IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

JACK W. LEACH, ET AL.,

Plaintiffs,

v.

CIVIL ACTION NO.: 01-C-608
(Judge George W. Hill)

E.I. DU PONT DE NEMOURS AND COMPANY,
Defendant.

JOINT MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND RELATED MATTERS

COME NOW Plaintiffs, Jack W. Leach, et al., and Defendant, E. I. du Pont de Nemours and Company ("DuPont"), by their undersigned counsel, pursuant to Rule 23 of the West Virginia Rules of Civil Procedure, to jointly request that this Court enter an order preliminarily approving the settlement of this class action and related matters, as described below. In support of this Motion, Plaintiffs and DuPont (collectively the "Parties") state the following:

I. BACKGROUND OF THE LAWSUIT AND SETTLEMENT

Named Plaintiffs filed the instant lawsuit against DuPont and the Lubeck Public Service District ("LPSD") in the Circuit Court of Kanawha County, West Virginia, on August 30, 2001 (the "Lawsuit"). Pursuant to a motion filed by DuPont, the Lawsuit was transferred to this Court in December of 2001. In an Order entered April 10, 2002, the Court certified the Lawsuit to proceed as a class action and designated counsel for Plaintiffs as Class Counsel. The Court later clarified the definition of the certified Class in an Order entered on June 26, 2003.

On January 16, 2003, counsel for LPSD and Class Counsel filed a joint motion for approval of a compromise and settlement with LPSD ("LPSD settlement") and for designation of appropriate

notice of the LPSD settlement to the Class. On March 21, 2003, the Court entered an Order granting preliminary approval of the LPSD settlement, setting a final fairness hearing, and approving the proposed notice to the Class Members. On April 18, 2003, the Court conducted the final fairness hearing, and, at the conclusion, the Court entered an Order granting final approval of the LPSD settlement, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, with the express certification that there was no just reason for delay and the express direction that judgment in accordance with the settlement agreement be entered immediately. No appeal was taken by any party or interested Class Member from this Order, and it has become final.

For over three years, the Parties have actively litigated all claims, including numerous motions and proceedings before the Court, voluminous exchange of discovery, and multiple depositions. During the pendency of this Lawsuit, the Parties have also litigated issues in proceedings before the West Virginia Supreme Court of Appeals. Trial in this matter was scheduled to begin on October 12, 2004.

On May 9, 2003, the Court entered an Order requiring the remaining Parties in the Lawsuit to mediate their claims and disputes in good faith. Pursuant to that Order, the Parties jointly selected two mediators to assist in mediation discussions. For more than a year, Class Counsel and counsel for DuPont engaged in repeated, extensive arm's-length negotiations, with assistance from the mediators, who acted as intermediaries in conveying offers and counter-proposals between the Parties. As a result of these extensive negotiations, the Parties ultimately executed a Settlement Agreement in Principle in Boston, Massachusetts, on September 4, 2004, approximately one month before trial was scheduled to begin. In a hearing before the Court on October 22, 2004, the Court

ordered the Parties to appear before the Court on November 23, 2004, beginning at 2:30 p.m., to address preliminary approval of the Settlement and related issues. The Court also scheduled a final fairness hearing on the Settlement to occur, if the Court grants preliminary approval, on February 28, 2005, beginning at 9:30 a.m. A copy of a more detailed Class Action Settlement Agreement (the "Settlement") as of November 17, 2004, is attached hereto and incorporated herein by reference as if restated in full, identified as Exhibit 1.[1] Exhibit 1 contains the complete Settlement that the Parties are hereby jointly submitting to the Court for preliminary approval.

II. BASIS FOR SETTLEMENT

Class Counsel appointed in this Lawsuit includes two firms located in West Virginia and one firm located in Ohio. Members of the Class Counsel team have extensive litigation and trial experience, including class action personal injury cases, as well as matters involving environmental contamination. Class Counsel drew on this collective experience to evaluate the Settlement.

As a part of their pre-filing investigation and prosecution of the Lawsuit against DuPont, Class Counsel have undertaken an extensive investigation into the facts and law relating to the claims asserted against DuPont. Named Plaintiffs, through Class Counsel, have pursued extensive discovery from DuPont that has included numerous sets of interrogatories, requests for production of documents, over three hundred requests for admissions and depositions. Class Counsel have reviewed and analyzed publicly-available documents, studies and data, as well as documents produced by DuPont and the LPSD. As of the date of the execution of the Settlement Agreement in Principle, Class Counsel have reviewed and analyzed in excess of one and a half million pages of

1 The Parties intend that any term in capital letters in this Motion have the meaning set forth in the Definition section of Exhibit 1, unless otherwise specifically defined herein.

documents obtained from DuPont, the LPSD and publicly-available sources, and the Parties have taken thirty-five (35) depositions in over three years of active litigation. Additionally, Class Counsel retained professionals in the fields of toxicology, epidemiology, chemistry, and medicine to assist them in assimilating and understanding the huge volume of documents and studies relating to the claims asserted in the Lawsuit. An independent medical evaluation was performed on each Named Plaintiff, including an analysis of blood to determine the level of C-8 present, and Class Counsel had the opportunity to review these evaluations. Class Counsel's retained professionals also evaluated health-related information about the community through questionnaires, medical records and other data.

As a result of the investigation described above, Named Plaintiffs and Class Counsel have concluded that the Settlement of the claims asserted against DuPont in the Lawsuit on the terms and conditions set forth in Exhibit 1 is fair, reasonable, adequate, and in the best interests of the Class. In reaching this conclusion, Named Plaintiffs and Class Counsel have carefully weighed the benefits to the Class of the Settlement for the consideration offered by DuPont against the significant risks of recovery, delay, and costs that continued prosecution of the Lawsuit would entail. In this regard, Class Counsel have recognized and considered the expense and length of time that proceedings necessary to continue the Lawsuit against DuPont through discovery, trial, and appeals would entail. Class Counsel also have considered the problems of proof and possibility of modifications to applicable law and believe that the certainty and amounts of recovery, combined with the benefits of providing C-8 water treatment now for the affected human drinking water supplies and the completion of a community health study now, when weighed against the risks of proceeding further

with the Lawsuit, strongly support the Settlement. Based upon the totality of this analysis, Class Counsel and Named Plaintiffs believe that the Settlement, as set forth in Exhibit 1, is the most likely means of providing a substantial benefit to the Class. Through the Settlement, the Class will receive the benefit of analysis by an independent Science Panel of whether there is a Probable Link between C-8 and Human Disease, including the design and completion of a Community Study, water treatment designed to reduce the level of C-8 in affected drinking water supplies, as well as a Health Project and monetary compensation as described in more detail under Section III.B of this Motion. In addition, if the Science Panel finds a Probable Link between Human Disease(s) and C-8, the Class will receive the benefit of Medical Monitoring through a Medical Monitoring Fund pursuant to a Medical Monitoring Protocol designed by an independent Medical Panel and may pursue their personal injury claims for any such Human Disease(s). Based upon the foregoing, Class Counsel concludes that the Settlement is fair, reasonable, adequate, and in the best interests of the Class, and strongly support approval of the Settlement.

DuPont specifically denies any liability or wrongdoing relating to the matters alleged in the Complaint. DuPont has carefully weighed the costs associated with continuing to litigate this Lawsuit. Subject to the provisions set forth in Section 3.3 and Article 6 of the Settlement (Exhibit 1), with respect to the tolling and potential preservation of the Conditionally Released Claims and the findings of the Science Panel, DuPont is entering into this Settlement to avoid the time, expense, and distraction of embroilment in the current Lawsuit and potential future litigation and disputes relating to present, past or future C-8 exposure claimed to be attributable to the operations of Washington Works. DuPont, therefore, supports approval of the Settlement.

III. ISSUES FOR CLARIFICATION UNDER THE SETTLEMENT

A. Appointment of Administrators for Settlement

The Parties previously submitted a joint Order seeking Court appointment of William V. Crichton, Sr., to serve as Guardian Ad Litem for all Class Members who may be under the age of majority, incompetent, or otherwise under disability. The Parties have agreed that The Garden City Group, Inc. should serve as the neutral Administrator of the Settlement, pursuant to Section 10.1 of the Settlement set forth in Exhibit 1. The Parties, therefore, jointly request the Court to approve and appoint The Garden City Group, Inc. to serve as Administrator for the Settlement with authority to perform the duties described in Section 10.2 of the Settlement set forth in Exhibit 1. The Parties have also agreed that James D. Lamp, who served as a mediator for this Lawsuit, should serve as the Special Master, pursuant to Section 10.3 of the Settlement set forth in Exhibit 1. The Parties, therefore, jointly request the Court to approve and appoint James D. Lamp to serve as Special Master to perform the duties described in Section 10.4 of the Settlement set forth in Exhibit 1.

In order to implement the Health Project described below on behalf of the Class, Plaintiffs hereby request that the Court also preliminarily approve their plan to use Robert G. Astorg, CPA, Managing Director, American Express Tax and Business Services, Inc., as administrator of the Health Project described below with authority to receive the Settlement Amount and disperse the Settlement Fund on behalf of the Class (the "Health Project Administrator"), pursuant to Section 9.1 of the Settlement set forth in Exhibit 1, as described in the following section of this joint Motion, with all costs and expenses of the Health Project Administrator to be paid from the Settlement Fund.

B. **Clarification of Plaintiffs' Proposed Community Health and Education Project**

Pursuant to Section 9.1 of the Settlement, as set forth in Exhibit 1, Plaintiffs must use at least $20 Million of the $70 Million Settlement Amount to be paid by DuPont under the Settlement "to fund certain health and education projects as reasonably described by Class Counsel in [this joint Motion] and as approved by the Court in its [Order preliminarily approving the Settlement]." (Exhibit 1, at Section 9.1) In satisfaction of this requirement, Plaintiffs request that the Court approve their proposed use of the Settlement Amount in the manner as follows:

1. The $70 Million Settlement Amount will be deposited into one or more interest bearing account(s) approved by the Court, hereafter referred to as the "Settlement Fund." The Settlement Fund will be held and maintained by the Health Project Administrator as a Qualified Settlement Fund pursuant to the provisions of Section 468B of the Internal Revenue Code.

2. The Settlement Fund will be disbursed through the Health Project Administrator to pay for a Class health and education project (" Health Project"). The Health Project shall include each Class Member, regardless of age or place of residence, who submits a valid proof of claim form (hereinafter "Proof of Claim form") to the Health Project Administrator establishing that he or she is a Class Member, as defined below (hereinafter referred to as "Health Project Participant"). The Proof of Claim form will include a health questionnaire designed to obtain relevant health data from the Class that will be useful and beneficial to the Class. With the consent of the Health Project Participant, or his or her parent or guardian, the health data obtained on the Proof of Claim form, along with the results of the Blood Tests described in subparagraphs (3) and (4)

below, will be submitted by the Health Project Administrator to the Science Panel described in Exhibit 1 for its consideration in making its determinations under the Settlement.

3. The Health Project will pay each Health Project Participant the sum of $150.00 from the Settlement Fund upon submission of his or her Proof of Claim form. Additionally, each Health Project Participant will be offered the opportunity to receive two separate blood tests to be paid for by the Health Project from the Settlement Fund. One blood test will be for the purpose of determining the levels of PFOA, PFOS, PFHS, and all available perfluoroalkanes from C5 to C12 in the Health Project Participant's blood ("Fluorocarbon Blood Test"). The second blood test will be for the purpose of determining whether or not the Health Project Participant's blood contains any indication(s) of cancer or other disease(s) ("Diagnostic Blood Test"). Each Health Project Participant who elects to obtain the Fluorocarbon Blood Test and Diagnostic Blood Test (hereinafter referred to collectively as "Blood Tests") will be paid the additional sum of $250.00 from the Settlement Fund immediately upon providing the required blood specimens.

4. The Diagnostic Blood Test will include the following, as appropriate for gender and age:

a. Chemistry panel (35 Chemistries)

b. C - Reactive Protein

c. Complete Blood Count (including differential and blood count)

d. Prostate Specific Antigen (PSA)

e. Carcinogenic Embryonic Antigen (CEA)

f. CA 125

g. Alpha fetoprotein

h. Thyroid hormone panel with T4, T3 and TSH

i. Insulin level

j. Growth hormone as reflected by Insulin like growth factor - 1 (ILGF1)

k. Testosterone with free and total testosterone

l. Estradiol

m. Prolactin

n. Immunoglobulins (IgE, IgA, IgG and IgM)

o. ANA

5. The costs of obtaining the required blood specimens, completing the specified tests, and reporting the results of the Fluorocarbon Blood Test to each Health Project Participant is reasonably estimated to be $210.00 per person. The cost of obtaining the required blood specimens, completing the specified tests, and reporting the results of the Diagnostic Blood Test to each Health Project Participant is reasonably estimated to be $336.00 per person. Therefore, the combined monetary value provided to each Health Project Participant from the Blood Tests is reasonably estimated to be $546.00 per person. In addition to the specific value, each Health Project Participant will receive the value of learning the results of the Blood Tests, and the Class will receive the benefit of generation of additional information for consideration by the Science Panel.

6. In addition to the monetary value of the Blood Tests paid from the Settlement Fund by the Health Project, each Health Project Participant who elects to obtain the Blood Tests will

also receive combined cash payments from the Settlement Fund totaling $400.00, as provided in subparagraph (3) above, for a combined aggregate value of $946.00 per person.

7. It is anticipated that, due to the potential size of the Class, which could include as many as 80,000 persons, the Settlement Fund will be completely spent by the disbursements paid directly to or for the benefit of each Health Project Participant who elects to obtain the Blood Tests. In the event there are more requests for Blood Tests by Health Project Participants than the Settlement Fund can pay, then the Health Project will be terminated as soon as there is no money left in the Settlement Fund. In the event that any money remains in the Settlement Fund after all Health Project Participants receive their Blood Tests and cash payments, then all such remaining money will be distributed, per capita, by the Health Project Administrator to each Health Project Participant, unless the amount of the distribution would be less than $25.00 per capita in which event all remaining money in the Settlement Fund will be donated to the Good Samaritan Clinic in Parkersburg, West Virginia.

C. Clarification of Certified Class Definition and Class Counsel

In its Order entered April 10, 2002, this Court conditionally certified this matter to proceed as a class action and clarified the definition of the Class by an Order entered June 26, 2003. Under West Virginia Rule of Civil Procedure 23, class certification is conditional; this Court may alter or amend the definition as the matter progresses toward resolution. *State ex rel. Metro. Life Ins. Co. v Starcher*, 196 W.Va. 519, 526, 474 S.E.2d 186, 193 (1996). The Class should be defined with sufficient specificity to make it administratively feasible for the Court to ascertain whether an individual is a Class Member. *See id.*

In the process of negotiating the Settlement of this Lawsuit, the Parties jointly agreed that further clarification of the Class in this matter is appropriate at this time in order to enable the Parties to prepare to provide appropriate notice to individuals who fall within the definition of the Class that their rights may be affected by the Settlement, if it is approved by the Court. Thus, as provided in Section 2.1.1 of the Settlement set forth in Exhibit 1, the Parties agree and hereby jointly request that this Court clarify that the Class is certified pursuant to West Virginia Rule of Civil Procedure 23(b)(2) and 23(b)(3) and includes as Class Members only those individuals who, (1) for the period of at least one year up to and including the date of the first notice issued in accordance with Section 2.1.3 of the Settlement set forth in Exhibit 1, have consumed drinking water containing .05 ppb or greater of C-8 attributable to releases from Washington Works from (a) any of six specified Public Water Districts (each as more particularly described in Schedule 2.1.1(A) of the Settlement set forth in Exhibit 1), (b) any private water source within the geographic boundaries of the Public Water Districts that is the individual's sole source of drinking water at that location or (c) any private water source more particularly described in Schedule 2.1.1(B) attached to the Settlement set forth in Exhibit 1 that is the individual's sole source of drinking water at that location; <u>and</u> (2) who (a) do not exercise their right to Opt Out of the Certified Class or (b) have not elected to waive their rights as a Class Member through execution of a Notice of Clarification Regarding Class Member Status filed with the Court in the Lawsuit. In addition, the Parties hereby jointly request that the Court clarify that the law firms of Taft Stettinius & Hollister LLP, Hill, Peterson, Carper, Bee & Deitzler, P.L.L.C., and Winter Johnson & Hill PLLC shall continue to be designated as Class Counsel to represent the Certified Class.

In making this request for clarification of the Class definition and continued designation of Class Counsel as counsel for the Class, as clarified, the Parties also request that the Court's Order in this regard confirm that such joint request by the Parties shall not constitute and shall not be construed as an admission on the part of either Party that the Lawsuit, or any other proposed or certified class action, is appropriate for class action treatment pursuant to West Virginia Rule of Civil Procedure 23 or any other class action statute or rule, and does not constitute a waiver of any substantive or procedural defenses. In addition, the Parties request that the Court's Order in this regard also confirm that the Parties' joint request and any Order granting such request are without prejudice to the rights of the Parties in the event that the Settlement is not approved or is terminated under the terms of the Settlement to seek decertification or modification of the Class as certified or clarified, or to oppose certification in any other proposed or certified class action.

D. Approval of Notice and Notice Plan

In order to provide notice to the Class Members in the best form practicable of the Settlement set forth in Exhibit 1 for which the Parties are hereby seeking preliminarily approval by the Court, the Parties have designed a notice plan to be implemented upon such preliminary approval by the Court (the "Notice Plan"). The Notice Plan consists of the following:

1. Direct mailing of notice in the form attached at Exhibit 2 to as many potential Class Members for whom the Administrator can reasonably obtain a current residential address either through practicable available information or by self-identification after published notice. Notice may also be sent to any address that the Administrator determines that a significant number of Class Members could potentially receive notice.

2. Publication twice on non-consecutive week dates and once on a weekend date of an abbreviated form of notice, the content of which is set forth in Exhibit 3, in the following local and regional papers:

- The Parkersburg News/The Parkersburg Sentinel/The Marietta Times
- Point Pleasant Register/Pomeroy Sentinel/Gallipolis Daily Tribune/Gallipolis Sunday Times-Sentinel
- Athens Messenger
- The Charleston Gazette/Charleston Daily Mail/Sunday Gazette Mail
- The Columbus Dispatch

The abbreviated form of notice contains sufficient information to allow individuals to determine whether they may be Class Members and to contact the Administrator to receive a copy of the complete notice set forth in Exhibit 2.

3. Publication once of an abbreviated form of notice, the content of which is set forth in Exhibit 3, in the following publications with national circulation: Parade Magazine and USA Weekend. The abbreviated form of notice contains sufficient information to allow individuals to determine whether they may be Class Members and to contact the Administrator to receive a copy of the complete notice set forth in Exhibit 2.

4. The Administrator will keep records of all contacts by potential Class Members and all direct mailings of notice.

5. As indicated in Exhibit 2 attached hereto, the direct mail notice will provide the clarified definition of the Class and the basic terms of the Settlement preliminarily approved by

the Court. The direct mail notice will also explain how testing of private drinking water wells within the geographic boundaries of the affected public water districts for C-8 can be requested by those who use such wells as their primary source of drinking water. The direct mail notice also will advise each Class Member that (A) the Court will exclude the individual from the Class, if he or she so requests by no later than February 1, 2005; (B) once the Settlement is approved and final, it will be binding on all who do not seek exclusion from the Class; and (C) any Class Member who does not request exclusion may file a written objection to the Settlement. The direct mail notice will also advise that objections to the Settlement may be filed with the Court and served not later than February 1, 2005.

6. The direct mail notice will also include instructions for Class Members to submit written requests to be excluded from the Class. The Administrator will keep records of such written requests from any Class Members who elect to be excluded and will provide a report to the Court and the Parties prior to any fairness hearing of all individuals who elect to be excluded from the Class. The direct mail notice will advise that requests for exclusion shall be postmarked no later than February 1, 2005.

7. The Administrator will begin direct mail notice as soon as practicable upon entry of this Court's Order approving the content of notices attached in Exhibits 2 and 3. The Administrator shall take reasonable steps to place the published notice as described in paragraphs 2 and 3, above, as soon as space is available for publication.

The Parties agree that approval of this Notice Plan, including the content of the form of notices set forth in attached Exhibits 2 and 3, will allow the Parties to proceed more efficiently to

prompt resolution of this matter immediately after the preliminary approval hearing. For the foregoing reasons, the Parties jointly request that this Court enter an Order that finds that the Notice Plan, and the form of notice set forth in Exhibits 2 and 3 hereto, as jointly presented by the Parties in this Motion, fairly and adequately satisfies the requirements of West Virginia Rules of Civil Procedure 23 (c)(2) and (e), is the best notice practicable under the circumstances, and duly satisfies due process requirements.

WHEREFORE, the Parties jointly move this Court for an Order that:

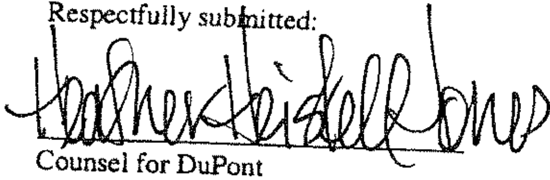
1. Preliminarily approves the Settlement, as set forth in Exhibit 1, including Plaintiffs' Health Project;

2. Appoints The Garden City Group, Inc. Administrator for the Settlement, appoints James D. Lamp, who served as a mediator in this Lawsuit, as Special Master for the Settlement and preliminarily approves the plan to use Robert G. Astorg, CPA, Managing Director, American Express Tax and Business Services, Inc., as Health Project Administrator;

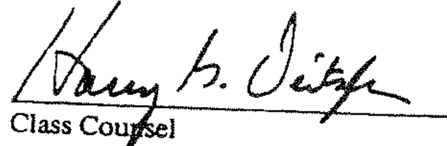
3. Clarifies that the Class is certified in the manner set forth in Section III.C of this Motion, and that Class Counsel shall continue to be designated Counsel for the Class, as clarified; and

4. Approves the form of the notice set forth in Exhibits 2 and 3 hereto and the Notice Plan, as set forth in Section III.D of this Motion, and finds that such notice constitutes the best notice practicable under the circumstances and fully satisfies the requirements of due process and Rule 23 of the West Virginia Rules of Civil Procedure.

Respectfully submitted:



Counsel for DuPont



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