

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
Northern Division

CHEYENNE SHONGO, et al,

Plaintiffs,

v.

Case No.: 1:22-cv-02684-MJM

CSX TRANSPORTATION, INC.,

Defendant.

**PLAINTIFFS' PETITION FOR PLAINTIFF AWARDS, AWARD OF  
ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

Plaintiffs move for an incentive award for each of the named plaintiffs, and for an award of attorneys' fees to Class Counsel as well as reimbursement of expenses, all of which are sought to be paid from the Common Fund established by the Preliminarily Approved Class Settlement under Federal Rules of Civil Procedure 23(h) and 54, and the Court's Order Certifying Settlement Class and Preliminary Approval of Class Action Settlement (ECF #59).

**I. INTRODUCTION AND LITIGATION HISTORY**

On October 18, 2022, two residents (Plaintiffs Cheyenne Shongo and Kennett Walker) of the Curtis Bay neighborhood of Baltimore, Maryland filed this class action on behalf of residents alleging that they had experienced property damage following a release from Defendant CSX Transportation's Curtis Bay Piers Coal Facility in Baltimore, Maryland (the "Facility"). The release occurred on December 30, 2021, following the ignition of a localized accumulation of methane and airborne coal dust on the Facility's operating conveyor, which enhanced the flammability of the released methane. Plaintiffs brought claims for Negligence, Trespass, Private Nuisance, and Strict Liability on behalf of all persons residing in the impacted areas adjacent to the Facility. ECF #1.

CSX then moved to dismiss the complaint and, in the alternative, to dismiss the class allegations. ECF #23. Plaintiffs opposed the motion with an extensive analysis of both Maryland common law regarding environmental claims under nuisance, trespass, and negligence theories and federal civil procedure regarding the use of FRCP 23 to assert class wide environmental claims. ECF #26. The Court considered the arguments of the parties and issued a detailed twenty-five-page Memorandum Opinion denying CSX's motion to dismiss and the Court declined to dismiss Plaintiffs' class allegations. ECF #32. A scheduling order followed the Court's Order, and the parties began discovery in June 2023. ECF #35.

Plaintiffs and their counsel zealously pursued discovery including detailed Requests for Production, Interrogatories, Requests for Admission, FOIAs on government entities, subpoenas to numerous third parties, and a Rule 30(b)(6) deposition of CSX. Plaintiffs also issued FOIA requests to the Maryland Department of the Environment (MDE), the Maryland Air and Radiation Management Administration (within MDE), the Baltimore County Fire Department (BCFD), and the Occupational Safety and Health Administration (OSHA). Plaintiffs further issued subpoenas to six of CSX's technical consultants. In response to Plaintiffs' written discovery requests, Defendant produced in excess of 17,000 pages of documents and native materials, including videos, photos, spreadsheets, and PowerPoints. The deposition of CSX's corporate representative was then conducted pursuant to Rule 30(b)(6) on numerous relevant topics of examination.

Additionally, Plaintiffs pursued critical discovery through other means. Notably, Plaintiffs' counsel retained two experts, including a Certified Industrial Hygienist and a Meteorologist/Certified Environmental Professional that conducted significant analysis regarding the effect of the release on homes in the putative class area and wind rose analysis of the area surrounding the facility on the day of the release. Plaintiffs' expert meteorologist conducted a site inspection with Plaintiffs' counsel and

reviewed and analyzed significant on-site and off-site data. Both of Plaintiffs' experts prepared multiple iterations of their reports.

While discovery was unfolding and on the eve of the due date for Plaintiffs' Rule 26(a)(2) disclosures, the parties negotiated a class-wide Settlement Agreement. Settlement was not achieved easily. Settlement followed several months of negotiations and a full-day mediation conducted with the assistance of the Honorable Bill Taylor. The mediation resulted in the proposed class-wide settlement agreement, which establishes a \$1,750,000.00 common fund for class member compensation court-approved fees, expenses and awards.

Plaintiffs' counsel prepared and filed a motion for preliminary approval, which the Court granted. ECF #59. Within the Settlement Agreement, the parties agreed:

Settlement Class Counsel may at their sole discretion file a motion with the Court seeking Incentive Awards for the individual Named Plaintiffs, and Defendant agrees not to oppose Settlement Class Counsel's motion for Named Plaintiffs' Incentive Awards, as long as all Incentive Awards are drawn exclusively from the Settlement Fund and the amount of any one (1) Incentive Award does not exceed \$5,000 to a single Named Plaintiff.

ECF #58-2 at 14. As to Attorneys' Fees and Costs, the Agreement states:

Settlement Class Counsel shall be paid reasonable attorneys' fees and out-of-pocket expenses (including the costs to provide notice to the absent class members as required under Rule 23) arising from their representation of the Settlement Class Members in this case from the Settlement Fund. Settlement Class Counsel shall file a motion with the Court seeking such fees and expenses, and Defendant agrees not to oppose Settlement Class Counsel's fee application or appeal the amounts awarded as fees and expenses by the Court, so long as all fees and expenses are drawn exclusively from the Settlement Fund and the amount of the requested fees, exclusive of reimbursed expenses, does not exceed \$577,500.

*Id.* Consistent with the terms of the Settlement Agreement and Federal Rule of Civil Procedure 23, Plaintiffs now file this Petition for Plaintiff Awards, Attorneys' Fees and Expenses.

## II. ARGUMENT

### a. **The Named Plaintiffs are entitled to an incentive award.**

Cheyenne Shongo and Kennett Walker each move for an award of \$5,000. “Incentive awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.” *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015). Here, the Named Plaintiffs reflect the efforts made to produce a class-wide settlement that has benefits beyond themselves. Each of the Named Plaintiffs received written discovery requests in the form of interrogatories and requests for documents to which they responded. Additionally, the Class Representatives prepared for and engaged in a day-long mediation, which required them to seek time off from work. Each Plaintiff prepared for deposition and Plaintiff Kennett Walker sat for a day-long deposition on December 12, 2023. Finally, the Class Representatives were consistently and conscientiously involved in both aggregating information for their counsel and supporting the matter both for class certification and on the merits of the claims.

An incentive award of \$5,000 to each of the Class Representatives for their efforts and the benefits they obtained for the class is reasonable and should be approved. It is also consistent with awards in other cases in the District of Maryland. See e.g., *Casa de Maryland v. Arbor Realty Trust*, DKC 8:21-1778 \*2 (D. Md. Mar. 11, 2024) (awarding \$7,500 to each Class Representative); *Muga v. BB & T*, WDQ-10-00890 (awarding a \$7,500 incentive payment); *Miller v. Prestige Financial*, Case No. 09-1671-BEL, ECF 36 (awarding \$6,000 incentive award); *Yost v. Elon Property Management Company*, 2023 WL 185178 at \* 10 (D. Md. Jan. 13, 2023) (awarding \$5,000 incentive payment); *Curry v. Money One Federal Credit Union*, 2021 WL 5839432 at \* 4 (D. Md. Dec. 9, 2021) (awarding \$6,000 incentive payment).

It is respectfully requested that the incentive payment be approved and that both Class Representatives be awarded \$5,000 from the common fund of \$1,750,000.00.

**b. Class counsel should be awarded reasonable attorneys' fees.**

Rule 23(h) permits courts to award “reasonable attorney’s fees ... that are authorized by law or by the parties’ agreement.” The Fourth Circuit has held that “[t]here are two main methods for calculating the reasonableness of attorney’s fees—the lodestar method and the percentage-of-recovery method”—and a “district court may choose the method it deems appropriate based on its judgment and the facts of the case.” *McAdams v. Robinson*, 26 F.4th 149, 162 (4th Cir. 2022). Plaintiffs’ counsel seeks an award of \$550,000 in fees and an additional \$40,789.39 in reimbursement of non-taxable advanced expenses. The parties settled the case after significant pre-suit technical investigation of the Curtis Bay CSX release, extensive motions practice of complex and novel issues of law, detailed review of technical documents, depositions, and extensive negotiations with CSX. They were ready, willing, and able to pursue the litigation through trial, as they have done in previous class actions.

**i. Class Counsel’s fee request is reasonable as a percentage of recovery.**

“There are two methods commonly used for calculating an attorney’s fee award: the lodestar method and the ‘percentage of recovery’ method.” *Decoben v. Abbasi, LLC*, 299 F.R.D. 469, 481 (D. Md. 2014). To determine whether a requested percentage of a settlement is a reasonable award for attorney’s fees, the Court considers: (1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity and duration of the case; and (7) public policy. *Feinberg v. T. Rowe Price Grp.*, 610 F. Supp. 3d 758, 771 (D. Md. 2022). The Court need not apply these factors in a “formulaic way” and may weigh the factors as appropriate for a particular case. *Id.*

Here, the attorneys' fee award in the amount of \$550,000 represents 31.4% of the percentage of recovery sum of \$1,750,000 and is reasonable for several reasons.

First, Class Counsel achieved a good result for the Class Members in this case, especially given the time and expense involved in establishing causation from the fate and transport of particulate matter from the release at CSX's facility on an individual, property-by-property basis. Through the class settlement that Class Counsel have achieved, each class member can expect to receive a significant sum of money. Furthermore, the risk of non-payment was a very realistic outcome when Class Counsel took this matter on a contingency fee basis.

Second, the quality of Class Counsel's legal work is evidenced by the substantial benefit conferred to the Settlement Class in the face of significant litigation obstacles, such as surviving the motion to dismiss, including a motion to strike the class allegations, conducting extensive discovery, and coordination of multiple experts from multiple disciplines. Class Counsel are experienced in environmental class action litigation, and Jonathan Nace and Nidel & Nace were recently appointed as class counsel in a similar air contamination class action in the United States District Court for the District of New Jersey. *Duarte v. United States Metals Ref'g Co.*, No. 2:17-01624-EP-MAH, ECF #276 \*4 (D.N.J. April 19, 2023). Additionally, Jonathan Nace, Zachary Kelsay, and Nidel & Nace were recently appointed class counsel in an environmental class action concerning allegations of housing habitability concerns in the United States District Court for the District of Maryland. *Casa de Maryland v. Arbor Realty Trust*, DKC 8:21-1778, ECF #168 \*25 (D. Md. Mar. 11, 2024).

Fourth, to date the Court has not received any objections or opt-outs to the settlement terms from class members. Mail notice was sent on June 3, 2024.

Fifth, a "request for one-third of a settlement fund is common in this Circuit and generally considered reasonable." *Boger v. Citrix Sys.*, Civil Action 19-cv-01234-LKG (D. Md. June 1, 2023) (collecting cases); *see also Decoben v. Abbasi, LLC*, 299 F.R.D. 469 (D. Md. 2014) (approving petition

for 1/3 of common fund); *Temp. Servs., Inc. v. American Int'l Grp., Inc.*, C/A No.: 3:08-cv-00271-JFA, at \*14 (D.S.C. June 22, 2012) (“A total fee of one-third of the class settlement for all work performed and to be performed in this case is well within the range of what is customarily awarded in settlement class actions.”); *In re Allura Fiber Cement Siding Litig.*, Civil Action No.: 2:19-mn-02886-DCN, at \*9-10 (D.S.C. May 21, 2021) (collecting cases and citing *Anselmo v. West Paces Hotel Grp., LLC*, No. 9:09-cv-02466-DCN, 2012 U.S. Dist. LEXIS 146618, at \*10-11, citing *Kidrick v. ABC TV & Appliance Rental, Inc.*, No. 3:97CV69, 1999 U.S. Dist. LEXIS 23693, at \*4 (N.D. W. Va. May 11, 1999) (noting that awards of 30%, 35% and even 50% have been found reasonable.); *In re Zurn Pex Plumbing Prod. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at \*2 (D. Minn. Feb. 27, 2013) (approving attorneys’ fees and expenses of \$8.5 million in litigation concerning brass plumbing fittings in which common fund settlement was \$20 million); *see also* Manual for Complex Lit. (Fourth) § 14.121 (2004) (“Attorney fees awarded under the percentage method are often between 25% and 30% of the fund.”)).

Sixth, this was a significantly complex case spanning several years and involving not only issues of class certification, but complex issues of environmental science. Counsel overcame specific legal hurdles that were raised in efforts to defeat this case. Notably, this Court critically opined that although Maryland courts had not addressed whether the blanketing of air particles, such as soot or pollutants could constitute a trespass under Maryland law, such a claim was not foreclosed. ECF #32 at 10. The Court denied the motion to strike the class allegations opining that “the central questions of liability stemming from this incident are all plausibly susceptible to class wide adjudication—including whether the activities conducted at Curtis Bay are abnormally dangerous, whether the defendant was negligent in operating the facility, and whether the explosion and its fallout interfered with class members’ rights to exclusive possession of their properties or the use and enjoyment of their land.” ECF #32 at 25. These opinions were not guaranteed at the inception of this litigation, and the development of the law

likely opens the door for future matters that previously might not have been able to secure legal counsel.

Seventh, public policy supports the award of the 31.4% fee to Class Counsel. Ensuring a safe and pollution-free environment in low-income minority communities is a significant issue in this case. Low-income minority communities often find it difficult to secure legal representation following environmental contamination. This is especially true for underprivileged and underserved residents who lack resources and knowledge regarding the legal options available to them. Lawyers, including contingency-fee-based lawyers, often cannot see a viable economic method to pursue litigation, especially in highly technical cases such as this one. Curtis Bay is a neighborhood in Baltimore, with a measured overall hardship rate 49% higher than the rest of Baltimore City, partially due to the industrial environment surrounding the neighborhood, an unemployment rate nearly double the rest of Baltimore City, and approximately 39.5% of the community over 16 years of age is unemployed.<sup>1</sup> Class Counsel took on these concerns and produced a path forward for these litigants and the Class.

**c. Plaintiffs' counsel seeks reimbursement of expenses incurred and paid.**

Rule 23(h) makes clear that the Court may also award “non-taxable costs” in addition to attorneys’ fees earned. “There is no doubt that costs, if reasonable in nature and amount, may appropriately be reimbursed from the common fund.” *In re Microstrategy, Inc.*, 172 F. Supp. 2d 778, 791 (E.D. Va. 2001) (citing *Harris v. Marboefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Plaintiffs, therefore, respectfully move for reimbursement of a total of \$40,789.39 in costs reimbursed to Nidel & Nace, PLLC.

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<sup>1</sup> Baltimore City Health Department, 2017 Neighborhood Health Profile, Brooklyn/Curtis Bay/Hawkins Point, at 9–10 [https://health.baltimorecity.gov/sites/default/files/NHP%202017%20-%2004%20Brooklyn-Curtis%20Bay-Hawkins%20Point%20\(rev%206-9-17\).pdf](https://health.baltimorecity.gov/sites/default/files/NHP%202017%20-%2004%20Brooklyn-Curtis%20Bay-Hawkins%20Point%20(rev%206-9-17).pdf)

Each of the requested costs is reasonable and the large majority and most significant of which can be broken down as follows:<sup>2</sup>

<u>Category</u>	<u>Amount</u>	<u>~Percentage of Costs</u>
Expert Witness Fees	\$24,371.63	60%
Mediators	\$5,491.22	13%
Deposition Transcripts/Video	\$4,920.46	12%

The remaining expenses consist of other necessary expenses such as process servers of subpoenas, requests for records, parking, and case specific e-discovery costs. Each of the requested expenses was necessary to the litigation for this matter and were reasonable in both need and amount. Expert witnesses in the fields of industrial hygiene and meteorology were all necessary to prosecute this matter. Plaintiffs respectfully request reimbursement of them pursuant to Rule 23(h). These expenses have all been fully paid by Class Counsel as of the filing of this motion and were incurred and paid with no promise of reimbursement without success.

### **III. CONCLUSION**

For all of the reasons set forth above, the Plaintiff requests the court to approve the payments of an incentive payment of \$5,000 to each Class Representative and the payment to Class Counsel of \$550,000.00 in attorneys' fees, which is 31.4% of the cash common fund recovered, and \$40,789.39 in reasonable costs and expenses, consistent with the contingency fee basis on which they pursued the claim and for their time, dedication, expenses, and for the risk undertaken and results obtained for the class.

**WHEREFORE**, the Plaintiffs pray this Court grant this Petition for Fee and Incentive Awards as sought by this Motion.

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<sup>2</sup> Plaintiffs' counsel will provide itemized statements of their expenses to the Court, but respectfully moves to do so only *ex parte* and under seal if the Court desires the statements.

Respectfully submitted,

/s/ Jonathan B. Nace  
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**CERTIFICATE OF SERVICE**

This is to certify that on this 17th day of June 2024, I caused a copy of the foregoing to be served upon all parties.

/s/ Jonathan Nace  
Jonathan Nace, Esquire  
Bar Number: 18246