UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re Flint Water Cases	No. 5:16-cv-10444-JEL-EAS HON. JUDITH E. LEVY MAG. ELIZABETH A. STAFFORD

PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AS TO THE LAN SETTLEMENT

For the reasons stated in the attached Memorandum of support, and supporting declarations and exhibits, Plaintiffs, through their counsel, move the Court pursuant to Federal Rules of Civil Procedure 23(h) and 54(d) to approve their proposal for attorneys' fees to be awarded to Movants Co-Lead Class Counsel and Co-Liaison Counsel, as well as Settlement Subclass Counsel and the law firms that have worked with and under the supervision of Co-Lead Class Counsel, including the Plaintiffs' Executive Committee ("Plaintiffs' Counsel"), as described in further detail in the accompanying Memorandum, and their request for reimbursement of expenses incurred by Plaintiffs' Counsel.[1]

[1] Defendant LAN has agreed to take no position with respect to this motion. *See* Lan Settlement Agreement ("LSA") ¶ 11.1, ECF No. 2673-2, PageID.87007; Amended Settlement Agreement ("ASA") ¶ 11.2, ECF No. 1394-2, PageID.54160.

Dated: December 15, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above case were served via the ECF filing system on December 15, 2023.

Dated: December 15, 2023

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AS TO THE LAN SETTLEMENT

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CONCISE STATEMENT OF THE ISSUES PRESENTED

1. Should the Court re-approve Plaintiffs' Counsel's proposed structure for attorneys' fees to be awarded to Plaintiffs' Counsel?

2. Should the Court approve Plaintiffs' Counsel's application for a common benefit assessment from the Qualified Settlement Fund?

3. Should the Court approve Plaintiffs' Counsel's application for reimbursement of expenses?

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

- *In re Flint Water Cases*, 63 F.4th 486 (6th Cir. 2023) ("*Fee Appeal*").
- *In re Flint Water Cases*, 583 F. Supp. 3d 911 (E.D. Mich. 2022) ("*First Fee Order*").
- *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974).
- *In re Flint Water Cases*, 2023 WL 7724502 (E.D. Mich. Nov. 15, 2023) ("*LAN Preliminary Approval*").

I. INTRODUCTION

Working together, Plaintiffs' Counsel[1] have now secured **a combined settlement fund of $634.5 million for those injured by the Flint Water Crisis.** The fund also now includes an additional more than $30 million in interest that has accrued as a result of the investments authorized by Plaintiffs' Counsel. This combined fund reflects settlements with several parties including the State of Michigan, City of Flint, and, most recently, the professional engineering company LAN.[2] Plaintiffs' Counsel achieved this important result following more than seven years' work—a considerable investment of time and money, all of which was done on contingency.

This Court established a framework for attorneys' fees in this case ("Fee Framework") that was upheld on appeal to the Sixth Circuit. Fee Order (Feb. 4, 2022), ECF No. 2105; *In Re Flint Water Cases*, 63 F.4th 486 (6th Cir. 2023) (rehearing en banc denied Apr. 24, 2023). That Framework—which included a 6.33% common benefit fee to Co-Lead and Co-Liaison Counsel and a 25% fee on the class and individual portions of the settlement (with 10% fee on the programmatic relief component), for a total fee

[1] "Plaintiffs' Counsel" refers to movants Co-Lead Class Counsel and Co-Liaison Counsel, as well as Settlement Subclass Counsel and the law firms that have worked with and under the supervision of Co-Lead Class Counsel, including the Plaintiffs' Executive Committee.

[2] Leo A. Daly Company, Lockwood Andrews and Newnam, Inc., and Lockwood and Newnam, P.C. (collectively, "LAN"). Plaintiffs' Motion for Final Settlement Approval is due January 29, 2024.

of 31.33% for class and individual claimants—ensured similarly situated claimants recovered similarly from the settlement fund. As the Court previously concluded, the total fee and Framework was, and is, reasonable in light of the results obtained and efforts expended. Accordingly, Plaintiffs' Counsel ask that the Court apply the same Fee Framework to the additional amounts included in the settlement fund as a result of the LAN settlement. Additionally, Plaintiffs' Counsel request reimbursement from the settlement fund for expenses of $5,371,770.20 incurred in prosecuting this litigation.

II. PROCEDURAL HISTORY & FEE FRAMEWORK

Plaintiffs' Counsel secured a settlement with LAN which supplements the previous settlement fund of $626.5 million by $8 million. On November 15, 2023, the Court preliminarily approved the LAN Settlement and ordered that any motion for attorneys' fees and expenses be filed on or before December 15, 2023. *LAN Preliminary Approval*, 2023 WL 7724502.

The Fee Framework is designed to provide reasonable and equitable compensation to Plaintiffs' Counsel for the work they have performed and the risk and expenses they have shouldered in prosecuting these cases. As relevant to the instant motion, the Framework awards Plaintiffs' Counsel fees in the amount of 31.33% of the settlement fund with the following components:

- A global CBA of 6.33% to be divided between Co-Lead Class Counsel and Co-Liaison Counsel and paid following final approval of the Settlement and thereafter as the Fund is further funded pursuant to the terms of the Settlement.

- Class Counsel fees equal to 25% of the gross value of claims resolved through the Adult Exposure, Property Damage, and Business Economic Loss Subclasses. Class Counsel also receive 8% of the funds awarded to Minors assisted or retained by Class Counsel after August 20, 2020.

- IRC fees equal to 25% of the funds awarded to Claimants retained by IRC before August 20, 2020; and 8% of funds awarded to Claimants retained after, or Minors retained or assisted after, August 20, 2020.

- A supplemental CBA—to be divided between Co-Lead Class Counsel and Co-Liaison Counsel—of 17% of the amounts awarded to Claimants retained after, or Minors assisted after, August 20, 2020, and a supplemental CBA equal to 25% of the amounts awarded to Minors who do not retain counsel.

Fee Order, ECF No. 2105 at PageID.72142-43.

III. ARGUMENT

A. The Court Should Reapprove the Fee Framework and Award.

Incurring more than $12 million in expenses—including $5,371,770.20 in the last two years alone—Plaintiffs' Counsel took on considerable risk in litigating this matter on a contingent basis. In addition to the efforts detailed in Plaintiffs' Counsel's prior fee application, Plaintiffs' Counsel have now devoted enormous efforts to facilitating and implementing the settlement, Co-Liaison Counsel's pursuit of the Bellwether I trial, completing expert discovery and related motion practice on the claims against LAN and Veolia, and preparing the remaining claims for trial. All of those efforts have been for the common benefit of the beneficiaries of the settlement fund. While the nature and quality of Plaintiffs' Counsel's work and the results achieved for the settlement beneficiaries, rather than lodestar, have been the primary considerations in Plaintiffs'

Counsel's fee requests, counsel's time and expense reports also support the requested fees and expenses. While not inclusive of every firm that has submitted time and expenses to the Special Master,[3] the declarations filed indicate that Plaintiffs' Counsel have invested 73,740.55 hours of work into this litigation, representing $29,197,161 of lodestar at current rates, vastly exceeding the total sum requested, and have advanced more than $5.3 million in expenses since the prior settlement. The Fee Framework provides for attorneys' fees in the amount of 31.33% of the total recovery—an eminently fair and reasonable request under governing precedent.

1. The Framework's Common Benefit Assessments Should be Reapproved.

It is well established that counsel who perform common benefit work resulting in recovery of a common fund are entitled to compensation for those services from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *In re Flint Water Cases*, 583 F. Supp. 3d 911, 922 (E.D. Mich. 2022) ("*First Fee Order*") (discussing common fund doctrine). "The Sixth Circuit has long-recognized the common benefit doctrine." *Id.* (citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1195 (6th Cir. 1974)). The rationale for applying the common benefit doctrine in this type of case is particularly compelling:

> "[W]hen a court consolidates a large number of cases, stony adherence to the American rule [in which each litigant pays his or her own attorneys'

[3] Many but not all firms assigned work by the Co-Lead Class Counsel and Co-Liaison Counsel filed declarations in conjunction with this Motion.

> fees] invites a serious free-rider problem. . . . If a court hews woodenly to the American rule under such circumstances, each attorney, rather than toiling for the common good and bearing the cost alone, will have an incentive to rely on others to do the needed work, letting those others bear all the costs of attaining the parties' congruent goals." . . . Therefore, a court supervising mass tort litigation is allowed to "intervene to prevent or minimize an incipient free-rider problem" and may use "measures reasonably calculated to avoid unjust enrichment of persons who benefit from a lawsuit without shouldering its costs."[4]

Here, the Court directed Co-Lead Class Counsel and its Executive Committee, Co-Liaison Counsel, and Subclass Settlement Counsel to take leadership roles to the collective benefit of all plaintiffs.[5] For example, the Court ordered Interim Co-Lead Class Counsel and Interim Co-Liaison Counsel to "coordinate" and "conduct" all discovery "on behalf of and for the benefit of the putative class or individual actions," to "act as spokesperson for all plaintiffs" at all hearings, to negotiate with Defendants, and to have exclusive authority to pursue settlement with the Defendants.[6] Moreover, the Time and Expense CMO, which sets forth certain standards and procedures for

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[4] *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, No. MDL 05-1708 DWF/AJB, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008), *amended in part*, No. MDL 05-1708 DWF/AJB, 2008 WL 3896006 (D. Minn. Aug. 21, 2008) (quoting *In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992)).

[5] *See, e.g.*, Order (July 27, 2017), ECF No. 173 (consolidating cases and appointing Interim Co-Lead Class Counsel and Co-Liaison Counsel); Order Delineating the Duties of Interim Co-Lead Class Counsel and Co-Liaison Counsel for the Individual Actions and Creating a Plaintiffs' Executive Committee for the Proposed Class (Oct. 26, 2017), ECF No. 234 ("Order Delineating Duties").

[6] Order Delineating Duties at PageID.8722.

counsel seeking a common benefit award, reflects that Plaintiffs, their counsel, and the Court contemplated that common benefit work by Plaintiffs' Counsel could be entitled to compensation in the form of a common benefit award.[7] Indeed, the order specifically assigned to Co-Lead Class Counsel and Co-Liaison Counsel responsibility for coordinating and approving common benefit work by other Plaintiffs' Counsel.[8]

In their leadership roles, Plaintiffs' Counsel have performed a tremendous amount of work for the common benefit of all plaintiffs including:

- Investigating, researching, and drafting multiple consolidated complaints;
- Researching and briefing multiple dispositive motions including several unique to LAN;
- Extensive discovery work, including drafting discovery requests and responses and briefing for discovery-related motions and review of countless documents produced by Defendants and third parties, preparing for and participating in Court conferences regarding discovery disputes, taking and defending fact and expert depositions, conducting extensive expert consultant

[7] Order (June 19, 2018), ECF No. 507. Among other things, the order stated that the "Court reserves decision on whether certain work performed by various plaintiffs' counsel in the Flint Water Cases may inure to the common benefit of the litigation as a whole, or to specific portions of the litigation. The Court further reserves judgment as to whether any time recorded, or expenses incurred, shall be recognized as common benefit time or expense and will address whether to assess a surcharge on any monetary settlements in Flint Water cases, or any portion of such cases, at a future point in time." *Id.* at PageID.15842.

[8] *Id.* at PageID.15827, 829-830. Under the order, "[o]nly time spent on matters common to all plaintiffs in the Flint Water Cases ("Common Benefit Time") will be considered in determining fees. No time spent on developing or processing any case for an individual client/claimant will be considered except as approved by Interim Co-Lead Class Counsel or Interim Co-Liaison Counsel as work that serves a common benefit." *Id.* at PageID.15829.

and witness analysis and discovery; and

- Extensive, multi-year mediation and settlement negotiations.[9]

Plaintiffs' Counsel who performed this work and bore the associated risk are therefore entitled to reasonable compensation for these services from the common settlement fund they successfully negotiated.[10] The Framework accomplishes that through reasonable and justified 6.33% CBAs which reflect of the fact that all plaintiffs have substantially benefitted from common benefit work by Plaintiffs' Counsel. Lead counsel (with support from members of the Executive Committee who shared responsibility for the most significant litigation tasks; for negotiating, implementing and facilitating the settlement; and for funding the litigation) in these consolidated cases have taken on the majority of the expense, risk, and burden in litigating these cases to the benefit of all Plaintiffs. Their common benefit lodestar to date measures $29,197,161. It is therefore appropriate to award them the 6.33% global CBA.

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[9] In addition, Plaintiffs' Counsel will continue to perform substantial common benefit work in administering the Settlement.

[10] *E.g.*, *In re NuvaRing Prod. Liab. Litig.*, No. 4:08-MDL-1964, 2014 WL 7271959, at *1 (E.D. Mo. Dec. 18, 2014) ("[U]ntil a Master Settlement Agreement was reached . . . a number of attorneys performed an extraordinary amount of work and advanced substantial expenses which benefited all plaintiffs and claimants who asserted NuvaRing related injuries against the defendants. These 'common benefit attorneys' should and must be compensated for their efforts."); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 528 (D. Nev. 1987).

2. The Court Should Award Attorneys' Fees Using the Percentage of the Fund Approach.

Courts generally approve of awarding fees from a common fund based on the percentage-of-the-fund method.[11] "The Sixth Circuit has observed a 'trend towards adoption of a percentage of the fund method in [common fund] cases."[12] This trend holds true for courts in this District, which regularly utilize the percentage-of-the-fund approach in common fund cases.[13] A percentage of the fund approach fosters judicial economy by eliminating a detailed, cumbersome, and time-consuming lodestar analysis.[14] Compared to the lodestar method, the percentage of the fund approach is "easy to calculate" and "establishes reasonable expectations on the part of plaintiffs'

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[11] *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (stating that in common fund cases "a reasonable fee is based on a percentage of the fund bestowed on the class"); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991) ("Indeed, every Supreme Court case addressing the computation of a common fund fee award has determined such fees on a percentage of the fund basis.").

[12] *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 243 (E.D. Mich. 2016) (quoting *Rawlings v. Prudential-Bache Prop., Inc.*, 9 F.3d 513, 515).

[13] *See, e.g.*, *N.Y. State Teachers' Ret. Sys.*, 315 F.R.D. at 243; *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *17 (E.D. Mich. Dec. 13, 2011); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 502–03 (E.D. Mich. 2008); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531–32 (E.D. Mich. 2003).

[14] *Rawlings*, 9 F.3d at 516–17; *N.Y. State Teachers' Ret. Sys.*, 315 F.R.D. at 243; *Stanley v. United States Steel Co.*, No. 04-74654, 2009 WL 4646647, at *1 (E.D. Mich. Dec. 8, 2009) ("Use of the percentage method also decreases the burden imposed on the Court by eliminating a full-blown, detailed and time consuming lodestar analysis while assuring that the beneficiaries do not experience undue delay in receiving their share of the settlement."); *In re Cardizem CD*, 218 F.R.D. at 532.

attorneys as to their expected recovery."[15]

The attorneys' fees contemplated under the proposal are all calculated as a percentage of either collective funds recovered or, what is functionally similar in the aggregate, individual recoveries from these funds. The global 6.33% CBA, combined with the 25% assessment of the value of Settlement Subclass Members' claims, results in a straightforward percentage of the fund fee amounting to 31.33%. Thus, the Framework uses a combination of classic percentage-of-the-fund fees and functionally similar percentage-of-individual-recovery fees or fee caps to establish an equitable system of attorney compensation that fosters judicial economy by eliminating the need for a detailed, cumbersome, and time-consuming lodestar analysis. *Rawlings*, 9 F.3d at 516–17. Such an analysis would be particularly complex, burdensome, and time-consuming here given the number firms (and lawyers in each firm) representing both Class and Individual Plaintiffs in these cases. So too would a lodestar approach be impractical here where the claims against LAN mirror the claims against non-settling defendant VNA, making any sort of assignment of hours to a particular defendant essentially impossible.

3. The Total Fee Is Appropriate When Compared to Other Percentage of the Fund Awards.

An "award of attorneys' fees in common fund cases need only be 'reasonable

[15] *Rawlings*, 9 F.3d at 516.

under the circumstances,'" *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996), for which the Court "must provide a clear statement of the reasoning used in adopting a particular methodology and the factors considered in arriving at the fee," *Rawlings, Inc.*, 9 F.3d at 516. An appropriate fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

The Framework's combined fees and their structure are in line with the fee amounts and structures approved by courts in comparable mass tort litigation. *See, e.g.*, *First Fee Order*, 583 F. Supp. 3d 911 (setting 31.33% fee). In such cases, courts have commonly approved the same general approach used here, where certain percentages of the recovery are assessed as common benefit fees while fees for individually retained counsel are capped at defined percentages, resulting in overall fees typically in the range of 32% to 35%.[16] Here, the 6.33% global CBA and a flat 25% fee for Subclass

[16] *See, e.g.*, Mem. at 13*, In re Concussion Injury Litig.,* No. 2:12-md-02323 (E.D. Pa. Apr. 5, 2018), ECF No. 9860 (adopting 33% overall contingent fee rate for Class Counsel and Individually Retained Plaintiffs' Attorneys combined); *In re Vioxx*, 760 F. Supp. 2d 640, 653, 658 (E.D. La. 2010) (instituting 32% overall cap, granting 6.5% in fees to steering committee and stating that would leave IRC "over 25%," but also requiring IRPAs to pay 1% in common benefit expenses); *In re Vioxx*, 650 F. Supp. 2d 549 (E.D. La. 2009) (implementing a cap of 32% on overall fees in a case settled following six bellwether trials); *In re Guidant*, No. MDL 05-1708 DWF/AJB, 2008 WL 3896006, (D. Minn. Aug. 21, 2008) (adjusting overall fee cap to 37.18% and adopting complex formula for IRC fee but effectively setting that amount at about 22.8% of gross recovery); *In re Zyprexa*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. Mar. 28, 2006) (instituting

Members' claims amount to a total maximum fee percentage of 31.33%, slightly less than the typical fee in comparable cases. *Supra* Note 16. Moreover, except for the global 6.33% CBA, fees under the proposal are to be distributed only as and to the extent that claims are successfully paid out, ensuring Plaintiffs' Counsel will not receive a windfall and incentivizes them to maximize actual recoveries by Claimants. Finally, the 25% assessment Co-Lead Class Counsel request from the Settlement Subclass funds is consistent with fee awards to class counsel in other class actions in this Circuit.[17]

4. The *Ramey* Factors Justify the Fee Framework and Total Award.

A court is tasked with ensuring that counsel are fairly compensated for the work performed and the result achieved. *Rawlings*, 9 F.3d at 516. Courts in the Sixth Circuit evaluate the reasonableness of a requested fee percentage award using six factors: (1) the value of the benefit rendered to the plaintiff class; (2) the value of the services on an

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adjustable 35% overall fee cap); *In re Zyprexa*, No. MDL-1596, 2007 WL 2340790, at *1 (E.D.N.Y. Aug. 17, 2007) (common benefit set aside of 3% of gross recovery); *In re Bayou Sorrel*, No. 6:04-cv-1101, 2006 WL 3230771, at *6 (W.D. La. Oct. 31, 2006) (setting fees at "36% for all plaintiff's attorneys, 50% of which is to be distributed to the PSC for the common benefit work and 50% to the various private attorneys representing individual plaintiffs," yielding 18% IRC rate); *In re MGM Grand Hotel Fire*, 660 F. Supp. 522 (instituting 33.33% overall cap, granting 7% in fees to steering committee and stating that would leave 26.33% to IRC, but also requiring IRC to pay 1.5% in common benefit expenses).

[17] *See, e.g.*, *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *19 ("The requested award of close to 30% appears to be a fairly well-accepted ratio . . . generally in complex class actions."); *In re Cardizem*, 218 F.R.D. at 532 (collecting cases and noting "20–30% range of reasonable attorneys' fees generally awarded in this Circuit").

hourly basis; (3) whether the services were undertaken on a contingent fee basis; (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (5) the complexity of the litigation; and (6) the professional skill and standing of counsel involved on both sides. *Fee Appeal*, 63 F.4th at 495–96 (citing *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974).

Under these factors, the Fee Framework and total award is fair, reasonable, and justified.

i. Plaintiffs' Counsel Obtained a Significant Result.

Courts have consistently recognized that the result achieved is a major factor to be considered in making a fee award.[18] This assessment should take into account the costs, risks, and delay associated with further litigation.[19] Particularly when considered as part of the more than $660 million in settlement funds and accrued interest that have been generated as a result of counsel's efforts throughout the life of this litigation, the additional the $8 million contribution to the fund is an excellent result for victims of the

[18] *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (noting that the "most critical factor is the degree of success obtained"); *Rawlings*, 9 F.3d at 516 (stating that a percentage of the fund will compensate counsel for the result achieved); *Smillie v. Park Chem. Co.*, 710 F.2d 271, 275 (6th Cir. 1983).

[19] *See Sheick v. Auto. Component Carrier LLC*, No. 2:09-cv-14429, 2010 WL 4136958, at *15 (E.D. Mich. Oct. 18, 2010); *see also Garner Props. & Mgmt., LLC*, 333 F.R.D. 614, 627 (E.D. Mich. 2020); *UAW v. Ford Motor Co.*, Nos. 05-74730, 06-10331, 2006 WL 1984363, at *21 (E.D. Mich. July 13, 2006), *aff'd*, 497 F.3d 615 (6th Cir. 2007); *Ford v. Fed.-Mogul Corp.*, No. 2:09-CV-14448, 2015 WL 110340, at *6 (E.D. Mich. Jan. 7, 2015).

Flint Water Crisis against the resource-constrained LAN.[20] The settlement with LAN "streamline[s] future litigation in the Flint Water Cases, insofar as Plaintiffs would proceed against only VNA and the Environmental Protection Agency." *LAN Preliminary Approval*, 2023 WL 7724502, at *10. The Issues Class and Bellwether trials will now proceed as to claims only against VNA, allowing Plaintiffs to present a single timeline and fact pattern, and substantially decreasing the risk of jury confusion and burnout at the upcoming Issues Class trial.[21]

ii. Plaintiffs' Counsel Undertook this Complex Case on a Contingency Basis.

A determination of a fair fee must include consideration of the contingent nature of the fee and the difficulties that were overcome in obtaining the settlement.

Plaintiffs' Counsel have vigorously prosecuted these cases for more than seven years on a wholly contingent basis. Contingent fee cases sometimes result in no compensation whatsoever for plaintiffs' counsel, even after the expenditure of

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[20] As noted in Plaintiffs' preliminary approval brief, the Settling Defendants are represented by experienced counsel, and undoubtedly would continue to deny Plaintiffs' allegations, contest liability, and appeal any result adverse to them. Likewise,

[21] *See, e.g.*, *In re Corrugated Container Antitrust Litig.*, No. M.D.L. 310, 1981 WL 2093, at *16 (S.D. Tex. June 4, 1981) (settlement allowed plaintiffs "to reduce the complexity and expense of trial" and "streamline their evidence to focus on the conduct . . . of nonsettling defendants… improv[ing] their chances of success in trial"), *aff'd*, 659 F.2d 1322 (5th Cir. 1981); *see also* Lawrence G. Certrulo, *Toxic Torts Litigation Guide* § 16:33 ("Partial settlements are advantageous . . . they often reduce the scope of discovery or trial.").

thousands of hours of work. That can happen for any number of reasons in complex cases like these, including the discovery of facts unknown when the case is commenced, changes in the law during the pendency of the case, or a decision of a judge or jury following a trial on the merits. Even plaintiffs who prevail at trial may find their judgment overturned on appeal. Or, in the case of LAN, plaintiffs may achieve a "'pyrrhic victory' where the defendant cannot satisfy a judgment." *LAN Preliminary Approval*, 2023 WL 7724502, at *10 (citing *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007)).[22]

Plaintiffs' Counsel have assumed considerable risk in taking on and investing substantial resources into these cases with no guarantee of recovery. This case has entailed extensive discovery and lengthy motion practice and appeals. The Settling Defendants are represented by experienced counsel, and absent the Settlement would undoubtedly continue to deny Plaintiffs' allegations, contest liability, and appeal any contrary result. Settlement also "avoids a situation where LAN is unable to satisfy a judgment greater than what is included in the LSA." *LAN Preliminary Approval*, 2023 WL 7724502, at *10. In addition to counsel's own substantial lodestar (detailed below),

[22] The Special Master engaged an independent expert, who "confirm[ed] that the Settlement amount is consistent with LAN's ability to allocate funds to this settlement while maintaining company operations." *LAN Preliminary Approval*, 2023 WL 7724502, at *2 (citations and quotations omitted).

Plaintiffs' Counsel's investments have included costly expert consultation and other expenses, all borne by Plaintiffs' Counsel with no guarantee of recoupment. Given the circumstances, the fee proposal is reasonable.

iii. A Loadstar Cross-Check Supports the Fee Framework and Award.

While not required, courts commonly use counsel lodestar as a "crosscheck" to confirm the reasonableness of a percentage award. *See Linneman v. Vita-Mix Corp.*, 970 F.3d 621, 628 (6th Cir. 2020). This analysis is not a precise science, but rather a tool for rough comparison among cases. "Because the lodestar is being used merely as a cross-check, it is unnecessary for the Court to delve into each hour of work that was performed by counsel to ascertain whether the number of hours reportedly expended was reasonable." *In re IPO Sec. Litig.*, 671 F. Supp. 2d 467, 506 (S.D.N.Y. 2009).

As described in the declarations submitted in support of this application and the previously submitted fee application, Plaintiffs' Counsel have spent more than 73,470.55 hours performing common benefit work for the Plaintiffs here.[23] This results in a lodestar of more than $29,197,161 at current rates.[24] Leopold Decl. ¶ 5. This lodestar

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[23] *See* Declaration of Theodore J. Leopold ("Leopold Decl.") ¶ 5. Should the Court request, Plaintiffs' Counsel will provide detailed time records for the Court to review *in camera*.

[24] The Supreme Court and courts in this Circuit have recognized that, "[t]o compensate for the delay Plaintiffs' Counsel encounter[] in receiving compensation" in contingent fee cases, "it is appropriate to use current fee rates in calculating the lodestar." *Connectivity Sys. Inc. v. Nat'l City Bank*, No. 2:08-CV-1119, 2011 WL

includes only common benefit work performed in conformance with the Time and Expense CMO. Therefore, it does not include additional legal work performed by individually retained counsel solely on behalf of their clients. All of this common benefit time has been submitted to Special Master Greenspan on a monthly basis for review.[25] Overall fees contemplated by the proposal include the 6.33% CBA combined with the 25% assessment of the value of claims, resulting in a straightforward percentage of the fund fee amounting to 31.33%, equaling the fee previously approved by the Court and affirmed by the Sixth Circuit in connection with the prior settlements included in the settlement fund. This results in an additional or $2,506,400 in attorneys' fees based on the LAN component of the settlement in addition to the amounts previously awarded from the settlement fund (and, if allowed, counsel's proportionate share of the accrued interest).

292008, at *13 (S.D. Ohio Jan. 26, 2011) (citing *Missouri v. Jenkins*, 491 U.S. 274, 283–84 (1989) (using current rates)); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 556 (2010) ("Compensation for this delay is generally made either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." (quotation marks omitted)). The Sixth Circuit has approved the application of current billing rates in cases involving significant delay in receiving compensation. *See Barnes v. City of Cincinnati*, 401 F.3d 729, 745 (6th Cir. 2005) (finding current market rates reasonable because litigation "had been ongoing for nearly six years"); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 684 F. Supp. 953, 958 (6th Cir. 1988) (noting that current rates were appropriate to counterbalance a delay in payment) (reversed on other grounds).

[25] Time and Expense CMO, ECF 507 at PageID.15829; *First Fee Order*, 583 F. Supp. 3d at 942.

Collectively, Plaintiffs' Counsel have invested more than $113 million in time towards the prosecution of these cases since their inception. Co-Lead Counsel and the Executive Committee have alone invested more than $80 million. Even with the additional fees, the total fees awarded Class Counsel from the settlements will be less than the amount of their combined lodestar at their current rates. Courts routinely approve awards that represent a substantial *increase* of counsel's lodestar particularly when, as here, counsel's efforts have resulted in substantial recoveries for the settlement beneficiaries.[26] The lodestar cross-check reflects "an enormous amount of work" and clearly demonstrates the proposal's reasonableness. *E.g.*, *First Fee Order*, 583 F. Supp. 3d at 945.

iv. Public Policy Considerations Support the Requested Fee.

Courts recognize that public policy supports rewarding plaintiffs' counsel who take on challenging cases like these on a contingent basis on behalf of plaintiffs who might otherwise not be able to prosecute them. *First Fee Order*, 583 F. Supp. 3d at 938. Plaintiffs in complex mass tort litigation such as this are often represented by counsel who are retained on a contingent basis, largely due to the significant commitment of time and expense required in comparison to the plaintiffs' financial resources. Many

[26] *See, e.g.*, *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 767–68 (S.D. Ohio 2007) (awarding a multiplier of 6 and noting that "[m]ost courts agree that the typical lodestar multiplier . . . ranges from 1.3 to 4.5").

individual plaintiffs and class representatives are unlikely to be able to pursue protracted and costly litigation at their own expense. That is especially true where, as here, the claims are complex and require a considerable amount of expert testimony, the individual damages suffered by some Plaintiffs may be significantly less than the cost of prosecuting the action, and many Plaintiffs are part of lower-income households. The significant expenses, combined with the high degree of uncertainty of ultimate success, make contingent fees a virtual necessity for such cases.

Public policy thus strongly supports the fee proposal. Without the prospect of eventual compensation for Plaintiffs' Counsel here, these cases likely never have been brought. Approving the proposal will help ensure that plaintiffs' attorneys continue to take up important cases like these in the future.

v. The Complexity of the Litigation Justifies the Requested Award.

Prosecution of any mass tort or complex class action presents intricate and novel issues. This case, which this Court recognized has been "demanding and challenging," *First Fee Order*, 583 F. Supp. 3d at 945, is no exception.

vi. Victims of the Flint Water Crisis Benefited from Exemplary Representation.

Plaintiffs' Counsel are known leaders in class action, mass tort, and complex litigation. The quality of their representation has been recognized by the Court on multiple occasions. *In re Flint Water Cases*, 499 F. Supp. 3d at 423; *LAN Preliminary Approval Order*, 2023 WL 7724502, at *7, *12. Likewise, nationally known, prominent,

and extremely capable counsel represent Defendants and have vigorously defended this action. The ability of Plaintiffs' Counsel to obtain a favorable result in the face of such qualified opposition is further evidence of the quality of their work.

* * *

All factors all weigh in favor of the fee award requested. The Court should grant Plaintiffs' fee proposal.

B. The Court Should Approve Plaintiffs' Counsel's Request for Reimbursement of Reasonable Litigation Expenses

Plaintiffs' Counsel also request reimbursement of common benefit expenses incurred so far in connection with the prosecution of this litigation on behalf of the beneficiaries of the combined settlement funds. Pursuant to the Time and Expense CMO (ECF No. 507, at PageID.15834-842), these expenses include both shared costs paid by the Flint Litigation Fund and held costs paid by individual firms for the common benefit of Plaintiffs. Plaintiffs' Counsel have incurred common benefit expenses in the aggregate amount of $5,371,770.20, with the Class Litigation Fund paying $2,895,698.33 of this, the Individual Litigation Fund paying $2,296,606.74 of this, and held costs constituting $179,465.13 of this amount.[27]

"The common fund doctrine . . . authorizes reimbursement of the reasonable

[27] Leopold Decl. at ¶¶ 9-10 (and supporting exhibits). Plaintiffs' Counsel may later seek reimbursement of future expenses.

amounts paid out-of-pocket to achieve a common benefit recovery or to advance the common goals of plaintiffs."[28] This rule applies in the class action context as well. *See In re Cardizem CD*, 218 F.R.D. at 535. The categories of expenses for which counsel seek reimbursement here are the type of expenses routinely charged to hourly clients and were necessary to the prosecution of the case. The ASA states that "Counsel for Individual Plaintiffs and Class Members shall be reimbursed and paid solely out of the FWC Qualified Settlement Fund for all expenses . . . , including but not limited to: . . . past, current, or future litigation and administration expenses (including, but not limited to, experts', consultants', and guardians ad litem fees and expenses); and the costs of providing the Settlement Class Notice and Individual Notice." ASA § 11.1; *see* LSA § 11.1 (adopting terms of ASA Art. XI).

A significant component of Plaintiffs' Counsel's expenses here is the cost of the expert work performed on behalf of the Plaintiffs. Plaintiffs' Counsel retained highly qualified experts in a variety of fields—including civil and environmental engineering, chemical engineering, urban planning, human health, economics, and ethics—to analyze the circumstances giving rise to the water crisis, the responsibilities of the engineering

[28] *In re NuvaRing*, 2014 WL 7271959, at *4; *see also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 2000 U.S. Dist. LEXIS 15980 at *38–40 (awarding 4% of the gross recovery for reimbursement of litigation expenses); *Phipps Group v. Downing (In re Genetically Modified Rice Litig.)*, 764 F.3d 864 (8th Cir. 2014) (approving over $5,000,000 in expenses to the common benefit attorneys).

defendants, and the medical and economic impact of the crisis on residents and businesses in Flint. These experts' work required many hours of research, calculating, and drafting essential to successful prosecution of this litigation and instrumental in procuring both this settlement and the previous.

Because these expenses were necessary to prosecute this litigation and achieve the Settlement, and because they are the types of expenses typically reimbursed in such cases, the Court should grant this request. Plaintiffs' further propose that the requested expense reimbursements should be funded from the more than $30 million in interest that has accrued on the settlement fund.[29] Counsel have deferred seeking reimbursement of additional expenses during he nearly three years since the settlement was funded, and all of the expenses at issue were incurred for the benefit of the claimants who will obtain recoveries under the combined settlement fund, which includes the LAN settlement, the previously funded settlement amounts, and accrued interest. Because of the delay in distributing the settlement while appeals were adjudicated and the claims process proceeded, and because of the increase in interest rates in the meantime, the accrued interest provides an ample source of funding for the requested expenses without

[29] The settlement fund had accrued $30,755,970.28 in interest as of November 30, 2023 as a result of the investments authorized by Co-Lead Counsel and Co-Liaison Counsel. The fund has continued to accrue interest since then and will continue to do so until the funds are distributed.

significantly impacting any claimant's anticipated recovery.[30] Accordingly, it would be both fair and reasonable to award the requested expense reimbursement from the combined settlement fund.

IV. CONCLUSION

For the reasons stated herein, Plaintiffs' Counsel request that the Court grant their Motion.

Dated: December 15, 2023

Respectfully submitted,

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[30] A substantial portion of the requested expenses consists of trailing expenses for expert work completed prior to completion of the MSA, as well as for claims facilitation work completed in connection with the MSA.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above case were served via the ECF filing system on December 15, 2023.

Dated: December 15, 2023

/s/ Theodore J. Leopold

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