air emissions, releases, or odors than current operations; or (4) statutory citizen-suit claims owing to actions of GPC after the Effective Date.[22] Third, and contingent on GPC's timely compliance with the Settlement provisions requiring it to install the Dryer House 5 RTO and Additional Pollution Controls, the Settlement will release the same categories of claims (limited by the same exceptions) for an additional seven years.[23]

The scope of these releases was the product of compromise. For more than a year prior to the mediation that led to settlement, GPC had conditioned settlement on Plaintiffs agreeing to a class-wide easement to emit in perpetuity—or its equivalent. This was a condition Plaintiffs had refused to entertain.[24] The compromise that broke the parties' impasse in 2018 gives GPC some of the post-settlement "peace" it had sought while at the same time securing substantial future improvements for Plaintiffs (*i.e.*, the RTO and $5 million in additional projects following independent audit).

In framing this compromise, the parties were guided by the Sixth Circuit's decision in *Moulton v. U.S. Steel*, 581 F.3d 344 (6th Cir. 2009). In *Moulton*, City residents had brought a class action against U.S. Steel, alleging nuisance in connection with air pollution generated by a neighboring steel mill. In addition to releasing pre-settlement claims, the proposed settlement released claims for:

> damages, past, present, or future ... under any theory of continuing nuisance, arising out of or relating to the maintenance of any structures, any acts, any operations, or any conditions that existed, began, or were initiated [at the mill] prior to the Settlement Effective Date and that continue for an indefinite period of time [including pollutants] emanating from [the mill] … during all periods of time that any such structures, any such acts, any such operations, or any such conditions continue.

[22] *See* Section 13.4.2 of the proposed Settlement.
[23] *See* Section 13.6 of the proposed Settlement.
[24] GPC had secured such releases in 2017 from the opt-out settlements.

Id. at 348. In other words, the settlement proposed to release claims arising *after* the settlement date and into the future, as long as those emissions arose from structures or operations or conditions that existed *before* the settlement. *Id.* The release in *Moulton* contained several exceptions. It did not bar "claims based solely on a future catastrophic [event];" and it did not bar "claims based solely on future operations by [U.S. Steel] that (i) involve substantially different manufacturing processes and (ii) result in substantially different or greater air emissions, releases, or odors than current or historical operations." *Id.*

The district court overruled an objection that the release of continuing-nuisance claims amounted to an unconscionable release of future tort claims, and the Sixth Circuit affirmed. The release, it explained, prohibited class members from raising continuing-nuisance claims if they "aris[e] out of or relat[e] to the maintenance of any structures ... acts ... operations ... or ... conditions that existed, began, or were initiated at [the mill] prior to the Settlement Effective Date and that continue for an indefinite period of time." *Id.* at 349. Thus, the bar on pursuing future continuing-nuisance claims applied only to claims arising out of conditions that existed prior to the settlement. It did not preclude future continuing-nuisance claims based on emissions from *new* equipment installed after the date of settlement. Nor did it bar future claims based on old equipment, so long as the continuing nuisance is a "new" one or, in other words, so long as the nuisance did not begin (and did not begin "continuing") until after the settlement's Effective Date. *Id.* at 350. By releasing future claims only for pre-settlement conduct, the court held, the agreement sensibly—and reasonably—accommodated U.S. Steel's interest in protecting itself from suits based on identical claims that existed at the time of the complaint without extinguishing the class's right to file distinct claims in the future. *Id.* The Court concluded that:

> [t]he district court did not abuse its discretion in approving this release. The release is not … unfair, unreasonable or inadequate. …. The settlement process depends on

> compromise, and the objectors cannot expect U.S. Steel to give up $4.45 million dollars, based on conduct since 2003, while leaving class members free to turn around and sue the next day for the same conduct. The release reasonably balances U.S. Steel's interest in resolving the claims and the public interest in protecting River Rouge and Ecorse residents from future harmful emissions.

Id. at 350-51.

For the same reasons, the terms of release in the proposed Settlement reflect a reasonable compromise. While the release bars future claims arising out of nuisance-creating conditions similar to those that existed at the time of the settlement, it does not bar future claims caused by future operations that result in "substantially different or substantially greater air emissions, releases, or odors than current operations as of the Effective Date." *See* Section 13.4.2.3 of the proposed Settlement. These releases are thus narrower than the releases approved in *Moulton,* which allowed future claims only if the increased emissions resulted from new equipment; here, future claims are allowed if future emissions, releases, or odors are substantially different or substantially greater, even if based on existing equipment. The release thus reflects a fair compromise between the parties.

E. Fees, Costs, and Enhancement Awards.

The Settlement contemplates that Plaintiffs will apply to the Court for a fee award from the Settlement Fund in the amount of 25% of the total value of the recovery, *i.e.*, the combined value of the Settlement Fund and affirmative relief, and reimbursement of their litigation costs. That application, filed separate from this joint motion, demonstrates that the requested fee is reasonable compensation for the work Plaintiffs' counsel have performed, the risks undertaken, and the results achieved.[25] The Settlement also contemplates that Plaintiffs will apply to the

[25] The Settlement has no "clear sailing" provision on Plaintiffs' attorneys' fees and costs. GPC has stated no opposition to date, but reserves the right to object once it has reviewed Plaintiffs' separate submission. The Court has given GPC 14 days following the application (i.e., until January 31, 2019) to do so.

Court for enhancement awards to the Plaintiffs ($25,000 each) and class-member witnesses ($7,000) in recognition of their contribution to the class action's success. As Plaintiffs' separate application also demonstrates, these enhancements are also reasonable and fair. But both the fees and the enhancements are subject to the Court's approval.

IV. CLASS MEMBERS HAVE BEEN NOTIFIED OF THE SETTLEMENT, ITS TERMS, AND THEIR RIGHT TO OBJECT; ONLY ONE OUT OF THOUSANDS OF CLASS MEMBERS OBJECTED.

A final factor for the Court to consider is whether or not Class Members oppose the proposed Settlement. In order to ensure that Class Members have due opportunity to object, Notice is required. *See* Iowa R. Civ. P. 1.271 (requiring class notice and a hearing prior to the Court's review). In this case, the Court approved full-form notice, half-page print notice, and media notices when it granted preliminary approval. As the Rule requires, the Notice set out the range of payments Class Members can expect, how final payments would be determined, how Class Members can make their claims, the affirmative relief required, the scope of the releases, the fees, litigation costs, and enhancement awards Class Counsel will ask the Court to award, the alternatives to settlement considered by Class Counsel, and why Class Counsel recommend the Settlement as in the Class Members' best interests. The Notice also informed Class Members of their right to object to the Settlement if they believe it is unfair, and how to do so.

As ordered by the Court, the Settlement Administrator direct-mailed the Notice on November 19 to a class-member list compiled from the best available commercial databases and posted on two settlement websites. Undelivered Notices were skip-traced and re-mailed. Spanish-language Notices have been made available on request. A half-page publication Notice was published during November and December of 2018 in two print papers (the *Muscatine Journal* and the *Hometown Extra*), five times in each. Numerous media spots were run in

December 2018 on three local radio stations and public access television. The Settlement Administrator has fulfilled numerous requests for the Notice received by phone, email, and online. In combination, these forms of notice were reasonably calculated to satisfy due process and afford any Class Member who believes the Settlement terms are unfair an opportunity to object. *See Lewis v. Jaeger*, 818 N.W.2d 165, 181 (Iowa 2012); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).[26]

The noticed deadline for objections was January 3, 2019. Only one objection has been filed with the Court. One objector out of many thousands of Class Members reflects strong support for the proposed Settlement. *See Ressler v. Jacobson*, 149 F.R.D. 651, 656 (M.D. Fla. 1992).

The one objector is Shane Schenkel, who states that he has resided since July 2011 at 331 Green Street, at the outer periphery of the class boundary. Mr. Schenkel asserts in his objection that he believes that GPC pollution exacerbated his allergies, for which he has been using nasal spray and pills. In addition, the objection states that Mr. Schenkel has had to power wash his house twice a year and wash his car. As a result, he states that he ought to be reimbursed for the health effects of the pollution as well as the time, money and labor invested in the clean-up.

Plaintiffs recognize Mr. Schenkel's complaints, but the objection does not warrant disapproval of the proposed Settlement. The harms Mr. Schenkel describes—nuisance-level exacerbation of allergy symptoms and alleged soiling of his siding and cars—are consistent with the harms asserted by Class Members generally; and they are precisely the kinds of harms on

[26] Additional notifications directed to "stimulate claims" have also begun. Plaintiffs are conducting in-person targeted canvassing of the Class Area. Furthermore, additional media spots are set to run each month, including during the first half of March. Plans for targeted Facebook advertising, reminder post-cards and door-hangers are in the works.

which the proposed Settlement payments are based. As the original opt-out Notice explained in 2017, the class action sought "money damages from GPC as compensation for personal inconvenience, discomfort and annoyance caused by smoke, odor and haze emitted by the GPC plant" (2017 Notice at 3), including "nuisance-level physical symptoms like burning eyes, sinus congestion, and other irritations" and "extra maintenance and cleaning burdens (for example cleaning … cars, siding)." *Id.* Mr. Schenkel opted out in October 2017 (pursuant to the Class Notice), then opted back in in December 2017 (pursuant to the Corrective Action Notice) is presumed to know this.

In any event, Mr. Schenkel's estimated award under the Settlement is roughly $2,200. *See* Settlement Calculator at 54, Settlement Ex. A-1 (Base Payments for Mr. Schenkel's 311 Green Street residence since 2011). Mr. Schenkel's objection provides no reason for why that amount is an unreasonable compromise of his claim, or how much more he thinks he would claim. Overall, this objection provides no basis for withholding final approval.

Finally, Plaintiffs' counsel intend to contact Mr. Schenkel to be sure that he is aware of his entitlement to claim payment under the proposed Settlement, that doing so will not affect his right to pursue his objection, that the claim filing deadline is March 19, that Plaintiffs' counsel are available to assist him in the filing, and that if he does not file and the Settlement is approved, his right to the payment will have been waived. This is an outcome Plaintiffs wish to avoid.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request an Order granting final approval of the proposed Settlement and overruling Mr. Schenkel's objection.

A proposed form of Order for the Court's consideration is filed herewith.

Plaintiffs' application for approval of Plaintiffs' attorneys' fees, litigation expenses and enhancement awards is filed, by Plaintiffs, separately herewith.

Dated this 17th day of January, 2019.

s/ Sarah E. Siskind
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ATTORNEYS FOR DEFENDANT
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served on all parties via the Court's EDMS system this 17th day of January, 2019.

/s/ Sarah E. Siskind
Sarah E. Siskind