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<p>LIONEL MEDINA, EKATERINA VOROBEOVA, KARISTA VAETH and JENNIFER SCULLION, on behalf of Themselves and all others Similarly Situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>SIMSMETAL EAST LLC, SIMS MUNICIPAL GROUP RECYCLING of NEW YORK, LLC, SIMS GROUP USA HOLDINGS CORPORATION,</p> <p style="text-align: center;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY</p> <p>DOCKET NO. HUD -L-001589-24</p> <p><u>CIVIL</u></p> <p>NOTICE OF UNOPPOSED MOTION TO GRANT PRELIMINARY APPROVAL TO PROPOSED CLASS ACTION SETTLEMENT, TO APPROVE DISTRIBUTION OF PROPOSED SETTLEMENT NOTICE AND TO SET A HEARING DATE FOR A FORMAL FAIRNESS HEARING ON PROPOSED SETTLEMENT</p>
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TO: Clerk, Hudson County

Return Date of motion: January 23, 2026-9:00 a.m.
 Place: William J. Brennan Courthouse
 583 Newark Ave.
 Jersey City, New Jersey 07306

Please take notice that the undersigned, attorneys for Plaintiffs in the above captioned matter, will apply to the above-named court at the William J. Brennan Courthouse, 583 Newark Ave., Jersey City, New Jersey, for an Order Granting Preliminary Approval to Proposed Class Action Settlement, to approve distribution of the proposed settlement notice and to set a hearing date for a formal hearing on proposed settlement.

Counsel will rely upon the attached Plaintiff’s Memorandum of Law, certification and exhibits as part of this motion.

Pursuant to the Rules, the undersigned:

Do request oral argument.

This matter is not currently scheduled for a trial.

The discovery end date for this matter was September 25, 2025

MATSKOUDIS & FANCIULLO, LLC

Dated: January 14, 2026

BY: _____
William C. Matsikoudis, Esq.

LIONEL MEDINA, EKATERINA VOROBÉVA, KARISTA VAETH and JENNIFER SCULLION, on behalf of Themselves and all others Similarly Situated,
Plaintiffs,

vs.

SIMSMETAL EAST LLC, SIMS MUNICIPAL RECYCLING OF NEW YORK, LLC, SIMS GROUP USA HOLDINGS CORPORATION,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION HUDSON COUNTY
Docket No.: HUD-L-001589-24

CIVIL ACTION

**ORDER GRANTING PRELIMINARY
APPROVAL TO PROPOSED
CLASS ACTION SETTLEMENT**

This matter having come before the Court on an unopposed motion by Plaintiffs under *Rule* 4:32-2(e) for preliminary approval of a proposed class action settlement, approval of a proposed form of class settlement notice and notice plan, and setting a hearing date for the formal public hearing on whether to grant final approval to the proposed class settlement, and the Court having considered the motion papers and presentation, and for good cause shown;

IT IS ORDERED this _____ day of _____, 2026, as follows:

1. The Court grants preliminary approval of the proposed class action Settlement as being within the range of potential final approval. All capitalized terms set forth in this Order have the same meaning as in the parties' Settlement Agreement dated _____, 2025 (the "Agreement"), filed with Plaintiffs' motion.

2. This matter shall preliminarily proceed as a class action, for settlement purposes only, with a Settlement Class defined as follows:

All owners and residents during the class period of the condominium units in eight buildings within the Port Liberté community with addresses of 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom

Way, and 4 Constellation Place that have windows, doors, balconies, or other open-air access facing Defendants' business operations.

3. For settlement purposes only, the Court preliminarily appoints Plaintiffs Lionel Medina, Ekaterina Vorobeva, Karista Vaeth, and Jennifer Scullion as the named Class Representatives and William C. Matsikoudis, Esq. and Derek S. Fanciullo, Esq. of Matsikoudis & Fanciullo, LLC and G. Martin Meyers, Esq. and Justin A. Meyers, Esq. of Law Offices of G. Martin Meyers, P.C. as Class Counsel.

4. It is apparent from the file and presentation of counsel that the proposed Settlement Class meets the requirements of *Rule* 4:32-1(a) and (b)(3), such that class notice should be provided. The Court specifically makes the following findings:

a. The members of the Settlement Class are so numerous as to make joinder impracticable.

b. There are questions of law and fact common to the Settlement Class, and such questions predominate over any questions affecting only individual Settlement Class Members for purposes of the Settlement.

c. Plaintiffs' claims and the defenses to such claims are typical of the claims of the Settlement Class Members and the defenses to such claims for purposes of the Settlement.

d. Plaintiffs and their counsel can fairly and adequately protect, and have fairly and adequately protected, the interests of the Settlement Class Members in this action with respect to the Settlement.

e. The proposed class action Settlement is superior to all other available methods for fairly and efficiently resolving this action.

5. The Court appoints JND Legal Administration, 1201 2nd Avenue, Suite 3400,

Seattle, Washington 98101 as the Settlement Administrator. One-third (1/3) of the costs incurred by the Settlement Administrator shall be paid, collectively, by Defendants Simsmetal East LLC and Sims Group Holdings USA Holdings Corporation (collectively, “Simsmetal”), one-third (1/3) shall be paid by Sims Municipal Recycling of New York, LLC (“SMR”, and, together with Simsmetal, “Defendants”), separate and apart from their payments to the Settlement Fund, and the remaining one-third (1/3) shall be paid out of the Settlement Fund.

6. The Court approves the content of the proposed Class Long Form Notice, the Class Email Notice, the Class Postcard Notice, the Class Publication Notice, and the Claim Form submitted by Counsel and the proposed manner of notice distribution and claim process set forth in the Settlement Agreement. The Court finds that the manner and content of each of these documents will provide the best notice practicable to the Settlement Class under the circumstances. One-third (1/3) of the costs incurred in connection with the preparation and dissemination of any notices to the Settlement Class shall be borne by each of Simsmetal and SMR, separate and apart from their payments to the Settlement Fund, and the remaining one-third (1/3) shall be separately paid out of the Settlement Fund.

7. The Court directs Class Counsel to provide to the Settlement Administrator, within 15 calendar days of the entry of this Order, (a) a list of any and all persons whom records made available to Class Counsel indicate are Settlement Class Members; and (b) their last known email and postal addresses. Such information shall include, at a minimum, the list of owners and residents maintained by the Port Liberté Homeowners’ Association that have been obtained by Class Counsel. The Court further directs that the Settlement Administrator shall thereafter arrange for such searches of commercial databases as it deems appropriate to supplement the list provided by Class Counsel with names and last known addresses of owners and residents.

8. The Court further directs that the Settlement Administrator shall disseminate the Class Email Notice and the Class Postcard Notice pursuant to paragraph 5.4 of the Settlement Agreement to all persons whom the parties' records and the other records obtained by the Settlement Administrator indicate may be Settlement Class Members, at their last known email and/or mailing address. Specifically, the Settlement Administrator will send a first Email Notice on or before 21 calendar days after entry of this Order and will send a Second Email Notice to those Settlement Class Members who, as of that date, had not submitted a valid Claim 42 calendar days after the entry of this Order to all persons for whom the Settlement Administrator has a valid email address. The Settlement Administrator will also send a postcard notice via U.S. Mail to all persons for whom the Settlement Administrator has a valid mail address on or before 30 calendar days after entry of this Order.

9. The Court further directs that the Settlement Administrator shall cause the Class Publication Notice to be published in the manner set forth in paragraph 5.4(c) of the Settlement Agreement, specifically, by publication in the electronic version of The Star-Ledger (www.nj.com/starledger) starting 30 calendar days after entry of this Order, and then on a second occasion 45 days after entry of this Order.

10. Within 19 calendar days of the entry of this Order, the Settlement Administrator shall create a Settlement Website (either www.PortLiberteSettlement.com or a substantially similar domain name), which will contain information describing the Settlement and will contain the Settlement Agreement, the Claim Form (Exhibit A to the Settlement Agreement), the Class Email Notice (Exhibit B to the Settlement Agreement), the Class Long Form Notice (Exhibit C to the Settlement Agreement), the Class Postcard Notice (Exhibit D to the Settlement Agreement), the Class Publication Notice (Exhibit E to the Settlement Agreement), Class Counsel's contact

information, and a copy of Plaintiffs' operative First Amended Complaint (the "FAC"). The Class Long Form Notice, Class Email Notice, Class Postcard Notice, Class Publication Notice, and Claim Form shall also be posted by Class Counsel in a prominent location on Class Counsel's website, www.mf-legal.com.

11. Any person included within the Settlement Class who wishes to be excluded, or to "opt out," from membership in the Settlement Class must do so in writing by mailing a Request for Exclusion from the Settlement to the Settlement Administrator. Any such Request for Exclusion must be post-marked no later than 20 business days before the Final Approval Hearing scheduled in this matter. Any Settlement Class Member who has filed an Objection to the fairness, reasonableness, or adequacy of the Settlement pursuant to paragraph 12 of this Order shall be deemed not to have opted out of the Settlement Class pursuant to this paragraph. In the event and to the extent that the parties advise the Court that a Settlement Class Member has made a submission to the Court and the parties which appears to assert both an Objection to the proposed Settlement and a Request for Exclusion from the Settlement Class, such Settlement Class Member shall be deemed to have objected to the Settlement. Any Request for Exclusion that fails to satisfy the requirements of the Settlement Agreement, or is not properly or timely submitted, shall not be effective, and the person making such a Request shall be deemed to have waived all rights to opt out of the Settlement.

12. Any Settlement Class Member who has not timely filed a written Request for Exclusion from the Settlement Class pursuant to paragraph 11 of this Order may file an Objection to the fairness, reasonableness or adequacy of the Settlement. Any member of the Settlement Class who so objects may appear at the Final Approval Hearing, in person or through counsel, to show cause why the Settlement should not be approved as fair, adequate and reasonable. Any such

Objections to the proposed Class Settlement must be submitted to the Hudson County Civil Clerk, post-marked no later than 20 business days before the Final Approval Hearing scheduled in this matter, with a copy also mailed to the Settlement Administrator and to the parties' counsel. Any Objection that fails to satisfy the requirements set forth in the Settlement Agreement, or that is not properly and timely submitted, shall not be effective, will not be considered by this Court, and will be deemed waived, and those Settlement Class Members shall be bound by the final determination of this Court.

13. Except for good cause shown, no person (other than the parties and their respective representatives and counsel) may appear or be heard at the Final Approval Hearing, or file papers, briefs, or other submissions regarding the Final Approval Hearing, unless by 20 business days before the Final Approval Hearing such person or his or her counsel files with the Clerk of this Court and simultaneously serves on counsel for all parties at the addresses set forth in the Settlement Agreement a timely, written notice of request to appear at the Final Approval Hearing.

14. Pursuant to *Rule* 4:32-2(e)(1)(C), a formal, public hearing on whether to grant final, binding approval to the proposed class action Settlement shall be held on _____, at the Superior Court of New Jersey, Law Division, Hudson County, Hudson-Brennan Courthouse, 583 Newark Avenue, Jersey City, New Jersey 07306 in Courtroom 4D at _____. Any person wanting to be heard on that date by phone or virtually shall contact Hudson County Civil Case Management for directions on how to appear. During this Final Approval Hearing, the Court shall determine whether:

a. This action meets each of the prerequisites for class certification set forth in *Rule* 4:32-1(a) and (b)(3), and may properly be maintained as a class action under *Rule* 4:32-2(a);

b. The Settlement should receive final approval as fair, reasonable, adequate, and in the best interests of the Settlement Class, in light of any Objections presented by Settlement Class Members and the parties' responses to any such Objections;

c. A Final Approval Order granting final approval of the Settlement, entering final judgment and dismissing the FAC with prejudice, as provided in the Settlement Agreement, should be entered; and

d. The applications of Plaintiffs' counsel for the payment of attorneys' fees and expenses are reasonable and should be approved.

e. The Final Approval Hearing may be postponed, adjourned or continued, and the format of the hearing may likewise be altered, by further order of this Court, without further notice to the parties or the members of the Settlement Class.

15. Any memoranda of law or other documents in support of final approval of the proposed class Settlement, copies of any Objections or Requests for Exclusion that have been submitted to Class Counsel or Defendants' Counsel, and an affidavit, certification or declaration attesting that class notice has been distributed in a manner consistent with this Order, must be submitted to the Court ten business days before the Final Approval Hearing.

16. If the Settlement is finally approved, the Court shall enter a separate Final Approval Order finally approving the Settlement, entering judgment and dismissing the FAC. Such order and judgment shall be fully binding with respect to all members of the Settlement Class. In addition, Plaintiffs shall submit their application for an award of attorneys' fees and expenses no later than 52 days after the entry of this Order.

17. In the event that the proposed Settlement set forth in the Settlement Agreement is not granted final approval by the Court, or in the event that the Settlement Agreement becomes

null and void pursuant to any of its other terms or is otherwise not consummated, then the provisions of paragraph 8.3 of the Settlement Agreement shall be given full effect, any and all orders entered by the Court in connection with the proposed Settlement shall become null and void, and the Settlement Class defined in paragraph 2 of this Order shall be immediately decertified without further order of this Court. In such event, all proceedings in this Court related to the proposed Settlement shall be withdrawn without prejudice to the rights of any and all parties, who shall be restored to their respective positions as of the date of the execution of the Settlement Agreement, and this action will revert to its status as of that date.

18. Neither the Settlement Agreement, nor any of its terms or provisions, nor any of the related negotiations or proceedings connected with the Settlement Agreement, shall be construed as an admission or concession by Defendants of the truth of any of the allegations made by Plaintiffs, or of any liability, fault or wrongdoing of any kind. Neither the Settlement Agreement nor any submission by any party in connection with Plaintiffs' motions for preliminary or final approval of the Settlement or Plaintiffs' application for an award of attorneys' fees and expenses, any appeal from such motions or application, or any related motions or proceedings may be used in this action or in any other proceeding for any purpose other than as specified in the Settlement Agreement.

19. This Court enters a Preliminary Injunction barring and enjoining Plaintiffs and all Settlement Class Members, to the extent permissible by existing law, from bringing, filing, commencing, prosecuting (or further prosecuting), maintaining, intervening in, participating in, or receiving any benefits from any other lawsuit, arbitration proceeding, or administrative, regulatory or other proceeding in law or equity that asserts, arises from, concerns, or is in any

way related to the released Claims identified in the Settlement Agreement, until such time as this Court has ruled on the fairness of the Settlement terms following the Final Approval Hearing.

SO ORDERED:

Hon. Kalimah H. Ahmad, J.S.C.

<p>LIONEL MEDINA, EKATERINA VOROBEOVA, KARISTA VAETH and JENNIFER SCULLION, on behalf of Themselves and all others Similarly Situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>SIMSMETAL EAST LLC, SIMS MUNICIPAL GROUP RECYCLING OF NEW YORK, LLC, SIMS GROUP USA HOLDINGS CORPORATION,</p> <p style="text-align: center;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO.: HUD-L-001589-24</p> <p>CIVIL ACTION</p>
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**PLAINTIFFS' BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

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Introduction

This motion seeks preliminary approval of a class action lawsuit settlement on behalf of a proposed class of current and former condominium residents and/or owners of the Port Liberté community (“Port Liberté”) in Jersey City whose condominium units face Defendants’ recycling facilities (the “Defendants’ Facilities”). The lawsuit alleges that Defendants’ Facilities create a variety of harms that constitute tortious conduct, including the tort of private nuisance, such as noxious odors, excessive noise, excessively bright overnight lights, air pollution, smoke from fires, and explosion shockwaves, that unreasonably interfere with the proposed class members’ quality of life, public health, peace and property values in violation of New Jersey common law. Defendants deny Plaintiffs’ claims in their entirety, deny any wrongdoing or liability whatsoever to Plaintiffs or the proposed class, and assert that they fully complied with relevant Federal, State and local law in their operation of their respective Facilities.

However, after an investigation that included noise and air sampling, and the exchange of a large volume of information and thousands of pages of documents through both formal and informal discovery, the parties jointly concluded that exploration of a potential class-wide settlement was desirable in order to avoid the time, expense, and inherent uncertainties of protracted litigation. After more than nine months of arms-length settlement negotiations, the parties ultimately reached the proposed class settlement embodied in the settlement agreement (the “Settlement Agreement”), attached as Exhibit A to the accompanying Certification of William Matsikoudis (“Matsikoudis Cert.”), subject to Court approval.

The Court should grant this unopposed motion for preliminary approval of the Settlement Agreement because, as explained infra, the Settlement Agreement provides significant financial compensation for the proposed class members and requires the Defendants to provide injunctive

relief that will do much to address the stated concerns of the class members, all while not impairing the Defendants' ability to provide their important recycling services and to conduct their respective business operations.

Defendant Simsmetal East LLC and Sims Group USA Holdings Corporation (together, "Simsmetal") operate a metal recycling facility in an industrial area known as Claremont Terminal directly across a navigable channel, known as Claremont Terminal Channel, from Port Liberté. Simsmetal purchases and processes ferrous and non-ferrous scrap metal, and other metal debris, including, but not limited to, automobiles, for sale and reuse. The Simsmetal facility utilizes a variety of equipment, such as torch cutters, mobile car crushers and a metal shredder (the "Metal Shredder"). Simsmetal sells the processed metal materials and, to do this, Simsmetal engages in barge loading, overseas container ship loading, rail car loading, and truck loading.

Defendant Sims Municipal Recycling of New York, LLC ("SMR") operates in two areas of Claremont Terminal. SMR handles municipal recycling of aluminum cans, plastic and glass for Jersey City and New York City. SMR's "Materials Recovery Facility" sits next to Simsmetal and is immediately across Claremont Terminal Channel from and faces Port Liberté. SMR also operates a separate glass recycling facility slightly south of and inland from Port Liberté at Claremont Terminal.

Simsmetal and SMR do not oppose this motion that seeks: (1) preliminary, non-binding approval of the proposed class action settlement memorialized in the accompanying Settlement Agreement; (2) certifying a conditional settlement class for the purpose of consummating the proposed class settlement; (3) approving the proposed form of email, postcard, publication, and long form notice of the proposed class settlement (Exhibits B, C, D, and E and to the Settlement Agreement) and the proposed manner of notice distribution; (4) approving the proposed claim

form (Exhibit A to the Settlement Agreement); and (5) scheduling a formal settlement approval (or “fairness”) hearing approximately 119 days after preliminary approval (on or after May 22, 2026) on whether to grant final, binding approval of the proposed class settlement.

Procedural History

Plaintiffs’ original Complaint was filed on April 26, 2024. SMR was not named as a party defendant in the original Complaint, in that the Complaint stated an incorrect name (Sims Municipal Recycling NJ, LLC, instead of Sims Municipal Recycling of New York, LLC.) On August 28, 2024, Plaintiffs filed a Motion to Amend the Complaint to name SMR as an additional Defendant and to modify the definition of the putative class discussed infra. The Court granted that motion on October 11, 2024. Accordingly, Plaintiffs filed their First Amended Complaint on October 22, 2024.

The parties engaged in motion practice with regard to discovery. Defendants filed a motion to transfer the case to the Complex Business Litigation Program, which the Plaintiffs opposed. The Court denied the Defendants’ motion, but changed the case Track from Track II to Track IV and assigned The Honorable Kalimah Ahmad, J.S.C. to manage the case. Plaintiffs successfully filed a motion to compel discovery against Simsmetal and defeated Simsmetal’s motion for a protective order.

Plaintiffs and SMR began to discuss settlement in late 2024. These settlement negotiations between Plaintiffs and SMR dealt with both monetary relief for putative class members and injunctive relief, pursuant to which SMR would take actions to address the nuisance that Plaintiffs allege SMR’s actions create. The settlement discussions took place over months and included an on-site conference at Port Libertè between counsel for Plaintiffs, counsel for SMR, one of Plaintiffs’ experts and officials from SMR, at which the operations of SMR were discussed, and

specifically as they relate to Plaintiffs' allegations. In light of the settlement discussions between Plaintiffs and SMR, SMR filed two motions to extend the time to file an Answer or responsive pleading, to which the Plaintiffs consented, and which were granted. The Court then entered a consent order suspending SMR's obligation to file an Answer while the parties pursued settlement discussions.

Plaintiffs and Simsmetal exchanged and responded to voluminous interrogatories and document demands. The Plaintiffs produced more than 10,000 pages of documents obtained via pre-litigation investigation and public records requests of federal, state and local governments. Additionally, the Plaintiffs procured experts to determine the impact of Simsmetal operations on noise, specifically with regard to noise levels at the residences of class members, and air quality. In that regard, Plaintiffs' experts positioned monitoring devices at various locations to measure the noise levels and particulate matter concentration in the air. The noise and air monitoring produced substantial data that was later produced in discovery.

In early 2025, Plaintiffs and Simsmetal began to discuss settlement that progressed to serious in-person negotiation sessions in March, April and September 2025. At these meetings, Plaintiffs' counsel conferred with Simsmetal counsel and two representatives of Simsmetal, including its COO.

Finally, on December 1, 2025, the parties were able to reach an amicable resolution of the lawsuit on a class wide basis as to all parties.

The Proposed Settlement Class

The proposed settlement calls for certification of a Settlement Class defined as:

all owners and residents during the class period of the condominium units in eight buildings within the Port Liberté community with addresses of 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court

East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, and 4 Constellation Place that have windows, doors, balconies, or other open-air access facing Defendants' business operations.

People are eligible to be class members if they either owned and/or resided at one of the eligible units (pursuant to a valid deed or lease) between April 26, 2018 through the date of Preliminary Approval (the "Class Period"). The Class Period tracks the relevant statute of limitations for the claims brought by the Plaintiffs.

Based upon discovery and investigation there are approximately 1,250 individuals in the proposed settlement class.

Summary of Proposed Settlement

Under the proposed class settlement Defendants will both make monetary payments and each will undertake distinct individual operational practices in the form of the proposed injunctive relief to address the Plaintiffs' concerns.

Subject to Court approval, Defendants will pay a combined total of \$1,475,000 into a Settlement Fund to fund the following: (a) valid claims timely submitted by settlement class members; (b) class counsel fees not to exceed 33.33% of the Settlement Fund (i.e., \$491,617.50), plus reimbursement of costs and expenses of \$52,884.92 (both subject to Court approval); and (c) Plaintiff's share of the class notice and other administrative costs of the settlement, estimated to be \$27,000. Additionally, SMR and Simsmetal will each pay one-third (1/3) of the class notice and other administrative costs of the settlement.

Under the proposed class settlement, class members shall be eligible to submit a claim for payment based upon their status as an owner and/or resident, under a deed or as an occupying lessee pursuant to a valid lease between April 26, 2018 and the date of preliminary approval, of

one of the condominium units that are part of the class definition, i.e., a condominium in Port Liberté with windows, doors, balconies and/or other open-air access directly facing the Sims Facilities at one of the following buildings 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, (“Primary Class Buildings”), or that indirectly face the Sims Facilities but directly face a newly constructed apartment building known as “The Oliver” located at 190 Chapel Avenue, Jersey City that now sits between their units, located at 15 Freedom Way and 4 Constellation Place, and Defendants’ Facilities and directly faces Defendants’ Facilities (“Secondary Class Buildings”). Class counsel has identified 219 total units with eligible class members, of which 147 are Primary Class Building Units and 72 in Secondary Class Building Units.

The payment entitlement will be done by unit with each unit being attributed shares. Shares are awarded based upon a point system as follows: Class Members can earn (one) 1 point for each of the following: owning an eligible unit; residing in an eligible unit; owning a eligible unit for at least three (3) years during the Class Period; and residing in an eligible unit for at least three (3) years during the Class Period. Eligible units in Primary Class Buildings receive one (1) share per point (up to four (4) total shares). Eligible units in a Secondary Class Buildings receive one quarter ($\frac{1}{4}$) of a share per point (up to one (1) total share). If more than one person submits a valid claim for the same unit, the shares for that unit will be divided proportionally. Based upon the eligible condominium units identified by class counsel, there are a total of 660 shares eligible to participate in the proposed class settlement.

Examples:

- If a Class Member owned and lived in a unit for three (3) or more years, he or she would receive:
 - Four (4) shares for an eligible unit in a Primary Class Building.
 - One (1) share for an eligible unit in a Secondary Class Building.
- If a Class Member lived in a unit for three (3) or more years but didn't own it, he or she would receive:
 - Two (2) shares for a unit in a Primary Class Building.
 - Half (½) a share for a unit in a Secondary Class Building.

Injunctive Relief Relating to SimsMetal

Simsmetal will provide injunctive relief to assuage concerns of the Plaintiffs that includes the following actions: (1) creation of a hotline telephone number to receive calls from Port Liberté residents regarding concerns about impact from operations, such as noise, where Simsmetal must take commercially reasonable actions to investigate and resolve each complaint made in good faith, to, as well as complaints of odor, which Simsmetal must direct to SMR when the temperature is above 40 degrees and which SMR must handle as discussed below; (2) implementation and maintenance of a mandatory training program for all employees whose job functions may contribute to the generation of excessive or loud impulse noises at the Simsmetal Facility; (3) an agreement that all vessel/stevedoring activities relating to the Simsmetal Facility only shall be conducted from 7:00a.m. until 10:00pm Monday through Friday, and 8:00a.m. until 10:00p.m. Saturday(s) and Sunday(s); (4) within one year of the Settlement Agreement's Effective Date, effectuation of all necessary steps to ensure that activities at the Simsmetal Facility do not cause noise levels in excess of fifty decibels (50db), pursuant to N.J.A.C. 7:29-1.1 *et. seq.*, and Jersey City Ordinance § 222-5.2, to reach the Port Liberté property line between the hours of 10:00 p.m. and 7:00 a.m., which will include the construction of a barrier between the Metal Shredder and/or its associated equipment and Port Liberté (the "Shredder Barrier"); (5) shall make commercially reasonable efforts to ensure that activities at the Simsmetal Facility do not cause unreasonable

levels of fugitive dust emissions to leave the Simsmetal Facility, including by creating and implementing a dust emissions plan and training program; (6) undertaking a three month air monitoring program at two locations on the northern side of the Simsmetal Facility, plus one location to be determined for purposes of background sampling, to measure particulate matter (PM₁₀); (6) implementation of fire detection and fire-explosion suppression systems; and (8) upon completion of the Shredder Barrier, Simsmetal shall reasonably reorient lights from the Metal Shredder and in its vicinity that face Port Liberté to minimize the impact of those lights.

Injunctive Relief relating to the SMR Facilities

SMR will provide injunctive relief to assuage concerns of the Plaintiffs that includes the following actions: SMR will maintain a system whereby back-up alarms on SMR mobile equipment are shut down between 6:00 p.m. and 6:00 a.m., during which time SMR will switch to the use of strobes; SMR will instruct, and use its best efforts to require tug boat operators delivering or picking up a barges going to, or from the SMR Facilities, to continue to use walkie talkies instead of communicating via loudspeakers, to the extent that those tug boat operators are under SMR's control; SMR already has taken steps to minimize the amount of light on exterior lighting fixtures that Plaintiffs thought point to Port Liberté from its glass plant and has investigated the exterior lighting near its municipal recycling facility and determined that the applicable lights are not pointing toward Port Liberté and that no adjustments there are needed; SMR will investigate calls to the hotline from class members which are directed by Simsmetal to SMR between the hours of 9:00 a.m. and 5:00 p.m. on weekdays when the temperature is at least 40 degrees concerning odor issues, and, upon confirmation that either of the SMR Facilities is the source of the odor, promptly make commercially reasonable efforts in a good faith manner within a reasonable time to mitigate the odor with a misting or similar system.

Summary of Argument

The proposed class settlement was negotiated at arms-length between zealous and experienced counsel and the result is a compromise that is both fair and reasonable and represents an excellent result for the class. The settlement negotiations, formal discovery, informal exchange of information between the parties, and extensive investigation performed by Plaintiffs' counsel and experts have provided the parties with a sound basis for evaluating the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses under New Jersey law. Consequently, the parties have realized that they can avoid the risk and massive expense of continued litigation, while entering into a reasonable settlement that respects both the claims and concerns of the Plaintiffs and class members, as well as the legitimate business concerns of the Defendants and the social and economic benefits of Defendants' business operations, including the important public benefits served by SMR in its handling of recycling for Jersey City. Therefore, the parties have wisely and conscientiously decided to avoid litigation risk and expense by entering into a class-wide settlement now, which achieves Plaintiffs' main goal of this lawsuit: to reimburse qualified class members and make appropriate changes to Defendants' operation of their respective facilities that Plaintiffs allege impact class members' quality of life and diminish the value of their property and that assuages the concerns of the Plaintiffs, while simultaneously respecting the valuable contribution of the Defendants' business operations.

Pursuant to New Jersey Court Rule 4:32-1(e), Plaintiffs hereby move for an Order:

- 1) Granting preliminary, non-binding approval of the proposed class action settlement memorialized in the accompanying Settlement

Agreement attached to the Certification of William Matsikoudis
as Exhibit A:

- 2) Certifying a conditional settlement class for settlement purposes only for the purpose of consummating the proposed class settlement;
- 3) Approving the proposed form of email, postcard, publication, and long form notice of the proposed class settlement (Exhibits B, C, D, and E to the Settlement Agreement) and the proposed manner of notice distribution;
- 4) Approving the proposed claim form (Exhibit A to the Settlement Agreement);
and
- 5) Scheduling a formal settlement approval (or “fairness”) hearing approximately 119 days after preliminary approval (on or after **May 22, 2026**) on whether to grant final, binding approval of the proposed class settlement.

For the following reasons, the proposed settlement class should be preliminarily certified for settlement purposes only; the proposed class settlement should be given preliminary approval; the proposed email, postcard, publication, and long form notice of settlement, as well as the proposed claim form, should be approved and distributed to the settlement class; and a public fairness hearing on whether to grant final, binding approval of the proposed class settlement should be scheduled.

I. THE PROPOSED CLASS ACTION SETTLEMENT SHOULD BE GRANTED PRELIMINARY APPROVAL.

A. The Standard for Preliminary Approval of a Proposed Class Settlement.

“There is a strong public policy favoring the settlement of litigation.” Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 626, (App. Div. 1987). New Jersey state courts have long encouraged settlement of lawsuits, including the settlement of class actions. See Schmoll v. J.S. Hovnanian & Sons, LLC, 2006 WL 1520751 at *2 (N.J. Super. Ch. 2006), aff’d 394 N.J. Super. 415 (App. Div. 2007) (Matsikoudis. Cert. Ex. B), (“As in all cases, our courts have long subscribed to policy that encouraged the settlement of lawsuits between the parties, inclusive of class action proceedings.”). To qualify as a class action, a lawsuit must meet the requirements of R. 4:32-1, “which is modeled after Rule 23(a) and (b) of the Federal Rules of Civil Procedure.” Matter of Cadillac V8-6-4 Class Action, 93 N.J. 412, 424-25, 461 A.2d 736, 742 (1983). Thus, in evaluating and approving proposed class action settlements, New Jersey state courts have adopted federal procedures and have relied upon federal case law. See Schmoll v. J.S. Hovnanian & Sons, LLC, supra, at *3 (“The standards for approval of class actions that have been developed in the federal courts have been followed by our state courts.”). Approval of a proposed class action settlement takes place in two stages. See Jones v. Commerce Bancorp, Inc., 2007 WL 2085357 at *2 (Matsikoudis Cert. Ex. C) at *2 (D.N.J. 2007) (“Review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing”); see also MANUAL FOR COMPLEX LITIG., THIRD, § 30.41, at 236-37 (1995):

Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. ... If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment to class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice ... be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

At the preliminary approval stage, the court is not asked to make a binding determination

as to whether the proposed class action settlement will ultimately be approved. See Jones, 2007 WL 2085357 at *2 (“Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient.”); In re Initial Pub. Offering Sec. Litig., 226 F.R.D. 186, 191 (S.D.N.Y. 2005); In re Inter-Op Hip Prosthesis Liab. Litig., 204 F.R.D. 330, 350 (N.D. Ohio 2001) (at preliminary approval, “the Court ... is not obligated to, nor could it reasonably, undertake a full and complete fairness review.”). Rather, during the preliminary approval process, the Court makes a cursory review of the proposed settlement to determine if there any “glaring deficiencies” in the proposal. See West v. Circle K Stores Inc., 2006 WL 1652598 at *9 (E.D. Cal. 2006) (Matsikoudis Cert., Ex. D) (on application for preliminary approval of a proposed class settlement, “the court will simply conduct a cursory review of the terms of the parties’ settlement for the purpose of resolving any glaring deficiencies before ordering the parties to send the proposal to class members”).

Thus, at the preliminary approval stage, the Court is not asked to determine whether the proposal will ultimately be approved, but rather whether it might possibly be approved in the future, after additional briefing, at a final hearing open to the public. In re Nasdaq Mkt. Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing Manual for Complex Litig., 3d, § 30.41 (West 1995) (“Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.”); see also Gautreaux v. Pierce, 690 F.2d 616, 621 n. 3 (7th Cir. 1982) (noting that on a preliminary approval application the Court is merely asked to “determine whether the proposed settlement is within the range of possible approval.”); In re Prudential Secs. Inc. Ltd. P’ships, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (describing the Court’s

function on an application for preliminary approval as a limited search for “obvious deficiencies” and “unduly preferential treatment of class representatives or of segments of the class”).

Accordingly, the first stage of the class settlement approval process – the preliminary approval stage – is not binding. Rather, it merely: (1) triggers the mechanism for notice to be provided to potential class members; (2) sets in motion a process that will culminate in a full and final public fairness hearing (at which time the question of fairness is reviewed de novo); and (3) establishes a procedure for class members to “opt out” or register objections to the proposed settlement with the Court. Id. After notice of the proposed class settlement is given to class members, the second stage of the class settlement approval process takes place: the formal fairness hearing. At the formal fairness hearing, the Court, inter alia, entertains any objections by class members to the treatment of the litigation as a class action and/or the terms of the settlement. See Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989). Following that formal fairness hearing, the Court makes a de novo determination as to whether the parties should be allowed to settle the class action pursuant to the agreed upon terms. West, supra, 2006 WL 1652598 at *9.

B. The Proposed Class Settlement Meets the Requirements for Preliminary, Non-Binding Approval.

At the current time, the Plaintiffs are moving only for a non-binding preliminary approval of the proposed class action settlement, which is memorialized in the accompanying Settlement Agreement. See Matsikoudis Cert. Ex. A. Specifically, the Plaintiffs are seeking court permission to distribute the proposed class settlement notice and claim form – by electronic mail to all class members for whom the parties have obtained a valid email address in their records, by first class mail to class members for whom the parties have obtained a valid mailing address, and by publication in a local on-line newspaper, and by posting on the internet – informing the class of

the terms of the proposed settlement, and notifying them of their rights (1) to “opt out” of the proposed class, (2) to object to the proposed settlement, and/or (3) to appear and be heard at a formal fairness hearing. The Plaintiffs are also asking the court to conditionally certify the class and to schedule a formal fairness hearing on the proposed settlement on **May 22, 2026**, or later, which class members may attend and at which the Plaintiffs will present more full and detailed arguments as to why they believe the proposed settlement should be granted final approval. It is submitted that the proposed class action settlement meets the standard for preliminary approval as set forth in the above-cited authorities.

Previously, class members have objected to certain of the Defendants’ activities at their respective facilities in varying manners and assert they have suffered from the effects of the operations of those Facilities for more than a decade. (See Matsikoudis Cert. Ex. E). The Settlement Agreement will do much to eliminate the alleged negative impacts of the subject Facilities and create a mechanism by which class members’ concerns regarding the impacts of the operations of those Facilities will be assuaged. Moreover, class members stand to receive significant financial remuneration as part of the Settlement.

C. The Proposed Form of Notice to the Settlement Class Should Be Approved

Attached as Exhibit B to the Settlement Agreement is a proposed notice of class settlement that will be sent by email to all class members for whom the parties possess a valid email address. Attached as Exhibit D to the Settlement Agreement is a proposed notice of class settlement that will be sent by postcard notice via first-class mail to all class members for whom the parties have obtained valid mailing addresses as well as to all current residents in eligible condominium units. Attached as Exhibit E to the Agreement is a proposed publication notice that will be posted in the on-line newspaper *The Star Ledger*. Attached as Exhibit C to the Agreement is a proposed long

form notice that will be posted on the settlement website (once established) and on Plaintiffs' counsel's website for class members to access a full description of the proposed settlement. It is submitted that all forms of notice give class members a fair opportunity to consider the proposed settlement, to "opt out" of the settlement, and/or to raise objections thereto. This notice program includes: (a) appropriate information regarding the litigation, the class, the class representative, class counsel, and the essential terms of the settlement agreement; (b) appropriate information about class counsel's forthcoming application for attorney's fees and expenses; (c) appropriate information about how to participate in, or opt out of, the settlement; (d) appropriate information about this Court's final approval procedure; and (e) appropriate information about how to object to the proposed settlement. See Jones, supra, 2007 WL 2085357 at *5; Rosenburg v. IBM Corp., 2007 WL 128232 at *5 (N.D. Cal. Jan. 11, 2007). (Matsikoudis Cert. Ex. F).

D. The Proposed Plan of Notice Distribution Should Be Approved

R. 4:32-1(b)(3) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with the due process of law." "[A] fully descriptive notice ... sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process". Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). The New Jersey Court Rule governing class action notice "does not, however, contain a requirement for giving individual notice to all members reasonably identifiable, substituting instead the requirement that the members of the class be noticed by the best notice practicable under the circumstances 'consistent with due process of law.'" PRESSLER & VERNIERO, CURRENT N.J. COURT RULES, Comment 3.3 to Rule 4:32-1 (Gann 2025).

Here, the parties have agreed that the proposed form of settlement notice, once approved by the Court, will be sent to class members by: (i) electronic mail to all class members

for whom Defendants possess a valid email address in form substantially similar to that attached as Exhibit B to the Settlement Agreement; (ii) postcard notice sent via first-class mail to all class members in a form substantially similar to that attached as Exhibit D to the Settlement Agreement; and (iii) publication in a form substantially similar to that as attached as Exhibit E to the Settlement Agreement in the *Star Ledger* on-line newspaper. Class Counsel diligently worked to identify all of the eligible condominium units and to obtain electronic mail addresses of class members via a subpoena issued to and in collaboration with the relevant Port Liberté Homeowners Association (Matsikoudis Cert. ¶ 3); likewise, physical addresses of class members will be obtained by the Settlement Administrator, which is a nationally-recognized settlement administration firm that utilizes state of the art notice practices, utilizing tools that are expected to identify a very high percentage of owners and legal residents for the entire class period, with their current email or U.S. Mail addresses. Additionally, the class notice and Settlement Agreement, along with other relevant documents such as Plaintiffs' Amended Complaint, will be posted on a settlement website established by the Settlement Administrator as well as the website of proposed class co-counsel Matsikoudis & Fanciullo, LLC.

It is submitted that this notice campaign satisfies due process and is more than adequate under the case law. See, e.g., Sabol v. Hydroxatone LLC, 2013 WL 12161799 (D.N.J. Mar. 28, 2013) (Matsikoudis Cert. Ex. G)(approving notice distribution plan where an “Email Notice shall be sent electronically to the last known email address of all Settlement Class Members that Defendants has email addresses for” and a postcard notice sent by first class mail to class members for whom defendant lacked an email address); Morgan v. Pub. Storage, 301 F. Supp. 3d 1237, 1262 (S.D. Fla. 2016) (“Courts have routinely held that notice programs that provide

notice through a variety of media, including through email notice, satisfy the requirements” of Fed. R. Civ. P. 23); Kelly v. Phiten USA Inc., 277 F.R.D. 564, 569-70 (S.D. Iowa 2011) (approving class notice where “[n]otice was sent based upon Phiten’s customer e- mail data, with 114,712 e-mails successfully sent to Phiten customers”); Browning v. Yahoo!Inc., 2007 WL 4105971, at *4-7 (N.D. Cal. Nov. 16, 2007) (Matsikoudis Cert. Ex. H) (notice program satisfied due process where email notice was sent to class members whose email addresses were known, and mailed notice was sent to class members whose email addresses were unknown).

II. A CONDITIONAL CLASS SHOULD BE CERTIFIED

A. The Requirements for Certification Under Rule 4:32-1(a) Are Met.

Under R. 4:32-1(a), the party seeking class certification must satisfy four prerequisites: numerosity, commonality, typicality and adequacy of representation. In addition, the party seeking class treatment must also satisfy one of three alternatives under R. 4:32-1(b). Accepting the factual allegations of Plaintiffs’ First Amended Complaint as true for the purposes of certification of a settlement class, the requirements for class certification are clearly met in this case.

1. Rule 4:32-1(a)(1) Numerosity Is Met.

Numerosity requires that the proposed class be so large that joinder of all members would be “impracticable.” R. 4:32-1(a)(1). It is well-settled that 40 or more potential class members will satisfy the “numerosity” requirement. See Stewart v. Abraham, 275 F.3d 220, 226-227 (3d Cir.2001) (“No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.”); see also 1 H. Newberg, NEWBERG ON CLASS ACTIONS, §3.05, p.142 (2nd 1985) (“The difficulty in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone.”). In the case at bar, it is clear there are more than 40 class members. Indeed, Plaintiffs have obtained information showing that at least 1,000 persons are likely part of the class during the class period. Consequently, Rule 4:32-1(a)(1) “numerosity” is satisfied.

2. Rule 4:32-1(a) Commonality Is Met.

R. 4:32-1(a) requires there be “questions of law or fact common to the class.” Commonality does not require that every issue in a proposed class action be common among all class members. See In re Prudential Ins. Co., 148 F.3d 283, 310 (3d Cir. 1998) (“A finding of commonality does not require that all class members share identical claims, and indeed factual differences among the claims of the putative class members do not defeat certification.”) (citations omitted). Rather, there need be only one common issue of law or fact in an entire case for the “commonality” prerequisite to be met. See Delgozzo, 266 N.J. Super. at 185 (noting that “a single common question is sufficient” to meet Rule 4:32-1(a)(2) commonality); Gurriere v. Bloomfield Condo. Assocs., LLC, 2015 WL 10172760 (N.J. Super. Ch., Aug. 28, 2015) (Matsikoudis Cert. Ex. I) (“New Jersey has followed the approach under

the Federal Rule which holds that ‘a single common question is sufficient’” to meet R. 4:32-1(a)(2) commonality); see also Joseph A. Osefchen and Philip Stephen Fuoco, “Leveling the Playing Field in the Garden State: A Guide to New Jersey Class Action Case Law,” 37 Rutgers L.J. 399, 440 (2006):

New Jersey Court Rule 4:32-1(a)(2), usually referred to as the “commonality” prerequisite, does not require that every issue in the case be common to all class members, or even that most issues be common. Rather, New Jersey courts, like the federal courts, have held that a single common question will satisfy this requirement. Accordingly, the “threshold for commonality is relatively low in New Jersey.”

In this case, all of the class claims arise from Defendants’ alleged actions and the alleged consequences from them that Plaintiffs assert disturb the quality of their life, diminish the value of their property interest and create a nuisance. “The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land.” Sans v. Ramsey Golf & Country Club, Inc., 29 N.J. 438, 448 (1959). The issues of whether the impacts of Defendants’ alleged distinct operations, such as noise, odors, air pollution and brightness of lights allegedly rise to a level of unreasonableness is a common legal and factual issue for all class members. Accordingly, the requirement of “commonality” is easily met.

3. Rule 4:32-1(a)(3) Typicality Is Met.

This is a “requirement that the claims of the representative parties be typical of the class[.]” Matter of Cadillac V8-6-4 Class Action, 93 N.J. 412, 425 (1983). In explaining why the “typicality” requirement of R. 4:32-1(a)(3) is easily met on this motion, the Appellate Division in Laufer v. U.S. Life Ins. Co. in City of N.Y., 385 N.J. Super. 172, 180 (App. Div. 2006) stated: “The claims of a putative class representative are typical if they have the essential characteristics common to the claims of the class. Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding.” See

also Newberg, Class Actions, para. 8816, p. 850 (1977), noting the typicality requirement:

[C]an be met with surprising ease in most cases, because the majority of class action decisions support the view that when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is met.

As stated by the Appellate Division in Laufer, 385 N.J. Super. at 180: “If the class representative’s claims arise from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members, the typicality requirement is satisfied.” Typicality does not require the circumstances of the named plaintiffs to be identical to the other class members. See id. at 181 (“[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.”).

In this case, the common law claims of the named plaintiffs are typical of the claims asserted on behalf of the entire proposed class because they arise from the same alleged course of conduct engaged in by Defendants, the alleged results of that conduct, and involve the same legal theories (nuisance, trespass, negligence, and strict liability), and seek the same injunctive relief and monetary damages.

4. Rule 4:32-1(a)(4) Adequacy of Representation Is Met.

New Jersey Court Rule 4:32-1(a)(4) requires that the named plaintiffs and their counsel be able to fairly and adequately protect the interests of the class. With regard to the named plaintiffs, “adequacy” boils down to whether the proposed class representative has interests that are “antagonistic” to – or in actual conflict with – those of the class. See Laufer, 385 N.J. Super. at 182 (“To satisfy this requirement, ‘the plaintiff must not have interests antagonistic to those of the class.’”). The named plaintiffs are not required to prove the absence of such conflicts; rather, New Jersey law presumes the adequacy of the named plaintiffs and provides that defendant has the

burden of proving that the named plaintiffs are inadequate. See Delgozzo, 266 N.J. Super. at 188 (“The defense bears the burden of demonstrating that the proposed representation will be inadequate.”); Gross, 303 N.J. Super. at 342 (“the burden is on the opposing party to demonstrate that the proposed representations will be inadequate.”).

Here, there are no actual (or potential) conflicts of interest between the named Plaintiffs and the proposed class. The common nature of the claims pleaded, the fact that identical legal theories are being advanced for all class members, and the fact that the same relief is being sought for Plaintiffs as for every other class member support the conclusion that there no conflict between the named plaintiffs and the members of the putative class. The named Plaintiffs are all residents and owners in the Port Liberté community and have the same interest in seeing the Defendants conduct their operations in a way that Plaintiffs contend is less likely to interfere with the quality of life of residents of Port Liberté or diminish the value of class members’ property interest.

As to the second prong of R. 4:32-1(a)(4), there can be no doubt that Plaintiffs have retained experienced and competent counsel to represent themselves and the class action to address issues about which class members have complained for decades. Co-lead counsel Bill Matsikoudis has successfully litigated multiple complex environmental matters including Tennessee Riverkeeper, Inc. v. 3M Company, et. al. Case No. 5:16-cv-01029-AKK, I. In City of Newark v. E. I. du Pont de Nemours and Company (“DuPont”), 2:15-CV-01708 et. al., New Jersey Department of Environmental Protection v. PPG Industries, v. City of Jersey City, et. al., HUD-C-77-05; City of Jersey City v. Honeywell International Inc., HUD-L-2295-05; Jersey City Municipal Utilities Authority v. Honeywell International Inc., D.N.J., Civ. No. 05-5955 (DMC) and Jersey City Incinerator Authority v. Honeywell International Inc., D.N.J., Civ. No. 05-5993 (DMC). Additionally, Matsikoudis has substantial experience in complex Appellate litigation

including in Garden State Indem. Co. v. Miller & Pincus, 340 N.J. Super. 148, 154, 773 A.2d 1204, 1208 (App. Div. 2001); Powerhouse Arts Dist. Neighborhood Ass'n v. City Council of City of Jersey City, 413 N.J. Super. 322 (App. Div. 2010) Drosos v. GMM Glob. Money Managers Ltd., No. A-3674-21, 2023 WL 7545067, at *1 (N.J. Super. Ct. App. Div. Nov. 14, 2023) (Matsikoudis Cert. Ex. J); Jersey City United Against the New Ward Map v. Jersey City Ward Comm'n, No. 089292, 2025 WL 1699753, at *4 (N.J. June 18, 2025). (Matsikoudis. Cert. Ex. K). Matsikoudis graduated from Seton Hall Law School *cum laude* and from Seton Hall University *cum laude*. Prior to co-founding his public interest law firm, Matsikoudis had a distinguished career in public service, serving as Jersey City Corporation Counsel from 2004-2013 and serving as a Senior Deputy General and as an Assistant Counsel to Governor James E. McGreevey. Currently, Matsikoudis' serves as General Counsel to the Hudson County Improvement Authority.

Co-lead counsel G. Martin Meyers, Esq. is a Certified Civil Trial attorney by the New Jersey Supreme Court and has vast experience in complex litigation, class actions and trial work in his over 50-year legal career. Mr. Meyers is a graduate of the Wharton School of Finance and Commerce of the University of Pennsylvania, where he earned the degree of Bachelor of Science in Economics in May of 1968, and New York University School of Law, where he received his Juris Doctorate degree in May of 1971. Mr. Meyers has obtained multi-million-dollar recoveries for his client via both trial verdicts and negotiated settlements on numerous occasions, including in the matters of In re Diet Drugs Prods. Liab. Litig., 553 F. Supp. 2d 442, Case 2:21-cv-04525; Freireich v. Gateway Energy Services Company, 2:21-cv-04525; Gunter v. Ridgewood Energy Corp., 32 F. Supp. 2d (D.N.J. 1998) and 164 F.R.D. 391 (1996), *aff'd* 223 F. 3d 190 (3d Cir. 2000), Dean v. EBI Medical Systems, Inc., Kahanovitz v. EBI, et al., MRS-L-8-09, *aff'd* Kahanovitz v. Electro-Biology, Inc., as reported at 2011 N.J. Super. Unpub. LEXIS 190 (App. Div. 2011).

The litigation team of Mr. Matsikoudis and Mr. Meyers on this case includes three additional attorneys: Justin Meyers, Derek Fanciullo and Aspen-Jade Tucker, whose bios are attached to the Certification of Mr. Matsikoudis as Exhibits L, M, and N. Based on the foregoing, the requirements of R. 4:32-1(a)(4) are satisfied.

E. The Requirements for Certification Under Rule 4:32-1(b)(3) Are Met.

In addition to numerosity, commonality, typicality and adequacy of representation, there are additional requirements for class certification in R. 4:32-1, depending on the type of relief sought by the prospective class. When seeking injunctive relief, class certification is permitted if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” R. 4:32-1(b)(2). “Certification under (b)(2) is appropriate where one injunction can remedy the harmful conduct.” Cameron v. S. Jersey Pubs, Inc., 460 N.J. Super. 156, 181, (App. Div. 2019). A “class action may be maintained under Rule 4:32-1(b)(2) even though defendant's conduct is not damaging to every member of the class, [but] [w]hat is important is that the relief sought by the named plaintiffs should benefit the entire class.” Laufer v. U.S. Life Ins. Co. in City of New York, 385 N.J. Super. 172, 183 (App. Div. 2006). (internal citations and quotations omitted). Here the Plaintiffs sought injunctive relief, in that they have sought to restrain Defendants from engaging in operations or require Defendants to alter their operations such that these operations no longer allegedly interrupt Plaintiffs’ peace and enjoyment of their residences and allegedly damage their quality of life. The injunctive relief sought, and delivered via the settlement, such as restraining the Defendants from allegedly creating excessive noise, especially at night, odors, and air pollution, would benefit the entire class and therefore this element is meant to extend to the Amended Complaint and the Settlement deals with injunctive relief.

When money damages are sought, as they are here, R. 4:32-1(b)(3) creates the “predominance” condition for certification, which requires the court to find “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” This case meets the requirements of R. 4:32-1(b)(3) because: (a) common questions of law or fact predominate over individual issues, and (b) a class action is the superior method by which to resolve the case. In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 426, 435-436 (1983); Delgozzo, *supra*, 266 N.J. Super. at 189.

1. Predominance Is Met

“Predominance” of common issues does not require the absence of individual issues. Indeed, the Supreme Court of New Jersey has stated that a class may be certified under R. 4:32-1(b)(3) even where a court has found that “**substantial individual issues**” exist. Iliadis, *supra*, 191 N.J. at 108. As held by the New Jersey Supreme Court in Lee, 203 N.J. at 520:

Significantly, to establish predominance, plaintiff does not have to show that there is an “absence of individual issues or that the common issues dispose of the entire dispute,” or “that all issues [are] identical among class members or that each class member [is] affected in precisely the same manner.” Indeed, in a class-action setting, “[i]ndividual questions of law or fact may remain following resolution of common questions.” (emphasis added) (citations omitted).

Nor do the presence of purported individualized defenses defeat predominance or class certification. See Iliadis, 191 N.J. at 112:

So too, the individualized defenses advanced by Wal-Mart do not necessarily foreclose a finding of predominance. Although different factual situations may arise with respect to the defenses as to different plaintiffs, [such] does not derogate from the fact that the affirmative cause of action itself has the community of interests and of questions of law or fact which justify the class action concept.

Nor do potential differences or variations in damages among class members defeat class certification. See Muise v. GPU, Inc., 371 N.J. Super. 13, 46 (App. Div. 2004) (“Once the court finds that common questions of liability, and the fact of damage, predominate, individual variations in the calculation of damages does not preclude class certification.”); Lusky v. Capasso Bros., 118 N.J. Super. 369, 373 (App. Div. 1972) (certifying class, holding: “Although the computation of damages among the members of the class would differ, this factor alone is not sufficient in itself to justify dismissal of a class action.”).

The question the “predominance” prong seeks to answer is not whether there are any individual issues or defenses, but rather does “the core of the case concern common issues of fact and law.” Iliadis, *supra*, 191 N.J. at 108; see also Varacallo, *supra*, 332 N.J. Super. at 45 (“Irrespective of whether the trial court may be required to deal with individual claims of reliance, causation, and/or damages, the predominance factor has been met and class actions have been approved in this State where the court has found a common core of operative facts and the plaintiffs are seeking ‘to redress a ‘common legal grievance.’”)

In cases where, as here, the defendants are alleged to have engaged in a uniform policy or common course of conduct, the legality of that policy or course of conduct forms the core of the case and predominance is met. See Gurriere, 2015 N.J. Super. 2015 WL 10172760, quoting Varacallo, *supra*, 226 F.R.D. at 231 (“[I]n cases where it is alleged that the defendant . . . engaged in a common course of conduct, courts have found that conduct to satisfy the commonality and predominance requirements.”).

The “core” of this case involves allegations against the Defendants that are common to the entire class:

- a. Noise: That the regular operations of Defendants’ facilities allegedly generate excessively loud noise that disturbs the peace of class members and unreasonably interferes with their quality of life.
- b. Smells: That Defendants’ facilities allegedly emit pungent, noxious odors that intrudes into the homes and lives of Plaintiffs and Class Members, thereby unreasonably interfering with their quality of life.
- c. Overnight Work, Noise and Lights: That the overnight use of bright lights and use of loud machinery at Defendants’ facilities allegedly disturbs the peace and sleep of class members, thus unreasonably interfering with their quality of life.
- d. Dust/Particulate Matter/Air Pollution: That the operations at Defendants’ facilities allegedly impact the air quality at the Class Members’ residences by creating dust and particulate matter that thereby unreasonably interferes with their quality of life.
- e. Fires and Explosions: That the operations at Defendants’ facilities allegedly cause fires and explosions that damage air quality and disturb the peace and quality of life of class members.

The aforesaid allegations that noise, noxious odors, blinding lights, dust and particulate matter, toxic smoke and explosive shockwaves all unreasonably and substantially harm class members’ quality of life is the core of the concern of class members giving rise to this lawsuit and from which class members all seek redress. Every single claim in this case is based on these core allegations. The legal determination of those class-wide claims under New Jersey law will be identical as to Plaintiffs and every other class member. Consequently, the class claims constitute

a “common legal grievance” which more than satisfies the requirements of (b)(3) “predominance” in this case for purposes of certifying a settlement class.

2. Superiority Is Met.

The other prerequisite for certification under R. 4:32-1(b)(3) is that a class action be “superior to other available methods for the fair and efficient adjudication of the controversy.” Lee v. Carter-Reed, 203 N.J. at 520. In addressing the “superiority” requirement, the New Jersey Supreme Court has repeatedly held that class actions are the preferred and superior method of resolving claims where, as here, the members of the proposed class have allegedly suffered damages per person which are too low to make individual litigation practicable. See id. (“The whole point of a class action is to provide a diffuse group of persons, whose claims are too small to litigate individually, the opportunity to engage in collective action and to balance the scales of power between the putative class members and a corporate entity”); Iliadis, 191 N.J. at 105 (“When one inflicts minor harm across a dispersed population, ‘the defendant is, as a practical matter, immune from liability unless a class is certified.’”). The average financial redress per class member is too low to generate interest for lawyers to litigate these cases on a contingency basis and the billable cost of an individual case would far outweigh a likely successful award, not to mention the risk of an unfavorable outcome.

This factor is clearly satisfied here, as class certification is far superior to filing a series of individual lawsuits to resolve the exact same legal issues regarding whether Defendants’ actions have unreasonably interfered with the class members’ quality of life and caused them harm. To proceed in that fashion would be hopelessly duplicative, inefficient, and wasteful. Moreover, class members have complained to the Defendants in a variety of manners over two decades, but were unable to get results and did not go further and file legal claims until the Plaintiffs filed this class

action, which is getting results in the form of both injunctive relief and financial compensation that would otherwise be difficult, time-consuming and expensive to achieve.

Conclusion

For the foregoing reasons, the Court should grant preliminary approval to the proposed class action settlement, grant certification of the proposed settlement class for purposes of this settlement, authorize the distribution of the proposed notice of class settlement to prospective class members, and set a date for a formal fairness hearing on or after **May 22, 2026**.

Respectfully Submitted,

Dated: January 14, 2026

/s/ William C. Matsikoudis
William C. Matsikoudis, Esq.
MATSIKLOUDIS & FANCIULLO, LLC

MATSIKLOUDIS & FANCIULLO, LLC

William C. Matsikoudis, Esq. – Atty. No. 022391997

Derek S. Fanciullo, Esq. – Atty. No. 044682011

Aspen-Jade C. Tucker, Esq. – Atty No. 410972022

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Attorneys for Plaintiffs

<p>LIONEL MEDINA, EKATERINA VOROBEOVA, KARISTA VAETH and JENNIFER SCULLION, on behalf of Themselves and all others Similarly Situated,</p> <p>Plaintiffs,</p> <p>v.</p> <p>SIMSMETAL EAST, LLC, SIMS MUNICIPAL RECYCLING of NEW YORK, LLC, SIMS GROUP USA HOLDINGS CORPORATION,</p> <p>Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY</p> <p>DOCKET NO.: HUD-L-001589-24</p> <p><u>CIVIL ACTION</u></p> <p><u>CERTIFICATION OF WILLIAM C. MATSIKLOUDIS, ESQ.</u></p>
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I, WILLIAM C. MATSIKLOUDIS, ESQ., of full age, being duly sworn according to my oath, do hereby certify as follows:

1. I am an attorney at law in the State of New Jersey, and a partner in the law firm of Matsikoudis & Fanciullo, LLC (the “Firm”), attorneys for Plaintiffs. I am also one of the attorneys responsible for handling this matter on behalf of the Firm. I am thus fully familiar with the matters set forth herein.
2. I make this Certification in support of Plaintiffs’ Motion for Preliminary Approval of a Class Action lawsuit settlement in the above captioned matter.

3. This is a class action lawsuit on behalf of on behalf of the proposed class of current and former condominium residents and/or owners in eight buildings within the Port Liberté community with addresses of 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, and 4 Constellation Place that have windows, doors, balconies, or other open-air access facing Defendants' business operations. I worked with my cocounsel and employees of relevant condominium associations to identify all of the condominium units that face Defendants' business operations in the above referenced buildings. We additionally have obtained via subpoena and follow up efforts with the Port Liberté Home Owners Association ("PLHOA"), the email addresses of individuals that registered with the PLHOA since April 26, 2018.
4. Attached hereto as **Exhibit A** is a copy of the Settlement Agreement and its referenced exhibits.
5. Attached hereto as **Exhibit B** is a copy of the unreported case Schmoll v. J.S. Hovnanian & Sons, LLC, 2006 WL 1520751 (N.J. Super. Ch. 2006), aff'd 394 N.J. Super. 415 (App. Div. 2007).
6. Attached hereto as **Exhibit C** is a copy of the unreported case Jones v. Commerce Bancorp, Inc., 2007 WL 2085357 (D.N.J. July 16, 2007).
7. Attached hereto as **Exhibit D** is a copy of the unreported case West v. Circle K Stores Inc., 2006 WL 1652598 (E.D. Cal. 2006).
8. Attached hereto as **Exhibit E** is a true and accurate copy of complaints from residents regarding the Defendants' facility over the past decade.

9. Attached hereto as **Exhibit F** is a true and accurate copy of the unreported case Rosenburg v. IBM Corp., 2007 WL 128232 (N.D. Cal. Jan. 11, 2007).
9. Attached hereto as **Exhibit G** is a true and accurate copy of the unreported case Sabol v. Hydroxatone LLC, 2013 WL 12161799 (D.N.J. Mar. 28, 2013).
10. Attached hereto as **Exhibit H** is a true and accurate copy of the unreported case Browning v. Yahoo!Inc., 2007 WL 4105971, (N.D. Cal. Nov. 16, 2007).
11. Attached hereto as **Exhibit I** is a true and accurate copy of the unreported case Gurriere v. Bloomfield Condo. Assocs., LLC, 2015 WL 10172760 (N.J. Super. Ch., Aug. 28, 2015).
12. Attached hereto as **Exhibit K** is a true and accurate copy of the unreported case Jersey City United Against the New Ward Map v. Jersey City Ward Comm'n, No. 089292, 2025 WL 1699753 (N.J. June 18, 2025).
13. Attached hereto as **Exhibit L** is a true and accurate copy of the bio of Justin Meyers, Esq.
14. Attached hereto as **Exhibit M** is a true and accurate copy of the bio of Derek Fanciullo, Esq.
15. Attached hereto as **Exhibit N** is a true and accurate copy of the bio of Aspen-Jade Tucker, Esq.
16. I hereby certify that the foregoing statements made by me are true and correct. I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.

Respectfully submitted,

/s/William C. Matiskoudis, Esq.

William C. Matsikoudis, ESQ.

MATSIKOUDIS & FANCIULLO, LLC

Attorneys for Plaintiffs

Dated: 1/14/2026

Exhibit A

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE (“Agreement”) is entered into by and between plaintiffs Lionel Medina, Ekaterina Vorobeva, Karista Vaeth, and Jennifer Scullion, individually and in their representative capacities on behalf of all others similarly situated (collectively “Plaintiffs”), by and through their counsel, and Defendants Simsmetal East LLC (“Simsmetal East”); Sims Group USA Holdings Corporation (“Sims Group,” and together with Simsmetal East, “Simsmetal”); and Sims Municipal Recycling of New York, LLC (“SMR,” and together with Simsmetal, “Defendants”) (collectively, the “Parties” or singularly “Party”), by and through their respective counsel, to effect the settlement of the below-referenced class action litigation as set forth in this Agreement, subject to Court approval.

RECITALS:

WHEREAS, on April 26, 2024, Plaintiffs filed a lawsuit through a Class Action Complaint (the “Complaint”) captioned *Medina, et al. v. Simsmetal East LLC, et al.*, Docket No. HUD-L-1589-24, in the Superior Court for the State of New Jersey, Law Division, Hudson County (the “Litigation”), on behalf of a proposed class of residents of certain buildings contained within a multi-unit condominium development located in Jersey City, New Jersey known as part of Port Liberté (“Port Liberté”), and against Simsmetal and a third entity; and

WHEREAS, Plaintiffs have alleged, *inter alia*, that the conduct of Defendants’ respective business activities in the industrial area known as Claremont Terminal, in Jersey City, New Jersey, has produced certain adverse environmental impacts, including without limitation, noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions, that have injured Plaintiffs, including without limitation, by causing the market value of their condominium

units at Port Liberté to decrease and interfering with Plaintiffs' use and enjoyment of such condominium units; and

WHEREAS, Plaintiffs further alleged that Defendants' actions constitute both a public and private nuisance, as well as a trespass on Plaintiffs' property, were undertaken negligently, and give rise to strict liability as abnormally dangerous activities that pose a high degree of risk of harm to Plaintiffs and others; and

WHEREAS, Plaintiffs seek compensatory, statutory, exemplary, and punitive damages, attorneys' fees and costs, and injunctive and declaratory relief prohibiting Defendants' complained-of conduct in the future; and

WHEREAS, on August 28, 2024, Plaintiffs filed a Motion to Amend the Complaint to name SMR as an additional Defendant, to change the definition of the class that Plaintiffs proposed to certify to include certain units in eight condominium buildings that front or are immediately adjacent to the waterway between Port Liberté and Claremont Terminal and have windows, doors, balconies, or other open-air access facing towards Defendants' facilities at Claremont Terminal, and to make certain other changes; and

WHEREAS, the Court granted Plaintiffs' Motion to Amend the Complaint and, on October 22, 2024, Plaintiffs filed a First Amended Class Action Complaint (the "FAC"); and

WHEREAS, , Plaintiffs and Simsmetal engaged in written, document and other discovery; and

WHEREAS, the Parties agreed to an informal stay of all further discovery and litigation activity to permit them to engage in settlement discussions, and, over the past ten months, engaged in extensive and hotly-contested arms-length settlement negotiations; and

WHEREAS, in connection with those negotiations, Defendants produced, at the specific request of Plaintiffs' counsel, substantial and substantive informal discovery regarding the nature and environmental impact of Defendants' respective business activities, including (1) with respect to SMR, an informal interview on January 6, 2025, of Thomas Outerbridge, SMR's President, and Thomas Ferretti, SMR's Operations Manager, by Plaintiffs' counsel and their industrial hygiene expert, and a November 11, 2025 certification from Mr. Outerbridge, a copy of which is attached as **Exhibit G**, regarding certain facts about environmental and other operating conditions at the facility operated by SMR, which was subject to review, comment and approval by Plaintiffs' counsel and is being provided to the Court in the Litigation, and with respect to Simsmetal, four in person meetings and one video conference between Plaintiffs' counsel and Simsmetal representatives, including the Chief Operations Officers, at which certain facts about environmental and other operating conditions at the facility operated by Simsmetal were discussed in detail.

WHEREAS, on or about December 1, 2025, the Parties were able to reach an amicable resolution of the Litigation on a class-wide basis, the terms of which are set forth in this Agreement; and

WHEREAS, Defendants continue to deny the claims of Plaintiffs, continue to deny any wrongdoing or liability of any kind whatsoever to Plaintiffs or the Settlement Class (as defined below), and continue to assert that they fully complied with New Jersey and municipal law in all conduct with respect to the subject matter of the Litigation; and

WHEREAS, Plaintiffs have concluded that settlement is desirable due to the substantial risks in pursuing their claims and those of the Settlement Class against Defendants, and to avoid the time, expense and inherent uncertainties of protracted litigation and to resolve finally and

completely all pending claims of Plaintiffs and all members of the Settlement Class which were or could have been asserted based on the facts alleged in the FAC relating to the conduct of Defendants' business activities; and

WHEREAS, Defendants have concluded, without admitting liability, that settlement is desirable to avoid the time, further expense and burdens of protracted litigation and to resolve finally and completely all pending claims of Plaintiffs and all members of the Settlement Class which were or could have been asserted based on the facts alleged in the FAC, relating to the conduct of Defendants' business activities; and

WHEREAS, Plaintiffs recognize the costs and risks of prosecuting the Litigation through class certification and trial, and believe that their interests, and the interests of all Settlement Class Members, in resolving the Litigation and the claims against Defendants set forth in this Agreement are best served by and through the terms contained within this Agreement; and

WHEREAS, the parties believe this Settlement is a fair means of resolving the Litigation; and

WHEREAS, Defendants enter the Settlement with no admission of liability and expressly do not waive any argument, defense or position asserted in the Litigation; and

WHEREAS, the Parties desire to compromise and settle all issues and claims relating to the facts alleged by Plaintiffs in the Litigation or that could have been asserted under or relating to the facts alleged in the Litigation concerning Defendants' business activities, by or on behalf of all persons included in the Settlement Class; and

WHEREAS, solely for purposes of the Settlement, the Parties agree to the certification of a Settlement Class defined as **“all owners and residents during the class period of the condominium units in eight buildings within the Port Liberté community with addresses of 1 Independence**

Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, and 4 Constellation Place that have windows, doors, balconies, or other open-air access facing Defendants’ business operations”; and

WHEREAS, Plaintiffs and Class Counsel believe that this Agreement offers significant benefits to Class Members and is fair, reasonable, adequate, and in the best interests of all Class Members; and

WHEREAS, the Parties desire and intend to seek Court approval of the settlement as set forth in this Agreement;

NOW, THEREFORE, it is stipulated and agreed that, in consideration of the promises and mutual covenants set forth in this Agreement and the entry by the Court of a Final Order and Judgment (as defined below), the Litigation shall be settled and compromised on the terms and conditions set forth below. It is further agreed that each of the Recitals stated above is true and accurate and is made a part of this Agreement.

I. DEFINITIONS

As used in this Agreement, the following terms shall have the meanings set forth below. Where appropriate, terms used in the singular shall be deemed to include the plural and vice versa.

1.1. Applicable Allocated Percentage. The term “Applicable Allocated Percentage” shall have the meaning set forth in Paragraph 3.7 below.

1.2. Claim. The term “Claim” means submission of a valid Claim Form (defined below) for a cash payment in the form of a check as described in paragraph 3.8 below.

1.3. Claim Form. The term “Claim Form” means the form Class Members (defined below) must complete and submit to make a Claim for a cash payment under this Agreement. The Claim Form shall be substantially similar to the form attached as **Exhibit A** to this Agreement.

1.4. Claimant. The term “Claimant” means any Class Member (defined below) who submits a valid Claim Form, as determined by the Settlement Administrator (defined below) pursuant to Paragraph 3.8 of this Agreement, for a cash payment as described in Paragraph 3.1 below.

1.5. Claims Period. The term “Claims Period” means the time period during which Claim Forms may be submitted by Class Members (defined below) and shall conclude 120 days after entry of the Preliminary Approval Order (defined below).

1.6. Claremont Terminal. The term “Claremont Terminal” shall mean the industrial area located at Claremont Terminal Channel, Jersey City, New Jersey, situated at 40.677603°N - 74.0637523°W, at which Defendants (defined below) conduct business operations.

1.7. Class Condominium Building. The term “Class Condominium Building” means one of the Primary Condominium Buildings (defined below) or the Secondary Condominium Buildings (defined below) involved in the Litigation, as identified in the below definition of the Settlement Class.

1.8. Class Condominium Unit. The term “Class Condominium Unit” means a condominium unit in one of the Class Condominium Buildings involved in the Litigation (as defined below).

1.9. Class Counsel. The term “Class Counsel” means Matsikoudis & Fanciullo, LLC and Law Offices of G. Martin Meyers, P.C.

1.10. Class Counsel Fees and Expense Award. The term “Class Counsel Fees and Expense Award” means the amount awarded to Class Counsel by the Court for attorneys’ fees, costs and expenses.

1.11. Class Email Notice. The term “Class Email Notice” (or “Email Notice”) shall mean the Court-approved form of email notice sent by the Settlement Administrator (defined below) to Class Members (defined below) informing them of (a) the preliminary approval of the Settlement; (b) the scheduling of the Final Approval Hearing (defined below); and (c) the opportunity to submit Claims or to exclude themselves from or object to the Settlement. The Class Email Notice shall be substantially similar to the form attached as **Exhibit B** and shall be approved by the Court before dissemination.

1.12. Class Long Form Notice. The term “Class Long Form Notice” (or “Long Form Notice”) means the notice document that will be disseminated or made available to the Class Members (defined below) and will contain full and complete information about the Litigation (defined below) and the claims and defenses asserted by the Parties (defined below), the Class Settlement (defined below) memorialized in this Agreement, and the procedures for Class Members to participate in the Settlement, to exclude themselves from the Settlement, or to object to all or any aspect of the Settlement, such as Class Counsel’s application for attorneys’ fees, costs and expenses. The Class Long Form Notice shall be substantially similar to the form attached as **Exhibit C** and shall be approved by the Court before dissemination.

1.13. Class Members. The term “Class Members” means the members of the Settlement Class, as defined below.

1.14. Class Period. The term “Class Period” means the time period from April 26, 2018 through the date of Preliminary Approval (defined below).

1.15. Class Postcard Notice. The term “Class Postcard Notice” (or “Postcard Notice”) shall mean the Court-approved form of postcard notice to Class Members informing them of (a) the preliminary approval of the Settlement; (b) the scheduling of the Final Approval Hearing (as defined below); and (c) the opportunity for Class Members to submit claims or to exclude themselves from or object to the Settlement. The Class Postcard Notice shall be substantially similar to the form attached as **Exhibit D** and shall be approved by the Court before dissemination.

1.16. Class Publication Notice. The term “Class Publication Notice” or (“Publication Notice”) shall mean the Court-approved form of notice to be published on two occasions in the electronic version of The Star-Ledger (www.nj.com/starledger) , as set forth in paragraph 5.4(c) below, providing notice of (a) the preliminary approval of the Settlement; (b) the scheduling of the Final Approval Hearing (as defined below); and (c) the opportunity for Class Members to submit Claims or to exclude themselves from or object to the Settlement. The Class Publication Notice shall be substantially similar to the form attached as **Exhibit E** which shall be approved by the Court before dissemination.

1.17. Class Representatives. The term “Class Representatives” (or “Named Plaintiffs”) means Plaintiffs Lionel Medina, Ekaterina Vorobeva, Karista Vaeth, and Jennifer Scullion. “Class Representatives,” “Named Plaintiffs,” and “Plaintiffs” are used interchangeably throughout this Agreement and have the same meaning.

1.18. Court. The term “Court” means the Superior Court of New Jersey, Law Division, Hudson County, where the Litigation (as defined below) is pending.

1.19. Defendants. The term “Defendants” means the named Defendants in the FAC: Simsmetal East LLC, Sims Group USA Holdings Corporation and Sims Municipal Recycling of New York, LLC.

1.20. Defendants' Counsel. The term "Defendants' Counsel" refers collectively to the law firm of Connell Foley LLP, attorneys for Simsmetal (as defined below) and the law firm of Greenberg Traurig, LLP, attorneys for SMR (as defined below).

1.21. Effective Date. The term "Effective Date" (or "Settlement Effective Date") is the date on which this Settlement becomes Final (as defined below).

1.22. FAC. The term "FAC" shall mean and refer to the First Amended Complaint filed by Plaintiffs (as defined below) in the Litigation (as defined below).

1.23. Final. With respect to the Judgment (as defined below), this Settlement or the Class Counsel Fees and Expense Award, "Final" means that the time for appeal or petition for review or writ of certiorari has expired or, if an appeal or petition for review is taken and dismissed or the Settlement is affirmed, the time period during which further petition for hearing, appeal, or writ of certiorari can be taken has expired. If the Judgment is set aside, materially modified or overturned by the Court or on appeal, and is not fully reinstated on further appeal, the Judgment and this Settlement shall not become Final. Any proceeding or order or any appeal or petition for review or writ of certiorari pertaining solely to the Class Counsel Fees and Expense Award will not in any way delay or preclude the Judgment or this Settlement from becoming Final, provided, however, that Defendants shall have no obligation to pay any Class Counsel Fees and Expenses until a Final determination on the appropriate amounts of such Class Counsel Fees and Expenses has been made.

1.24. Final Approval Hearing and Order. The term "Final Approval Hearing" means the hearing at which the Court will consider and finally decide whether to enter the Final Approval Order, and the term "Final Approval Order" means the Court order that finally certifies the Settlement Class, approves the Settlement as set forth in this Agreement, approves payment of the

Class Counsel Fees and Expense Award, and makes such other final rulings as are contemplated by this Agreement.

1.25. Judgment. The term “Judgment” means the order of the Court to be issued following the Final Approval Order.

1.26. Litigation. The term “Litigation” means and refers to *Medina, et al. v. Simsmetal East LLC, et al.*, Docket No. HUD-L-1589-24, which is pending in the Superior Court for the State of New Jersey, Law Division, Hudson County.

1.27. Metal Shredder. The term “Metal Shredder” means and refers to the equipment utilized by Simsmetal at its facility to shred metal for its metal recycling operations.

1.28. MRF. The term “MRF” means and refers to the Materials Recovery Facility operated by SMR (as defined below) and located at 165 Linden Avenue East, Jersey City, New Jersey.

1.29. Notice and Other Administrative Costs. The term “Notice and Other Administrative Costs” means all costs actually incurred by the Settlement Administrator (as defined below) in administrating the Settlement, including but not limited to the Settlement Administrator’s administrative fee, setting up and operating the Settlement Website (as defined below), determining the names and addresses of Class Members, disseminating the Class Email Notice, Class Postcard Notice and Class Long Form Notice, and causing the Class Publication Notice to be published, including the cost of such publication, investigating and adjudicating Claim Forms submitted by persons claiming to be Class Members, disseminating the payments to the Class Members, and tracking Objections (as defined below) and Requests for Exclusion (as defined below).

1.30. Notice Period. The term “Notice Period” means the period beginning three weeks (i.e., 21 days) after entry of the Preliminary Approval Order and ending 30 days later (i.e., 52 days after Preliminary Approval, as defined below).

1.31. Objection and Objection Date. The term “Objection Date” means the date agreed upon by the Parties (as defined below) or otherwise ordered by the Court for Settlement Class Members to file an “Objection” to the Settlement or to any terms or provisions set forth in this Agreement, and to submit any required supporting statements, proof or other materials or argument, pursuant to Section VII of this Agreement.

1.32. Parties. The term “Parties” collectively means Plaintiffs Lionel Medina, Ekaterina Vorobeva, Karista Vaeth, and Jennifer Scullion, on behalf of themselves and all others similarly situated (the Settlement Class), by and through their counsel, and Defendants Simsmetal East LLC, Sims Group USA Holdings Corporation and Sims Municipal Recycling of New York, LLC, by and through their counsel.

1.33. Plaintiffs. The term “Plaintiffs” means Plaintiffs Lionel Medina, Ekaterina Vorobeva, Karista Vaeth, and Jennifer Scullion, individually and in their representative capacity on behalf of all others similarly situated (the Settlement Class).

1.34. PLHA. The “PLHA” refers to the Port Liberté Homeowners’ Association, 50 Aurora Place, Jersey City, New Jersey.

1.35. Port Liberté. The term “Port Liberté” refers to the multi- unit condominium development located in Jersey City, New Jersey where each of the Plaintiffs reside and own condominiums and where each of the Class Members do reside and/or have resided via leasehold interest or ownership of a condominium, and/or, alternatively, owned a condominium unit.

1.36. Preliminary Approval. The term “Preliminary Approval” means that the Court has entered an order preliminarily certifying the Settlement Class and preliminarily approving the Settlement and the terms and conditions of this Agreement, including the content and manner of providing notice to Class Members.

1.37. Preliminary Approval Order. The term “Preliminary Approval Order” means the order of the Court preliminarily certifying the Settlement Class for settlement purposes only and preliminarily approving the class Settlement memorialized in this Agreement. The Preliminary Approval Order shall be substantially similar to the form attached as **Exhibit F**, subject to Court approval.

1.38. Primary Class Buildings. The term “Primary Class Buildings” shall refer to the condominium apartment complexes located at the buildings with street addresses of 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, and 102 Shearwater Court East, in Jersey City, New Jersey, which directly face Claremont Terminal.

1.39. Request for Exclusion. The term “Request for Exclusion” means any request by any Class Member to be excluded from, or to “opt out” of, the Settlement pursuant to the provisions of Section VI of this Agreement.

1.40. Secondary Class Buildings. The term “Secondary Class Buildings” shall refer to the apartment complexes located at the buildings with street addresses of 15 Freedom Way and 4 Constellation Place in Jersey City, New Jersey, which did directly face Claremont Terminal for a portion of the Class Period until the construction of new residential building between the apartment complexes and Claremont Terminal.

1.41. Settlement. The term “Settlement” means the agreement by the Parties to resolve, on a class-wide basis, the Litigation and all Released Claims as set forth in paragraph 9.1, the terms of which have been memorialized and provided for in this Agreement.

1.42. Settlement Administrator. The term “Settlement Administrator” means JND Legal Administration, 1201 2nd Avenue, Suite 3400, Seattle, Washington 98101.

1.43. Settlement Class. The term “Settlement Class” means:

All owners and residents during the class period of the condominium units in eight buildings within the Port Liberté community with addresses of 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, and 4 Constellation Place that have windows, doors, balconies, or other open-air access facing Defendants’ business operations.

1.44. Settlement Costs. The term “Settlement Costs” shall refer collectively to the costs of (a) valid Claims timely submitted by Class Members via completed Claim Forms; (b) Class Members’ share of the Notice and Other Administrative Costs actually incurred by the Settlement Administrator (including check distribution costs and costs relating to the Class Publication Notice and the Settlement Website, as defined below); and (c) the Class Counsel Fees and Expense Award.

1.45. Settlement Fund. The term “Settlement Fund” means the total cash commitment by Defendants, collectively, for purposes of effecting the class Settlement of the Litigation, as described in Sections III and IV of this Agreement, but excluding two-thirds (2/3) of the Notice and Other Administrative Costs, which are being separately paid by Simsmetal and SMR. The Settlement Fund includes: (a) all cash payments to Class Members; (b) Attorneys’ Fees and Costs to Class Counsel; and (c) one-third (1/3) of the Notice and Other Administrative Costs. The total cash commitment by each Defendant, excluding Simsmetal’s and SMR’s respective one-third (1/3)

shares of the Notice and Other Administrative Costs, is described in Section III of this Agreement. The payment and disposition of the Settlement Fund is subject to the provisions of this Agreement.

1.46. Settlement Website. The term “Settlement Website” means a website created, operated, and maintained by the Settlement Administrator solely for the purpose of making available to the Class Members the documents and information related to the Litigation and this Settlement. The content of the Settlement Website must be approved by Class Counsel and Defendants’ Counsel before posting or otherwise making it available to Class Members, which approval shall not be unreasonably withheld.

1.47. Shredder Barrier: The term “Shredder Barrier” means and refers to the barrier to be constructed by Simsmetal between the Metal Shredder and/or its associated equipment and Port Liberté.

1.47. Simsmetal. The term “Simsmetal” refers collectively to Defendants Simsmetal East LLC and Sims Group USA Holdings Corporation.

1.49. SMR. The term “SMR” refers to Defendant Sims Municipal Recycling of New York, LLC.

1.50. SMR Facilities. The term “SMR Facilities” refers collectively to the MRF and the SMR Glass Plant (as defined below).

1.51. SMR Glass Plant. The term “SMR Glass Plant” means and refers to the glass plant facility operated by SMR and located at 165 Linden Avenue East, Jersey City, New Jersey.

1.52. SSN/TIN. The term “SSN/TIN” means, with respect to a Class Member who is a natural person, that person’s Social Security Number, and with respect to a Class Member which is a business entity, that entity’s Federal Taxpayer Identification Number, as appropriate.

1.53. Tax Returns. The term “Tax Returns” means, collectively, all federal, state and local tax returns and information returns required to be filed with relevant governmental entities by the Settlement Fund.

1.54. Total Cash Settlement Payment. The term “Total Cash Settlement Payment” means the total amount being paid in Settlement benefits to Class Members and refers to the amount of the Settlement Fund remaining after deducting (a) Class Members’ one-third (1/3) share of the Notice and Administrative Costs; and (b) Class Counsel’s Fees and Expenses.

II. REQUIRED EVENTS

2.1. Plaintiffs shall take all reasonable and necessary steps, subject to the Court’s availability, to obtain entry of the Preliminary Approval Order and to move for the Final Approval Order as soon as practicable. Defendants’ Counsel shall cooperate as set forth in this Agreement.

2.2. Plaintiffs shall move for, and Defendants’ Counsel shall not oppose, entry of a Preliminary Approval Order in the same or substantially identical form as that attached as **Exhibit F**. In moving for preliminary approval of this Settlement, Plaintiffs shall seek only certification of a settlement class that is expressly conditional on the Settlement obtaining final approval from the Court.

a. If the Court does not enter a Final Approval Order or the settlement does not occur, Defendants expressly reserve their right to challenge the propriety of class certification for any purpose as if the Parties had never entered into this Agreement.

b. The proposed form of the order that includes language certifying a settlement class shall expressly state that the Parties and Class Counsel agree that certification of the Settlement Class is a certification for settlement purposes only, and that Defendants retain their

right to object to class certification in the Litigation or in any other putative class action if the Court does not enter a Final Approval Order or the settlement does not occur.

2.3. Plaintiffs will use their best reasonable efforts, consistent with the terms of this Agreement, to promptly obtain a Final Approval Order. Defendants shall cooperate as set forth in this Agreement.

2.4. The Parties will submit a request to the Court to stay all discovery obligations and other activity in the Litigation while the motions for Preliminary Approval and Final Approval described in paragraphs 2.2 and 2.3 above are pending.

2.5. The Parties acknowledge that prompt approval, consummation and implementation of the Settlement set forth in this Agreement is essential. The Parties shall cooperate with each other in good faith to carry out the purposes of and effectuate this Agreement, shall promptly perform their respective obligations, and shall promptly take any and all actions and execute and deliver any and all additional documents and all other materials or information reasonably necessary or appropriate to carry out the terms of this Agreement and the transactions that it contemplates.

III. SETTLEMENT TERMS

3.1. Benefit to Settlement Class Members from the Settlement Fund. Defendants will pay a total of \$1,475,000 in cash to fund the following: (a) valid Claims (as determined by the Settlement Administrator pursuant to paragraph 3.9(b) below) timely submitted by Class Members via completed Claim Forms (as described in paragraph 3.8 below); (b) Class Members' one-third (1/3) share of the Notice and Other Administrative Costs actually incurred by the Settlement Administrator (including check distribution costs and costs relating to the Class Publication Notice and the Settlement Website, as described in Section V below); and (c) the Class Counsel Fees and

Expense Award, as described in paragraph 4.1 below. Simsmetal is only responsible for paying \$1,250,000 and SMR is only responsible for paying \$225,000 of the Settlement Fund. Other than Defendants' funding the Settlement Fund and Simsmetal and SMR also each paying one-third (1/3), respectively, of the Notice and Other Administrative Costs, Defendants shall have no further payment obligations to (a) Plaintiffs; (b) the participating Class Members who do not timely submit a valid Request for Exclusion; (c) the Settlement Administrator; or (d) Class Counsel, under the Settlement or this Agreement.

3.2 Notice and Other Administrative Costs. All settlement administration costs, including but not limited to the costs of (a) identifying Class Members; (b) printing, distributing and tracking documents associated in any manner with the Settlement; (c) publishing the Class Publication Notice; (d) distributing notices and settlement payments to Class Members; (e) determining the validity of claims; (f) determining the Applicable Allocated Percentages of participating Settlement Class Members under this Settlement; (g) providing necessary reports and declarations; and (h) any other duties and responsibilities necessary to administer the Settlement, shall be paid by the parties as follows: Simsmetal and SMR are each responsible for paying one-third (1/3) of the Notice and Other Administrative Costs, and their full shares shall be paid separately and independently of the Settlement Fund, and Class Members are responsible for paying one-third (1/3) of the Notice and Other Administrative Costs, and their full share is included in the Settlement Fund.

3.3 Injunctive Relief by Simsmetal. In partial consideration for the dismissal of the Litigation with prejudice under the terms of this Agreement, Simsmetal will undertake the following actions, which it estimates will require significant capital investment and operational adjustments.

a. Hotline

Within 30 days of Final Approval, Simsmetal shall create a hotline telephone number (the “Hotline”), calls to which shall be directed to a Simsmetal electronic voicemail box, which will then be promptly disseminated to operational, EHS and community affairs management on site between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, in order to receive calls from Port Liberté residents regarding concerns about operations generally and, more specifically, as delineated in this Agreement. Simsmetal shall log all calls to the Hotline, and shall take commercially reasonable efforts to investigate and resolve each complaint made on the Hotline in a timely and good-faith manner. In addition, during any period in which the outside temperature is at least 40 degrees Fahrenheit, Simsmetal shall promptly disseminate to SMR, between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, calls complaining of excessive odors which the caller states he or she believes are emanating from Claremont Terminal. Upon forwarding any odor complaint to SMR, and determining that Simsmetal is not the source of the odor, Simsmetal shall be relieved of any further obligation to investigate and/or remediate the odor complaint that was forwarded to SMR. All calls to the Hotline shall be logged with the date, time, caller contact information (if provided), nature and description of the call, and actions taken in response, if any.

b. Noise

(i) Training: Simsmetal shall implement and maintain a mandatory training program for all employees whose job functions may contribute to the generation of excessive or loud impulse noises at the Simsmetal Facility, specifically, equipment operators and yard supervisors. Initial training shall be completed within ninety (90) days of the Settlement Effective Date for all current relevant employees, and, subsequently, for all new hires prior to beginning of independent operation of applicable machinery. Refresher training shall be conducted annually.

(ii). Overnight Noise: Within one year of the Settlement Effective Date, Simsmetal shall take any and all necessary steps to ensure that activities at the Simsmetal Facility do not cause noise levels in excess of fifty decibels (50db), pursuant to N.J.A.C. 7:29-1.1 *et seq.*, and Jersey City Ordinance § 222-5.2, to reach the Port Liberté property line between the hours of 10:00 p.m. and 7:00 a.m. Among these measures, but without limitation, Simsmetal shall construct the Shredder Barrier designed to reduce the impact of noise emanating from the Metal Shredder and/or its associated equipment. All vessel/stevedoring activities at the Simsmetal Facility shall be conducted from 7:00 a.m. until 10:00 p.m. Monday through Friday, and 8:00 a.m. until 10:00 p.m. Saturday and Sunday.

c. Air pollution:

(i) Fugitive Dust: Within thirty (30) days of the Settlement Effective Date Simsmetal shall make commercially reasonable efforts to ensure that activities at the Simsmetal Facility do not cause unreasonable levels of fugitive dust emissions to leave the Simsmetal Facility by, without limitation, creating and implementing a fugitive dust emissions plan and training program.

(ii) Air Monitoring: Simsmetal shall conduct a three-month air monitoring program at two locations on the northern side of Simsmetal Facility plus one location to be determined for purposes of background sampling, to commence within six months of the Settlement Effective Date, in order to monitor PM10. Simsmetal will share a summary of all hourly sampling results and corresponding meteorological data with Plaintiffs' counsel monthly.

d. Fire Detection and Suppression Systems:

(i). Stockpile Safety Measures: Simsmetal shall equip all shredder infeed post-consumer recyclable metal stockpiles with fire detection and prevention systems. These systems shall include, at a minimum:

(a). Infrared thermal imaging cameras and/or heat sensors and/or comparable systems, such as human detection, capable of detecting elevated temperatures or potential hot spots;

(b) Fire extinguishers and other portable suppression equipment accessible throughout the Facility and inspected regularly.

(ii) Fire Suppression Infrastructure Implementation: The equipment set forth above, shall be installed and operational within ninety (90) days of the Settlement Effective Date. Simsmetal shall also develop and maintain site-specific fire response procedures, including coordination with the local fire department.

e. Light:

(i) Upon completion of the Shredder Barrier, Simsmetal shall reasonably reorient lights from the Metal Shredder and its vicinity that face Port Liberté in order to minimize impact of lights shining toward Port Liberté.

(ii) Within ninety (90) days of Settlement Effective Date, Simsmetal shall take commercially reasonable measures to minimize the impact of light west of the Metal Shredder on residences in Port Liberté.

3.4. Injunctive Relief by SMR. As further relief to the Class Members, SMR will undertake the following actions.

a. To address complaints of excessive noise at night emanating from SMR's business activities at the SMR Facilities, SMR will maintain the process through which the back-up alarms on SMR mobile equipment in use at the SMR Facilities are shut down, and use only strobe lights, from 6:00 p.m. to 6:00 a.m. SMR will also instruct, and use its best efforts to require, third-party tug operators delivering or picking up barges going to or from the SMR Facilities to continue to maintain the process through which they communicate by means other than loudspeaker, to the extent that such tug operators are under SMR's control. SMR's obligations in this regard also include tugs transporting barges used by SMR which are temporarily "parked" in the waterway on the Northeast-facing side of Claremont Terminal, whether or not their presence is related to processing activities there.

b. To address complaints of excessive light emanating from SMR's business activities at the SMR Facilities at night, SMR (a) has investigated and adjusted downward the direction of, and added hoods to, the lights mounted on the exterior of the SMR Glass Plant that are visible from parts of Port Liberté, and will continue to maintain such lighting changes to the extent that they do not compromise operational safety; and (b) has investigated the lights located to the east of the receiving building of the MRF and determined that none of those lights are pointed at Port Liberté, and that all of them are used in connection with SMR's business, and, accordingly, no adjustments to those lights are necessary.

c. Handling of Odor-related Calls to Hotline.

(i) To address calls from Class Members to the Hotline (described in paragraph 3.3 above) complaining of excessive odors during any period in which the outside temperature is at least 40 degrees Fahrenheit, SMR will implement a procedure to investigate and follow-up on such calls which are directed by Simsmetal to SMR between the hours of 9:00 a.m. to 5:00 p.m. on weekdays

(other than holidays). SMR will maintain a log of such calls, including the results of such investigations and any actions taken to mitigate the odor.

(ii) SMR will promptly investigate any odor-related calls to the Hotline which are directed to SMR by SimsMetal as described in paragraph 3.4(c)(i) above. If SMR is able to confirm that either of the MRF Facilities is the source of the odor, SMR will promptly make commercially reasonable efforts in a good faith manner within a reasonable time to mitigate the odor with a misting or similar system.

(iii) If the caller provides an email address, SMR will send an email to that caller informing him or her of SMR's determination of whether or not one of the MRF Facilities is the source of the odor and, if so, what SMR has done or is doing to mitigate the odor. Upon sending an email informing a caller that one of the MRF Facilities is not the source of the odor complaint to SMR, or if the caller does not provide an email address, SMR shall be relieved of any further obligation to investigate, remediate or report on such odor complaint.

3.5. Creation of and Payments into the Settlement Fund, and Payment of Notice and Administrative Costs.

a. In further partial consideration for the dismissal of the Litigation with prejudice under the terms of this Agreement, Defendants shall create a Settlement Fund to make payments of settlement benefits to the Class Members and to make the other payments as set forth below.

b. Within ten calendar days of entry of the Preliminary Approval Order, Defendants shall pay to the Settlement Administrator all amounts to be paid for providing notice of the Settlement, as set forth in Section V below.

c. Within five calendar days after the Settlement Effective Date, Defendants shall pay or cause to be paid into the Settlement Fund the following:

(i) The Defendants' respective one-third shares of the remaining estimated Notice and Administrative Costs payable to the Settlement Administrator, as set forth in Section V below. SimsMetal's and SMR's total respective shares of the payments required in this paragraph and in paragraph 3.5(b) above and 3(g) below are not included within, but are in addition to, the amount of their contributions to the Settlement Fund.

(ii) The Class Counsel Fees and Expenses Award, as set forth in Section IV below. Simsmetal shall be responsible for paying \$461,465.80 (84.75%) of that amount. SMR shall be responsible for paying \$83,036.62 (15.25%) of that amount. Immediately upon clearance of these amounts, the Settlement Administrator shall remit to Class Counsel by wire transfer the Class Counsel Fees and Expenses Award.

(iii) The Total Class Settlement Payment. The Total Class Settlement Payment shall equal the amount of the remainder of the Total Settlement Amount after deducting (i) the amount of Class Members' one-third (1/3) share of the Notice and Other Administrative Costs due to the claims administrator; and (ii) the total amount of the Class Counsel Fees and Expenses Award due from both Defendants. The Total Class Settlement Payment (plus interest as set forth in section 3(f) below) represents the amount of total cash benefits available to the Class Members.

d. Interest earned on the Settlement Fund shall compound within that fund and shall be available to pay Settlement benefits to Class Members.

After all payments of Settlement benefits to Class Members have been paid and all other tasks of settlement administration have been completed by the Settlement Administrator (other than the

payment called for in subparagraph 3(f) below), the Settlement Administrator shall issue a final invoice to Defendants and Class Counsel for any remaining fees and costs of settlement administration. Defendants shall pay their respective one-third shares, and the Class Members' one-third share shall be paid out of the Settlement Fund.

e. If any money remains in the Settlement Fund after the payment of each of the amounts set forth in subparagraphs (b) through (d) above, that amount shall be paid by the Settlement Administrator in the form of a check to the PLHA, as a *cy pres* distribution, for further use or distribution as the Board of the PLHA deems appropriate.

3.6. Form of Payment to Class Members. All Settlement benefits to be paid to Class Members who have filed a valid Claim are to be paid in the form of a check issued in the name of the Class Member, based upon the records of ownership and leases of the Class Condominium Units, as compiled by the Settlement Administrator with the assistance of the Parties.

3.7. Plan of Allocation and Applicable Allocated Percentages for Class Members. Class Members who have filed a valid Claim shall be entitled to payment of cash benefits from the Settlement Fund on a *pro rata*, per-share basis, according to the following formula, which is based on the individual Class Condominium Unit in which the Class Member owns or owned, or resides or resided, as appropriate, and the Class Condominium Building in which that unit is located.

a. A Class Member who has submitted a valid Claim and who either currently resides, or during the Class Period, formerly resided, in a Class Condominium Unit in one of the Primary Buildings, will receive one discrete residency settlement share for that status.

b. A Class Member who has submitted a valid Claim and who either currently owns, or during the Class Period, formerly owned, a Class Condominium Unit in one of the Primary Buildings, will receive one discrete ownership settlement share for that status.

c. A Class Member who has submitted a valid Claim and who either currently resides or during the Class Period, formerly resided in a Class Condominium Unit in one of the Primary Class Buildings for three years or more, will receive one additional discrete residency settlement share for that status.

d. A Class Member who has submitted a valid Claim and who currently owns or during the Class Period formerly owned a Class Condominium Unit for three years or more in one of the Primary Class Buildings, will receive one additional discrete ownership settlement share for that status.

e. A Class Member who has submitted a valid Claim and who either currently resides, or during the Class Period, formerly resided, in a Class Condominium Unit in one of the Secondary Class Buildings, will receive a one-quarter residency settlement share for that status.

f. A Class Member who has submitted a valid Claim and who either currently owns, or during the Class Period, formerly owned, a Class Condominium Unit in one of the Secondary Class Buildings, will receive a one-quarter ownership settlement share for that status.

g. A Class Member who has submitted a valid Claim and who currently resides or during the Class Period formerly resided in a Class Condominium Unit in one of the Secondary Class Buildings for three years or more, will receive a one-quarter additional residency settlement share for that status.

h. A Class Member who has submitted a valid Claim and who currently owns or during the Class Period formerly owned a Class Condominium Unit for three years or more in one of the Secondary Class Buildings, will receive a one-quarter additional ownership settlement share for that status.

i. The owners and residents of each Class Condominium Unit in a Primary Class Building are entitled, collectively, to a maximum of two residency shares and two ownership shares per Class Condominium Unit. The owners and residents of each Class Condominium Unit in a Secondary Class Building are entitled, collectively, to a maximum of one-half residency share and one-half ownership share per Class Condominium Unit. If more than one owner owned a Class Condominium Unit, the ownership settlement share shall be allocated equally among them. If more than one owner owned a Class Condominium Unit for more than three years, the additional ownership settlement share shall be allocated equally among them. If more than one resident resided in a Class Condominium Unit, the residency settlement share shall be allocated equally among them. If more than one resident resided in a Class Condominium Unit for more than three years, the additional residency settlement share shall be allocated equally among them.

j. Only persons holding legal ownership or leasehold interests in the Class Condominium Units shall be entitled to Settlement benefits. The final determination of ownership and residency shares shall be made by the Settlement Administrator based upon such records as it deems necessary reflecting legal ownership and lessee status in the Class Condominium Units. The Settlement Administrator shall calculate the Applicable Allocated Percentage for each Class Member, taking into account: (a) the dates in which the Class Member resided in or owned, as appropriate, one or more Class Condominium Units; and (b) the number of other Class Members, if any, who also resided in or owned, as appropriate, a given Class Condominium Unit during the period in question, and the dates of their respective ownership or residency, as appropriate, such that the Settlement Administrator can determine the number of residency or ownership shares, as appropriate, to which each Class Member is entitled, as specified in paragraph 3.7(a) through (i) above.

3.8. Proof of Claim.

a. To submit a Claim for a cash payment under the Settlement, a Claimant must complete and submit a Claim Form that includes certain information specified in the Claim Form, sufficient to permit the Settlement Administrator to identify the Class Member and confirm the Claimant's ownership or residency status in Class Condominium Unit, as appropriate. Each Claimant shall complete the Claim Form either in online or in hard copy form and shall either submit the Claim Form to the Settlement Administrator electronically via the Settlement Website or mail the original signed Claim Form to the Settlement Administrator so that it is received by the last day of the Claims Period.

b. In the event that a Class Member submits a timely Claim Form by the Claims Deadline but the Claim Form is incomplete or deficient, then the Settlement Administrator shall give such Class Member reasonable opportunity to provide any requested missing information, which information must be received by the Settlement Administrator no later than 30 calendar days after the Claims Deadline. In the event the Settlement Administrator receives such information more than 30 calendar days after the Claims Deadline, then any such claim shall be denied without further notice. The Settlement Administrator may contact any Class Member who has submitted a Claim Form to obtain additional information necessary to verify the Claim Form.

3.9. Review of Claims.

a. Class Counsel shall provide the Settlement Administrator with the addresses of Class Condominium Units that Class Counsel has identified and a list of owners and residents of Class Condominium Units during the Class Period from a list Class Counsel has obtained from the PLHA via a discovery subpoena. The parties agree that such list is not necessarily accurate and complete and may be supplemented by additional information obtained

by the Settlement Administrator. In that regard, the Settlement Administrator shall use its own independent efforts to identify additional past and present owners and residents of Class Condominium Units, using the above list furnished by Class Counsel. The Settlement Administrator's independent efforts will include, without limitation, employing search procedures, such as those conducted by TransUnion LLC.

b. The Settlement Administrator shall be responsible for reviewing all Claims to determine their validity, including without limitation, rejecting any Claim that (i) does not comply in any respect with the instructions on the Claim Form; (ii) is submitted after the expiration of the Claims Period; or (iii) is submitted by an individual who has not been identified or otherwise verified by the Settlement Administrator as a Class Member. The Settlement Administrator is authorized to require such additional information as it deems necessary to verify the validity of any Claims, in accordance with customary and reasonable fraud prevention and other commercially reasonable business practices.

3.10. Unclaimed Settlement Class Benefits or Uncleared Checks.

a. Checks issued pursuant to this Agreement shall expire 90 calendar days after they are issued, provided however, that a failure by any Class Member to deposit or cash a check within the period allotted shall have no effect on that individual's release pursuant to paragraph 9.1 below. Subject to good cause shown by the Class Member, the Settlement Administrator may reissue a check at any time up to an additional 15 calendar days following the original 90-day period. If any issued settlement checks are not cashed or deposited after 60 calendar days from issuance, the Settlement Administrator will send an email reminder to each Class Member reminding them that if they fail to cash a settlement check by the 90-day deadline, the check will expire and become non-negotiable. Those Class Members whose checks are not

cash within the period set forth in this subparagraph shall be ineligible to receive a cash Settlement benefit, and Defendants shall have no further obligation to make any payment pursuant to this Agreement, or otherwise, to such Class Members.

b. All amounts from uncashed checks issued in the distribution of cash settlement payments will be added to the Settlement Fund and (to the extent that there are remaining funds in the Settlement Fund after all payments required under this Settlement Agreement have been made) shall be paid by the Settlement Administrator in the form of a check to the PLHA, as a *cy pres* distribution, for further use or distribution as the Board of the PLHA deems appropriate.

3.11. Tax Obligations.

a. The Settlement Administrator shall timely and properly file, or cause to be filed, all Tax Returns required or advisable with respect to the earnings on the funds deposited in the Settlement Fund, including, without limitation, those described in Treasury Regulation § 1.468B-2(k). Such Tax Returns shall be prepared consistently with this paragraph and shall reflect that all taxes (including any estimated taxes, earnings or penalties) on the income earned on the funds deposited in the Settlement Fund shall be paid out of the Settlement Fund as provided in this Agreement.

b. Each Class Member must possess a valid SSN/TIN and shall be required to provide such number with their Claim Form. The provision of a valid SSN/TIN is necessary to comply with federal tax reporting and withholding requirements, including those under Internal Revenue Code §§ 6041 and 3406 and their corresponding Treasury Regulations. Failure to provide a valid SSN/TIN may result in the imposition of federal backup withholding at the rate prescribed by law (currently 24%) on any payment reportable on IRS Form 1099s, and such withholding shall be deducted from the distribution amount otherwise payable to the Class Member. The Settlement

Administrator may require each Class Member to complete and submit IRS Form W-9 to certify their SSN/TIN, ensuring accurate reporting and compliance with all applicable federal tax obligations.

c. The Parties shall have no liability or responsibility for any taxes, penalties or interest owed with respect to the Total Cash Settlement Payment, nor for the filing of any Tax Returns with the Internal Revenue Service or any other taxing authority, beyond the payment of such amounts as administrative costs from the Settlement Fund, as provided in this Agreement.

d. All taxes owed by the Settlement Fund shall be treated as administrative expenses and shall be timely paid, or caused to be paid, by the Settlement Administrator out of the Settlement Fund without prior order of the Court or further approval by the Parties. The Settlement Administrator shall withhold from any distributions such amounts as may be necessary to satisfy the obligations described in this paragraph, including any amounts required to be withheld under Treasury Regulation § 1.468B-2(1)(2).

IV. ATTORNEYS' FEES AND EXPENSES

4.1. Plaintiffs shall petition the Court for (and Defendants have agreed not to oppose) an award of attorneys' fees in an amount not to exceed \$491,617.50, plus reimbursement of Class Counsel's reasonable out-of-pocket costs in an amount not to exceed \$52,884.92. Plaintiffs will file their Petition before the expiration of the notice period so that Class Members who wish to review the Petition before submitting a Claim or choosing to exclude themselves from the Settlement may do so. Plaintiffs and Class Counsel agree that they will not seek recovery of any greater amounts of attorneys' fees and expenses than that set forth in this paragraph. The Parties understand and acknowledge that the award of attorneys' fees and expenses is within the Court's discretion.

4.2. The Parties' negotiation of, and agreement to, the attorneys' fees and expenses set forth in paragraph 4.1 above did not occur until after the substantive terms of this Agreement had been negotiated and agreed upon.

4.3. If and to the extent that counsel other than Matsikoudis & Fanciullo, LLC or Law Offices of G. Martin Meyers, P.C. apply for an award of attorneys' fees and expenses, Defendants reserve the right to oppose all such applications on any grounds, including without limitation, the grounds that Defendants have not agreed to pay such fees and expenses and that they are unreasonable or duplicative. Plaintiffs and Class Counsel shall cooperate with Defendants to the extent reasonably necessary to effectuate the intent of this paragraph, and warrant and represent that, as of the date of this Agreement, they are each unaware of any other counsel who intend to apply for an award of attorneys' fees and expenses in addition to that by the undersigned Class Counsel.

4.4. If this Agreement is terminated pursuant to any of its provisions, Defendants' obligations under this Section, including the obligation to pay any amount of attorneys' fees or expenses, shall likewise be terminated.

4.5. Any application for an award of attorneys' fees and expenses is to be considered separate from the approval of this Settlement, and any challenges to any such awards shall not terminate or delay the Settlement, provided, however, that Defendants shall have no obligation to pay any Class Counsel Fees and Expenses until a Final determination on the appropriate amounts of such Class Counsel Fees and Expenses has been made and the total amount of Class Counsel Fees and Expenses which Defendants shall be obligated to pay shall not exceed the amount set forth in paragraph 4.1 above.

V. CLAIMS ADMINISTRATION AND NOTICE TO CLASS MEMBERS

5.1. The Settlement Administrator, subject to Court approval, shall help implement the terms of the proposed Settlement as set forth in this Agreement. The Settlement Administrator shall be responsible for administering the Settlement and related tasks, including, without limitation, (a) establishing the Settlement Website at which Claims can be filed online, and which posts the Class Email and Postcard Notices, Class Long Form Notice, and other related documents as directed by Class Counsel; (b) distributing and publishing the Class Email and Postcard Notices to Class Members; (c) causing the Class Publication Notice to be published; (e) answering inquiries from Class Members or forwarding such inquiries to Class Counsel or Defendants' Counsel, as appropriate; (d) determining the Applicable Allocated Percentages of participating Class Members under this Settlement; (e) receiving and maintaining on behalf of the Court and the Parties any Class Member correspondence regarding Requests for Exclusion to the Settlement; (f) receiving, reviewing, determining the validity of and processing Claims and distributing payments to Class Members with valid Claims; and (g) otherwise assisting with the implementation and administration of the Settlement terms.

5.2. Performance Standards of Settlement Administrator. The contract with the Settlement Administrator shall obligate the Settlement Administrator to abide by the following performance standards:

a. The Settlement Administrator shall provide prompt, accurate and objective responses to inquiries from Class Counsel and Defendants' Counsel, and shall periodically report on class notice, Claims, Requests for Exclusion, and objectors; and

b. The Settlement Administrator shall keep no confidences from counsel for any of the Parties in connection with its administration of this Agreement.

5.3. Class Member Information Provided by Class Counsel to the Settlement

Administrator.

a. On or before 15 calendar days after entry of the Preliminary Approval Order, Class Counsel shall provide the Settlement Administrator with a list of any and all persons that records made available to Class Counsel indicate are Class Members and their last known email and postal addresses. Such information shall include, at a minimum, the list of owners and residents Class Counsel obtained from the PLHA via subpoena.

b. As set forth in paragraph 3.9(a) above, the Settlement Administrator shall make its own independent efforts to supplement the list provided by Class Counsel pursuant to paragraph 5.3(a) above by employing search procedures maintained and operated by TransUnion LLC.

c. Because the information about Class Members that will be obtained by the Settlement Administrator will consist of confidential, non-public and personal information, as well as other information protected by applicable privacy laws, the Settlement Administrator will execute a non-disclosure agreement and will take all reasonable steps to ensure that any information provided to it by Class Counsel or which Settlement Administrator otherwise obtains will be used solely for the purpose of effectuating this Settlement. The Settlement Administrator shall administer the Settlement in accordance with the terms of this Agreement.

5.4. Notice Requirements to Class Members.

a. The Settlement Administrator will send via electronic mail two Class Email Notices to Class Members at their last known email addresses, as set forth in the records made available to or otherwise obtained by the Settlement Administrator through the efforts set forth in paragraph 5.3(a) and (b) above. The Settlement Administrator will send the first Email Notice on

or before 21 calendar days after entry of the Preliminary Approval Order and will send the Second Email Notice to any Class Member who, by that date, had not already submitted a valid Claim 42 calendar days after the entry of Preliminary Approval. The form of the Class Email Notice shall be substantially similar to the form attached as **Exhibit B** to this Agreement and shall be approved by the Court before dissemination.

b. The Settlement Administrator will also send via U.S. Mail a Class Postcard Notice to Class Members at their last known street and mailing addresses, as set forth in the records made available to or otherwise obtained by the Settlement Administrator through the efforts set forth in paragraph 5.3(a) and (b) above. The Settlement Administrator will mail the Class Postcard Notice on or before 30 calendar days after entry of the Preliminary Approval Order. Should the Settlement Administrator receive any undelivered Class Postcard Notices, it will conduct one skip trace or postal look-up to search for a new address for such Class Member and resend the Class Postcard Notice to any newly found Class Member address. The form of the Class Postcard Notice shall be substantially similar to the form attached as **Exhibit D** to this Agreement and shall be approved by the Court before dissemination.

c. The Settlement Administrator will also cause the Class Publication Notice to be published in the electronic version of The Star-Ledger (www.nj.com/starledger) starting 30 calendar days after entry of the Preliminary Approval Order, and then on a second occasion 45 days after entry of the Preliminary Approval Order.

d. The Class Email Notice, Class Postcard Notice and Class Publication Notice will each contain information informing Class Members of (i) the preliminary approval of the Settlement; (ii) the scheduling of the Final Approval Hearing; and (iii) the opportunity for Class Members to submit claims or to exclude themselves from or object to the Settlement. The

costs for processing and disseminating the Class Email Notice, Class Postcard Notice and Class Publication Notice will be paid from the Notice and Other Administrative Costs paid to the Settlement Administrator, as set forth in paragraph 3.5(b) and (c) above.

e. The Settlement Administrator shall create a Settlement Website (either www.PortLiberteSettlement.com or a substantially similar domain name), which will contain information describing the Settlement and will contain the Class Long Form Notice (**Exhibit C** to this Agreement), the Class Email Notice (**Exhibit B** to this Agreement), the Class Postcard Notice (**Exhibit D** to this Agreement), the Class Publication Notice (**Exhibit E** to this Agreement), Class Counsel's contact information, a copy of this Agreement, and a copy of the FAC, as filed in the Superior Court of New Jersey, Law Division, Hudson County. The Settlement Administrator will create the Settlement Website on or before 19 calendar days after entry of the Preliminary Approval Order. The cost of the Settlement Website will be paid for from the Notice and Other Administrative Costs paid to the Settlement Administrator, in accordance with paragraph 3.5(b) and (c) above. The Class Long Form Notice, Class Email Notice, Class Postcard Notice and Class Publication Notice will also be posted by Class Counsel in a prominent location on Class Counsel's website, www.mf-legal.com.

f. The Claims Period shall run for a period of 120 days after entry of the Preliminary Approval Order.

g. Proof of Notice. No later than ten days before the Final Approval Hearing, the Settlement Administrator shall provide an affidavit, certification or declaration to the Court, with a copy to the Parties, attesting that notice was published and distributed in accordance with the terms of this Agreement, and that claims were received and processed in a manner consistent with the terms of this Agreement.

h. All valid Claim Forms must be postmarked or received by the Settlement Administrator no later than 120 days from the date of the Preliminary Approval Order. The Claim Forms must be submitted to the Settlement Administrator either electronically via the Settlement Website or via U.S. Mail.

i. Within 30 days of the Settlement Effective Date, the Settlement Administrator shall, consistent with paragraphs 3.1, 3.6 and 3.7 above, and the information provided by Class Counsel and obtained through its own independent efforts, distribute payments from the Settlement Fund to the Class Members who have, in a timely manner, completed valid Claim Forms and submitted such forms to the Settlement Administrator, by sending payment to Class Members in the form of a check sent via U.S. Mail.

5.5. The Parties agree that the methods of notice set forth in this Section constitute the best form of notice to the Class Members that is practicable under the circumstances.

VI. REQUESTS FOR EXCLUSION BY CLASS MEMBERS

6.1. Any Class Member may make a Request for Exclusion by mailing such request in writing to the Settlement Administrator, at the address set forth on the Settlement Website and in the Class Long Form Notice. Any Request for Exclusion must be mailed and postmarked no later than 20 days before the date of the Final Approval Hearing. Any Request for Exclusion shall (a) state the name, address, telephone number, and email address of the person requesting exclusion; (b) state whether that person claims to be a resident, owner or both; (c) provide the dates during which the person held such status; (d) include a clear statement that the person is a Class Member who elects to be excluded from the Settlement Class and from any Judgment entered pursuant to

this Settlement; and (e) contain the person's signature or the signature of an individual authorized to act on the person's behalf.

6.2. Any Class Member who submits a timely Request for Exclusion may not file an objection to the Settlement and shall be deemed to have waived any rights or benefits under the Settlement or this Agreement.

6.3. The Settlement Administrator shall report the names of all individuals who have submitted a Request for Exclusion to the Court no less than ten days before the Final Approval Hearing.

6.4. Any Class Member who wishes to be excluded from the Settlement Class can only opt out for himself or herself and, except for minors, cannot opt out for any other person. Nor can any person within the Settlement Class authorize any other person to opt out on his or her behalf.

VII. OBJECTIONS BY CLASS MEMBERS

7.1. The Parties will request that the Court enter an order requiring any Class Member who wishes to be heard orally at the Final Approval Hearing, or who wishes for any objection to be considered, to file a written notice of objection with the Court no later than 20 days before the Final Approval Hearing, and to mail a copy of such objection to the Settlement Administrator, Class Counsel and Defendants' Counsel. Such objections shall (a) state the name, address and telephone number of the person; (b) state whether that person claims to be a resident, owner or both, and the dates during which the person held such status; (c) state whether the person is represented by counsel, and if so the identity of such counsel; (d) provide proof of membership in the Settlement Class; (e) contain a detailed statement of each objection asserted, including the grounds for objection and reasons for appearing and being heard, together with any evidence and

documents in support of the objection; and (f) contain the person's signature or the signature of an individual authorized to act on the person's behalf.

7.2. The agreed-upon procedures and requirements for filing objections in connection with the Final Approval Hearing are intended to ensure the efficient administration of justice and the orderly presentation of any Class Member's objections to the Settlement, in accordance with such Class Member's due process rights. The Preliminary Approval Order will require all Class Members who have any objections to file with the Court such notice of objection or request to be heard, and to serve by mail or hand delivery such notice of objection or request to be heard upon the Settlement Administrator at the address set forth in the Class Long Form Notice and posted on the Settlement Website, by no later than the Objection Date. The Preliminary Approval Order will further provide that objectors who fail to properly or timely file their objections with the Court, along with the required information and documentation set forth above, or who fail to serve them as provided above, shall not be heard during the Final Approval Hearing, nor shall their objections be considered by the Court.

7.3. Class Members may object either on their own or through an attorney hired at their own expense. If an objecting Class Member hires an attorney to represent him or her, that attorney must file with the Court and serve upon the Parties' respective counsel, a notice of appearance no later than 20 days before the Final Approval Hearing.

7.4. Any objection that fails to satisfy the requirements of this Section, or that is not properly and timely submitted, shall be deemed ineffective, and deemed by the Parties to have been waived, and the Parties will argue that the Class Member asserting such objection may not have his or her objection heard or otherwise considered by the Court.

VIII. COURT ADMINISTRATION OF THE SETTLEMENT

8.1. The Parties agree that Plaintiffs will stipulate to as many further extensions of time of the deadline for SMR to answer, move against or otherwise respond to the FAC as are necessary, and that Plaintiffs may move for preliminary and final approval of this settlement before SMR has filed an answer or motion to dismiss the FAC.

8.2. If the Court makes any order whose terms are inconsistent with the terms of this Agreement (except for an order reducing the amount of legal fees or expenses awarded to Class Counsel), then any Party has the right to terminate and withdraw from this Agreement.

8.3. This Agreement was entered into only for the purpose of settlement of the Litigation. In the event that (a) this Agreement is terminated by any Party as permitted by the preceding paragraph; (b) the Court conditions either the Preliminary Approval Order or the Final Approval Order and Judgment on any modifications of this Agreement that are not acceptable to all Parties; (c) the Court does not finally approve this Agreement or enter a Final Approval Order and Judgment; or (d) a final settlement does not occur for any reason, then this Agreement shall be deemed null and void *ab initio* and the Parties shall be deemed restored to their respective positions as of the date of this Agreement. In that event: (a) any Settlement Class shall be immediately de-certified, and any order granting preliminary approval of the Settlement shall immediately be deemed null, void and vacated, and shall have no further force and effect, all without the need for any further action by the Court or the Parties; (b) the Litigation will revert to the status on the date of this Agreement; and (c) no term or draft of this Agreement, or any part of the Parties' settlement discussions, negotiations or documentation will have any effect or be admissible into evidence for any purpose in the Litigation or any other proceeding.

XI. RELEASE, DISMISSAL OF LITIGATION AND JURISDICTION OF COURT

9.1. Release. Upon the Settlement Effective Date, the Class Representatives, for themselves and on behalf of all Class Members, and each of the Class Representatives' and Class Members' respective heirs, spouses, parents, family members, trustees, executors, administrators, successors, assigns, employees, agents, representatives, any and all other persons or entities acting under the supervision, direction, control or on behalf of any of the foregoing, and any and all other persons or entities that could claim by or through them (collectively, the "Class Representative and Class Releasers"), fully, finally and forever settle and compromise with, and release and discharge, Defendants and their respective present and former parent companies and any and all other companies in the parent companies' chain of ownership, subsidiaries, divisions, related or affiliated companies, wholly owned companies, owners, shareholders, partners, members, officers, directors, managers, employees, consultants, agents, attorneys, insurers, representatives, accountants, beneficiaries, heirs, successors, predecessors, assigns, vendors, business partners, and any individual or entity which could be jointly liable with any of the foregoing, and all other persons acting under the supervision, direction, control or on behalf of any of the foregoing (collectively, the "Defendant Releasees") of and from all claims that were made or could have been made based on the facts alleged in the Litigation arising out of, concerning or related to the environmental impacts and effects on residents and owners of condominium units at Port Liberté of Defendants' business operations at the Claremont Terminal, and arising before the Settlement Effective Date, whether known or unknown, and including, but not limited to, any and all manner of legal, equitable, federal, state, administrative, statutory or common law actions or causes of action, suits, claims, debts, liabilities, charges, losses, demands, obligations, guarantees, torts, contracts, agreements, promises, liens, damages of any kind (including liquidated damages and statutory, exemplary and punitive damages), restitution, interest, penalties, attorneys' fees, costs

or expenses of any kind or nature whatsoever, asserted or unasserted, willful or not willful, intentional or not intentional, fixed or contingent, liquidated or unliquidated, which the Class Representative and Class Releasers now have or ever had against the Defendant Releasees (collectively, the “Released Claims”). This paragraph is referred to in this Agreement as the “Release.”

9.2. This Agreement and the Release set forth in this Section do not affect the rights of Class Members who timely and properly opt out of the Settlement.

9.3. The administration and consummation of the Settlement as embodied in this Agreement shall be under the authority of the Court. The Court shall retain jurisdiction to protect, preserve and implement the Settlement as memorialized in this Agreement, including, but not limited to, the Release set forth in this Section. The Court expressly retains jurisdiction to enter such further orders as may be necessary or appropriate in administering and implementing the terms and provisions of the Agreement, including, but not limited to, orders enjoining Class Members from prosecuting Released Claims.

9.4. Upon the Settlement Effective Date: (a) the Agreement shall be the final and exclusive remedy for any and all Class Members for the Released Claims, except those who have opted out in accordance with the terms and provisions of Section VI of this Agreement; (b) Defendants shall not be subject to any liability or expense to any Class Members with respect to Released Claims except as set forth in this Agreement; and (c) Class Members shall be permanently barred from initiating, asserting or prosecuting any and all Released Claims against Defendants in any manner, including in any local, state, or federal agency or court in the United States or any other tribunal. This Release shall have *res judicata*, collateral estoppel, and all other

preclusive effect in all pending and future lawsuits, arbitrations or other suits, actions or proceedings involving any of the Defendant Releasees with respect to the Released Claims.

9.5. No Other Lawsuit Pending. Plaintiffs and Class Counsel represent that they have not filed any other lawsuit, claim, charge, or complaint against Defendants concerning the subject matter of the Litigation – *i.e.*, the environmental impacts and effects on residents and owners of condominium units at Port Liberté of Defendants’ business operations at the Claremont Terminal – with any local, state or federal agency or court. In the event that any agency or court assumes jurisdiction of any lawsuit, claim, charge, or complaint, or purports to bring any legal proceedings on Plaintiffs’ behalf against Defendants concerning the subject matter of the Litigation, then Plaintiffs shall promptly request that the agency or court withdraw from and dismiss the lawsuit, claim, charge, or complaint with prejudice.

9.6. Plaintiffs and Class Counsel expressly understand and acknowledge that certain state statutes and principles of common law provide that a “general” release does not extend to claims that a creditor does not know or suspect to exist in his, her or its favor at the time of executing the release and which, if known, must have materially affected the settlement with the debtor. To the extent that any Class Member may argue that such statutes or principles of common law are applicable here, Plaintiffs, on behalf of themselves and the Class Members, agree that any such statutes, principles of common law or other sources of legal authority of any and all jurisdictions that may be applicable are knowingly and voluntarily waived and relinquished as they relate to released Claims by the Class Members, and further agree and acknowledge that this is a material term of this Agreement.

9.7. This Agreement may be pleaded as a full and complete defense to and may be used as the basis for a temporary restraining order or preliminary or permanent injunction

against any action, suit or other proceeding, which has been or may be instituted, prosecuted, continued to be prosecuted, or attempted, asserting any Released Claims.

9.8. No person shall have any claim against Defendants based on the administration of this Agreement, including without limitation, to any distribution made or not made pursuant to this Agreement, except as to obligations imposed on Defendants by this Agreement.

X. REPRESENTATIONS, WARRANTIES AND COVENANTS

10.1. Class Counsel and Plaintiffs, who are signatories to this Agreement, represent and warrant that they have the authority, on behalf of Plaintiffs and the Settlement Class, to execute, deliver and perform this Agreement and to consummate all of the transactions that it contemplates. This Agreement has been duly and validly executed and delivered by Class Counsel and Plaintiffs and constitutes their legal, valid and binding obligation.

10.2. Defendants' Counsel and Defendants, who are signatories to this Agreement, represent and warrant that they have the authority to execute, deliver and perform this Agreement and to consummate all of the transactions that it contemplates. This Agreement has been duly and validly executed and delivered by Defendants' Counsel and Defendants and constitutes their legal, valid, and binding obligation.

10.3. The Parties each represent and warrant that they have not assigned, transferred or purported to assign or transfer, in whole or in part, any interest in any of the rights and claims that are the subject of this Agreement.

XI. MISCELLANEOUS PROVISIONS

11.1. This Agreement, its attached Exhibits and any related documents are not to be used in evidence and shall not at any time be construed or deemed to be an admission or concession by

Defendants with respect to any alleged wrongdoing, fault or omission of any kind whatsoever, regardless of whether or not this Agreement results in entry of a Final Approval Order as contemplated by the Parties. Defendants specifically deny all of the allegations made in connection with the Litigation. This provision shall survive the expiration or voiding of the Agreement.

11.2. The headings of the Sections and paragraphs of this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

11.3. This Agreement, including all of its attached Exhibits, may not be modified or amended except in writing signed by all counsel for the Parties.

11.4. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. The Parties further agree that this Agreement shall be binding upon the transmission by each Party of a signed signature page to all other Parties via electronic means (*e.g.*, via facsimile or scan of a .pdf document), and such signatures shall have the same force and effect as original signatures.

11.5. This Agreement shall be governed by and construed in accordance with the substantive laws of the State of New Jersey without giving effect to any choice or conflict of law provision, or rule that would cause the application of the laws of any other jurisdiction.

11.6. Except as otherwise provided in this Agreement, each Party to this Agreement shall bear his, her, or its own costs of the Litigation.

11.7. The Parties to this Agreement reserve the right, by agreement and subject to the Court's approval, to grant any reasonable extensions of time that might be necessary to carry out any of the provisions of this Agreement.

11.8. The determination of the terms and drafting of this Agreement, including its Exhibits, has been by mutual agreement after negotiation, with consideration by and participation of all Parties and their counsel. Since this Agreement was drafted with the participation of all Parties and their counsel, the presumption that ambiguities shall be construed against the drafter does not apply. Each of the Parties was represented by competent and effective counsel throughout the course of settlement negotiations and in the drafting and execution of this Agreement, and there was no disparity in bargaining power among the Parties to this Agreement.

11.9. Integrated Agreement. All of the Exhibits to this Agreement are material and integral parts of this Agreement and are fully incorporated by reference. This Agreement, together with its attached Exhibits, constitutes the entire, fully integrated agreement between the Parties and cancels and supersedes all prior written and unwritten agreements and understandings pertaining to the Settlement of the Litigation.

11.10. Dispute Resolution. The Parties agree that any disputes regarding the terms and conditions of this Agreement, the Parties' rights and obligations under this Agreement, or as to any disagreement regarding the manner in which any issue or dispute arising under this Agreement should be resolved, shall be submitted to the Court administering this Agreement. Prior to submitting any such issue or dispute to the Court, the parties are required to meet and confer in good faith in an effort to resolve the issue or dispute. That Court shall retain continuing and exclusive jurisdiction over the Parties, including all Class Members, over the administration and enforcement of the Settlement and this Agreement, and over the distribution of benefits to the

Class Members. Any disputes or controversies arising with respect to the interpretation, enforcement or implementation of the settlement or this Agreement must be submitted by formal and proper motion to that Court on notice to all parties pursuant to the New Jersey Rules of Court. Prior to filing any motion to enforce the injunctive relief provided for in this Agreement, Class Counsel must provide Defendants with a reasonable opportunity to cure the alleged deficiency. .

11.11. Notices. All notices to the Parties' attorneys under this Agreement shall be made in writing and communicated by electronic and regular mail to the following addresses:

If to Plaintiffs or Class Counsel:

William C. Matsikoudis, Esq.
Derek S. Fanciullo, Esq.
MATSIKOUDIS & FANCIULLO, LLC
128 Monticello Avenue, STR 1
Jersey City, New Jersey 07304
(201) 915-0407
bmatsikoudis@mf-legal.com

and

G. Martin Meyers, Esq.
Justin A. Meyers, Esq.
LAW OFFICES OF G. MARTIN MEYERS, P.C.
35 West Main Street, Suite 106
Denville, New Jersey 07834
(973) 625-0838
justin@gmeyerslaw.com

If to Simsmetal or its Counsel:

Leo J. Hurley, Jr., Esq.
CONNELL FOLEY LLP
Harborside 5
185 Hudson Street, Suite 2510
Jersey City, New Jersey 07311
(201) 521-1000
lhurley@connellfoley.com

If to SMR or its Counsel:

David E. Sellinger, Esq.
Todd L. Schleifstein, Esq.
GREENBERG TRAURIG, LLP
500 Campus Drive, Suite 400
Florham Park, NJ 07932
(973) 360-7900
SellingerD@gtlaw.com

11.12. If the date for performance of any act required by or under this Agreement to be performed on a particular day or within a specified period of time falls on a Saturday, Sunday or legal or Court holiday, such act may be performed upon the next business day, with the same effect as if it had been performed on the day or within the period of time specified by or under this Agreement.

The Parties and their respective counsel have executed this Settlement Agreement as of the date(s) indicated on the lines below.

Dated: _____, 2025 _____

William C. Matsikoudis
Matsikoudis & Fanciullo, LLC
Counsel for Plaintiffs and the Settlement Class

Dated: _____, 2025 _____

G. Martin Meyers
Law Offices of G. Martin Meyers, P.C.
Counsel for Plaintiffs and the Settlement Class

Dated: _____, 2025 _____

Lionel Medina
Plaintiff

Dated: _____, 2025 _____

Ekaterina Vorobeve
Plaintiff

Dated: _____, 2025 _____

Karista Vaeth
Plaintiff

Dated: _____, 2025 _____

Jennifer Scullion
Plaintiff

Dated: _____, 2025

Leo J. Hurley, Jr.
Connell Foley, LLP
Counsel for Defendants Simsmetal East LLC and
Sims Group USA Holdings Corporation

Dated: _____, 2025

David E. Sellinger
Greenberg Traurig, LLP
Counsel for Defendant
Sims Municipal Recycling of New York, LLC

Dated: _____, 2025

By:

Defendant Simsmetal East LLC

Dated: _____, 2022

By:

Defendant Sims Group USA Holdings Corporation

Dated: _____, 2025

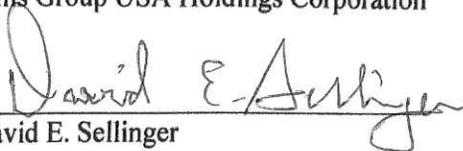
By: Thomas Outerbridge, President

Defendant Sims Municipal
Recycling of New York, LLC

Dated: _____, 2025

Leo J. Hurley, Jr.
Connell Foley, LLP
Counsel for Defendants Simsmetal East LLC and
Sims Group USA Holdings Corporation

Dated: December 18, 2025



David E. Sellinger
Greenberg Traurig, LLP
Counsel for Defendant
Sims Municipal Recycling of New York, LLC

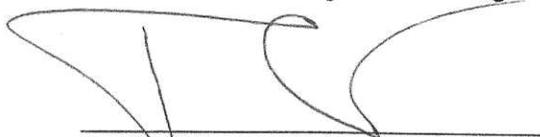
Dated: _____, 2025

By:
Defendant Simsmetal East LLC

Dated: _____, 2022

By:
Defendant Sims Group USA Holdings Corporation

Dated: DECEMBER 18, 2025



By: Thomas Outerbridge, President

Defendant Sims Municipal
Recycling of New York, LLC

The Parties and their respective counsel have executed this Settlement Agreement as of the date(s) indicated on the lines below.

Dated: _____, 2025 _____

William C. Matsikoudis
Matsikoudis & Fanciullo, LLC
Counsel for Plaintiffs and the Settlement Class

Dated: _____, 2025 _____

G. Martin Meyers
Law Offices of G. Martin Meyers, P.C.
Counsel for Plaintiffs and the Settlement Class

Dated: _____, 2025 _____

Lionel Medina
Plaintiff

Dated: _____, 2025 _____

Ekaterina Vorobeva
Plaintiff

Dated: December 18, 2025

DocuSigned by:
Karista Vaeth
5C49844999774AC...

Karista Vaeth
Plaintiff

Dated: _____, 2025 _____

Jennifer Scullion
Plaintiff

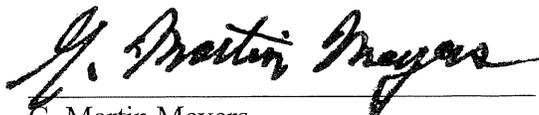
The Parties and their respective counsel have executed this Settlement Agreement as of the date(s) indicated on the lines below.

Dated: December 22, 2025



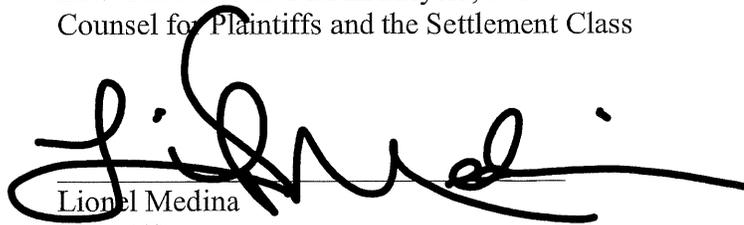
William C. Matsikoudis
Matsikoudis & Fanciullo, LLC
Counsel for Plaintiffs and the Settlement Class

Dated: 12/22, 2025



G. Martin Meyers
Law Offices of G. Martin Meyers, P.C.
Counsel for Plaintiffs and the Settlement Class

Dated: December 21, 2025



Lionel Medina
Plaintiff

Dated: _____, 2025

Ekaterina Vorobeva
Plaintiff

Dated: _____, 2025

Karista Vaeth
Plaintiff

Dated: _____, 2025

Jennifer Scullion
Plaintiff

The Parties and their respective counsel have executed this Settlement Agreement as of the date(s) indicated on the lines below.

Dated: _____, 2025 _____

William C. Matsikoudis
Matsikoudis & Fanciullo, LLC
Counsel for Plaintiffs and the Settlement Class

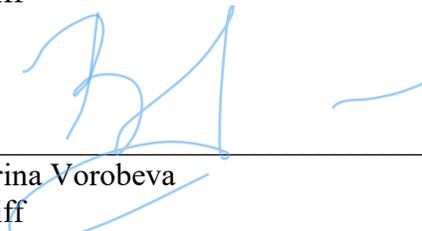
Dated: _____, 2025 _____

G. Martin Meyers
Law Offices of G. Martin Meyers, P.C.
Counsel for Plaintiffs and the Settlement Class

Dated: _____, 2025 _____

Lionel Medina
Plaintiff

Dated: **Dec 21**, 2025 _____


Ekaterina Vorobeva
Plaintiff

Dated: _____, 2025 _____

Karista Vaeth
Plaintiff

Dated: _____, 2025 _____

Jennifer Scullion
Plaintiff

The Parties and their respective counsel have executed this Settlement Agreement as of the date(s) indicated on the lines below.

Dated: _____, 2025 _____

William C. Matsikoudis
Matsikoudis & Fanciullo, LLC
Counsel for Plaintiffs and the Settlement Class

Dated: _____, 2025 _____

G. Martin Meyers
Law Offices of G. Martin Meyers, P.C.
Counsel for Plaintiffs and the Settlement Class

Dated: _____, 2025 _____

Lionel Medina
Plaintiff

Dated: _____, 2025 _____

Ekaterina Vorobeva
Plaintiff

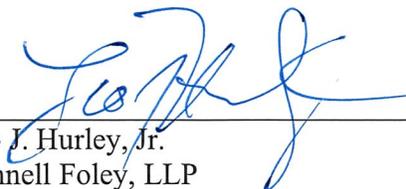
Dated: _____, 2025 _____

Karista Vaeth
Plaintiff

Dated: December 18, 2025 _____

Jennifer Scullion
Jennifer Scullion
Plaintiff

Dated: January 13, 2025⁶



Leo J. Hurley, Jr.
Connell Foley, LLP
Counsel for Defendants Simsmetal East LLC and
Sims Group USA Holdings Corporation

Dated: _____, 2025

David E. Sellinger
Greenberg Traurig, LLP
Counsel for Defendant
Sims Municipal Recycling of New York, LLC

Dated: December 30, 2025

Scott Miller

By: Scott Miller, Secretary
Defendant Simsmetal East LLC

Dated: December 30, 2023^{x5} *SM*

Scott Miller

By: Scott Miller, Secretary
Defendant Sims Group USA Holdings Corporation

Dated: _____, 2025

By: Thomas Outerbridge, President
Defendant Sims Municipal
Recycling of New York, LLC

Exhibit A

PORT LIBERTÉ SETTLEMENT CLAIM FORM

Instructions

If you are or were an owner or tenant of a condominium unit in certain buildings at Port Liberté, you may be eligible to receive a cash payment.

You may be eligible for a payment (meaning that you're a "Class Member") if you owned or leased a unit at 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, or 4 Constellation Place that has windows, doors, balconies, or other open-air access facing business operations at Claremont Terminal at any point between April 26, 2018 and _____, 2026. Important information is available on the Settlement Website, www.PortLiberteSettlement.com.

To file a Claim for a payment, you must complete and file this Claim Form. You can either:

(1) File Online: File online at www.PortLiberteSettlement.com; or

(2) File by Mail: Fill out, sign, and return this form to:

Port Liberté Settlement
c/o JND Legal Administration
PO Box 91232
Seattle, WA 98111

IMPORTANT: THE DEADLINE TO FILE A CLAIM IS [DATE], 2026.

STEP 1: <u>PROVIDE YOUR CONTACT INFORMATION</u>		
Name:	_____	_____
	<i>(First)</i>	<i>(Middle)</i>
	_____	_____
	<i>(Street)</i>	<i>(Unit/Apt #)</i>
	_____	_____
	<i>(City)</i>	<i>(State)</i>
	_____	_____
	<i>(Zip Code)</i>	
Telephone No.:	____-____-_____	
Email Address:	_____	
Social Security No.:	____-____-_____	~OR~
Tax ID No.:	____-____-_____	

STEP 2: <u>PROVIDE YOUR CLAIM ID AND PORT LIBERTÉ ADDRESS</u>		
Claim ID:	_____	
	<p>(Your Claim ID was included in the notice you received. We sent notices by email and mail. If you don't know your Claim ID, please email info@PortLiberteSettlement.com or call 877-206-2311.)</p>	
Port Liberté Address		
Street Address of Building:	_____	_____
	<i>(Street)</i>	<i>(Unit #)</i>
	_____	_____
	<i>(City)</i>	<i>(State)</i>
	_____	_____
	<i>(Zip Code)</i>	

Questions? Please call 877-206-2311 or email info@PortLiberteSettlement.com.
 To view JND's privacy policy, please visit <https://www.jndla.com/privacy-policy>

STEP 3: PROVIDE INFORMATION ABOUT YOUR OWNERSHIP OR TENANCY AT PORT LIBERTÉ

I own(ed) lease(d) my unit at Port Liberté (check only one).

IF YOU ARE OR WERE AN OWNER:

I have owned my unit since _____ (provide date of purchase of unit - MM/DD/YYYY).

Please attach a copy of a document demonstrating proof of ownership of the unit (such as a property title/deed, purchase agreement, or property tax bill/receipt).

I sold my unit (*if applicable*) on _____ (provide date of sale of unit - MM/DD/YYYY).

I have lived in my unit from _____ until _____ (provide dates of residence in unit - MM/DD/YYYY).

Please attach a copy of a document demonstrating proof of residence at the unit (such as a utility bill).

If anyone else was a co-owner with you while you owned the unit, please provide his/her name:

_____ (Co-owner #1)

_____ (Co-owner #2)

Note: To receive a cash payment, each co-owner must either complete his or her own Claim Form or sign the Claim Form below.

If applicable: I have leased my unit to someone else from _____ until _____ (provides dates of lease - MM/DD/YYYY)

IF YOU ARE OR WERE A LESSEE:

I leased my unit from the unit's owner from _____ until _____ (provide dates of lease - MM/DD/YYYY).

Please attach a copy of your lease or some other proof of residence at the unit (such as a utility bill).

If anyone else was a co-lessee with you while you leased the unit, please provide his/her name:

_____ (Co-lessee #1)

_____ (Co-lessee #2)

Note: To receive a cash payment, each co-lessee must either complete his or her own Claim Form or sign the Claim Form below.

STEP 4: SIGN THE FORM

Certification: I hereby certify under penalty of perjury that (1) the above and foregoing is true and correct; and (2) I believe, in good faith, that I currently own or lease an eligible unit at Port Liberté or that I previously owned or leased an eligible unit at Port Liberté at any point between April 26, 2018 and the date of Preliminary Approval.

Your Signature

Date

Co-owner #1 / Co-lessee #1 Signature

Date

Co-owner #2 / Co-lessee #2 Signature

Date

Exhibit B

EXHIBIT B

To: _____

From: info@PortLiberteSettlement.com

Subject Line: Notice of Port Liberté Settlement and Cash Payment

CLASS ACTION SETTLEMENT NOTICE

IF YOU ARE OR WERE AN OWNER OR TENANT OF A CONDOMINIUM UNIT IN CERTAIN BUILDINGS AT PORT LIBERTÉ, YOU MAY BE ELIGIBLE TO RECEIVE A CASH PAYMENT.

YOUR CLAIM ID:	<<Claim_ID>>
YOUR PIN:	<<XXXXXXXX>>
PLEASE REFER TO YOUR UNIQUE ID AND PIN TO FILE A CLAIM	

You must file a [Claim Form](#) to receive a cash payment. For more information, visit www.PortLiberteSettlement.com

[File Your Claim](#)

WHAT IS THIS CASE ABOUT?

Owners and residents of certain condominium units in certain buildings located at the Port Liberté multi-home development in Jersey City, New Jersey filed a class action lawsuit claiming that the operators of two industrial businesses at nearby Claremont Terminal produced noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions, that caused the market value of their units to decrease and interfered with their use and enjoyment of their units. The Defendants in the case, Simsmetal East LLC, Sims Group USA Holdings Corporation and Sims Municipal Recycling of New York, LLC, deny all liability.

WHO IS INCLUDED?

If you received this notice, records made available to the Parties to the lawsuit indicate you are eligible for a cash payment to address the legal issues raised in the lawsuit. You are eligible for a payment (meaning that you're a "Class Member") if you owned or leased a unit at 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, or 4 Constellation Place with windows, doors, balconies, or other open-air access facing the Defendants' business operations at Claremont Terminal at any point between April 26, 2018 and ____, 2026.

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides that Defendants will establish a Settlement Fund valued in the amount of **\$1,475,000**. Class Members who file valid Claims will receive a check. Payment amounts will be based on the number of settlement shares allocated to each Class Member and depend on four things: (1) whether you owned or leased the unit; (2) the number of years that you owned or leased the unit and resided in the unit; (3) the building in which the unit is located; and (4) the number of other Claimants (for more detail, see www.PortLiberteSettlement.com). In the event that the Settlement Fund, net of attorneys' fees and costs and one-third of the cost of notice and settlement administration, is not sufficient to enable the above payments, the per-claim payments will be decreased on a pro-rata basis. This notice is not an assurance as to the actual amount that any particular Class Member may receive.

In addition, the Settlement provides that Defendants are undertaking a number of remedial measures at their respective facilities at Claremont Terminal to minimize and mitigate the alleged environmental impacts of the noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions that allegedly result from their respective industrial business operations. These measures are described in detail in the Settlement Agreement.

WHAT ARE MY OTHER OPTIONS?

If you don't want to make a Claim, and don't want to be bound by the Settlement and any Judgment in this case, you must send a written request to exclude yourself from the Settlement, postmarked no later than **[date]**. If you exclude yourself, you won't get a payment through this Settlement. If you don't exclude yourself, you may object to the Settlement or to the request for fees by the attorneys representing the Class. The detailed Long Form Notice, available at www.PortLiberteSettlement.com, explains how to exclude yourself or object. The Court will hold a hearing in the case – *Lionel Medina, et al. v. Simsmetal East, LLC, et al.*, Docket No. HUD-L-1589-24, in the Superior Court of the State of New Jersey, Law Division, Hudson County in Jersey City, New Jersey – on **[date]** at **[time]**, to consider whether to approve the Settlement, and attorneys' fees not to exceed \$491,617.50, plus reimbursement of out-of-pocket litigation costs of \$52,884.92. You may appear at the hearing, but you don't have to. The Court has appointed attorneys (called "Class Counsel") to represent the Class. These attorneys are listed in the detailed Long Form Notice. You may hire your own attorney to appear for you, but you will have to pay that attorney.

WHERE CAN I GET MORE INFORMATION?

For more information, visit www.PortLiberteSettlement.com, call **877-206-2311**, or email **info@PortLiberteSettlement.com**.

Legal Notice: A Court authorized this Notice. This is not solicitation from a lawyer.

To unsubscribe from this list, please click on the following link: [unsubscribe](#)

Exhibit C

CLASS ACTION SETTLEMENT NOTICE

**IF YOU ARE OR WERE AN OWNER OR TENANT OF A
CONDOMINIUM UNIT IN CERTAIN BUILDINGS AT PORT LIBERTÉ,
YOU MAY BE ELIGIBLE TO RECEIVE A CASH PAYMENT.**

You must file a Claim Form to receive a cash payment.

For more information, visit www.PortLiberteSettlement.com

A court authorized this notice.

Your legal rights are affected whether you act or don't act.

Read this notice carefully.

This notice informs you of a proposed settlement (“Settlement”) of a class action claim against Simsmetal East LLC (“Simsmetal East”), Sims Group USA Holdings Corporation (“Sims Group,” and together with Simsmetal East, “Simsmetal”) and Sims Municipal Recycling of New York, LLC (“SMR,” and together with Simsmetal, “Defendants”). Defendants have agreed, under the terms of the Settlement, to provide you with an opportunity to submit a valid and timely Claim Form through which you may be eligible to receive a cash payment, as further discussed below.

SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

<p>Submit a Claim Form</p>	<p>If you are an eligible Class Member who owned or leased a condominium unit at 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, or 4 Constellation Place, Jersey City, New Jersey that has windows, doors, balconies, or other open-air access facing Defendants’ business operations at any time between April 26, 2018 and the ___, 2026 (the “Class Period”), you are entitled to submit a Claim for a check.</p> <p>If you received a notice about this Settlement by email or mail, you are part of the Settlement according to the records made available to the Parties to this lawsuit, and you are eligible for a cash payment from the Settlement.</p> <p>To receive payment, you need to complete and submit a Claim Form in a timely manner. The Claim Form is necessary to ensure that only eligible Class Members receive a benefit. A Claim Form is available on the Settlement Website at www.PortLiberteSettlement.com or by calling the Settlement Administrator toll free at 877-206-2311, or by writing the Settlement Administrator at Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111.</p>
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Questions? Visit www.PortLiberteSettlement.com, call **877-206-2311**, or email [info@ PortLiberteSettlement.com](mailto:info@PortLiberteSettlement.com)

SUMMARY OF YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
Do Nothing	By doing nothing, you forfeit the opportunity to receive any compensation and you give up any rights to sue Defendants, and certain parties related to them, about the claims that have been or could have been asserted based on the facts alleged in this lawsuit.
Ask to be Excluded	By asking to be excluded, you will not share in this Settlement. This is the only option that allows you to keep any rights to sue Defendants about the same legal claims in this lawsuit.
Object	You may write to the Court about why you do not like the Settlement.
Go To A Hearing	You may ask to speak in Court about the fairness of the Settlement.

Your rights and options – and the deadlines to exercise them – are explained in detail below.

The Court in charge of this case still has to decide whether to give final approval to the Settlement. Payments will be made only if the Court approves the Settlement and after all appeals (if any) are resolved. Please be patient.

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BASIC INFORMATION

1. Why did I receive notice of this lawsuit?

If you received a notice about this settlement by email or mail, the records made available to the Parties to this lawsuit indicate you are eligible for a cash payment from the Settlement because you owned or leased an applicable condominium unit at 1 Independence Way, 205 Shearwater Court East, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, or 4 Constellation Place, Jersey City, New Jersey at any time during the class period that has windows, doors, balconies, or other open-air access facing Defendants' business operations . Please note that not all condominium units in those buildings are involved in the proposed settlement.

You received an email or postcard notice because you have a right to know about the proposed Settlement of this class action lawsuit, and about your options, before the Court decides whether to approve the Settlement. If the Court approves it and after any objections and appeals are resolved, an administrator appointed by the Court will make the payments that the Settlement allows.

This package (this "Long Form Notice") explains the lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

The Court in charge of the case is the Superior Court of New Jersey, Law Division, Hudson County, and the case is pending in front of the Honorable Kalimah H. Ahmad, J.S.C. The lawsuit is known as *Lionel Medina, et al. v. Simsmetal East, LLC, et al.*, Docket No. HUD-L-1589-24. The people who sued are called the Plaintiffs, and the parties sued are called the Defendants.

2. What is this lawsuit about?

This is a proposed class action on behalf of owners and residents of certain condominium units in certain buildings located at the Port Liberté multi-home development in Jersey City, New Jersey at any time between April 26, 2018 and _____, 2026 (the "Class Period"). Specifically, Plaintiffs allege that Defendants operated two industrial businesses at nearby Claremont Terminal that allegedly produced noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions, that caused the market value of their units to decrease and that interfered with their use and enjoyment of their units. Plaintiffs allege that, in operating their businesses at Claremont Terminal in this manner, Defendants' actions constitute both a public and private nuisance, as well as a trespass on Plaintiffs' property, were undertaken negligently, and give rise to strict liability as abnormally dangerous activities that pose a high degree of risk of harm to Plaintiffs and others. Defendants deny the allegations.

3. Why is this lawsuit a class action and who is involved?

In a class action lawsuit, one or more people called the "Class Representatives" or "Lead Plaintiffs" sue on behalf of other people who have similar claims. The people together are a "Class" or "Class Members," and in this case are the "Settlement Class." The individuals or companies they sued – in this case the companies listed above – are called the Defendants. One Court resolves the issues for everyone in the Settlement Class, except for those people who choose to exclude themselves from the Settlement Class. Judge Ahmad is in charge of this case and has certified the lawsuit as a class action for settlement purposes only.

4. Why is there a settlement?

The Court did not issue a final ruling in favor of Plaintiffs or Defendants. Instead, the Class Representatives and Defendants agreed to enter into the Settlement after an extensive exchange of information and vigorous arms-length negotiations. That way, they avoid litigation costs and burdens, and the people allegedly affected by Defendants' alleged actions will get compensation as soon as possible. The Class Representatives, and the attorneys for the Class Representatives and the Settlement Class Members ("Class Counsel"), think the Settlement is best for the Settlement Class Members.

WHO IS COVERED BY THE SETTLEMENT?

5. Am I a Settlement Class Member?

The "Settlement Class" in this case is defined as:

All owners and residents during the class period of the condominium units in eight buildings within the Port Liberté community with addresses of 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, and 4 Constellation Place that have windows, doors, balconies, or other open-air access directly facing Defendants' business operations.

Your receipt of an email or postcard notice indicates that you have been identified as a potential Settlement Class Member because, according to the records made available to Plaintiffs and Defendants, you owned or leased an applicable condominium unit at one of the above buildings that has windows, doors, balconies, or other open-air access directly facing Defendants' business operations at any point during the Class Period (*i.e.*, between April 26, 2018 and ____, 2026).

If you are not sure whether you are included in the Settlement Class, you may visit www.PortLiberteSettlement.com for more information. You can also contact the Settlement Administrator toll free at 877-206-2311, by emailing info@PortLiberteSettlement.com, or by writing the Settlement Administrator at **Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111**.

THE SETTLEMENT BENEFITS - WHAT YOU GET

6. What does the Settlement provide?

The complete terms of the proposed settlement are set forth in the Settlement Agreement, which is available at www.PortLiberteSettlement.com. This notice provides only a summary of the terms of the settlement. The capitalized terms as used in this notice have the same meaning as the terms set forth in the Settlement Agreement.

The Settlement provides that Defendants will establish a Settlement Fund valued in the amount of \$1,475,000. Settlement Class Members who owned or leased an eligible condominium unit at one of the buildings that is included in the Settlement Class at any point during the Class Period (*i.e.*, between April 26, 2018 and ____, 2026) and who file valid Claims will receive a check. Payment amounts will be based

on the number of settlement shares allocated to each Class Member, as explained in Question No. 7 below, and depend on four things: (1) whether you owned or leased the unit; (2) the number of years that you owned or leased the unit and resided in the unit; (3) the building in which the unit is located; and (4) the number of other Claimants.

In addition, the Settlement provides that Defendants are undertaking a number of remedial measures at their respective facilities at Claremont Terminal to minimize and mitigate the alleged environmental impacts of the noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions that allegedly result from their respective industrial business operations. These measures are described in detail in the Settlement Agreement.

If approved by the Court, the Settlement will result in dismissal of this case and final resolution of all claims raised against Defendants. Such dismissal will release Defendants from liability for the claims in this lawsuit.

7. What can I get from the Settlement?

Settlement Overview

The Defendants have agreed to pay \$1,475,000 as part of the Settlement. If the Court approves the Settlement, Class Members who submit a valid Claim will receive a payment.

How Payments Are Calculated

Payment amounts are based on the number of settlement shares awarded to each Class Member. The number of shares you receive depends on:

- Whether you owned or lease the unit;
- Which building your unit is in (Primary Class or Secondary Class);
- How long you owned or lived in the unit; and
- The number of other Claimants.

Primary Class and Secondary Class Buildings

The number of shares a unit can receive depends on its building:

- **Primary Class** can receive up to 4 shares per unit and includes these buildings:
 - 1 Independence Way
 - 205, 206, 207 and 208 Shearwater Court West
 - 100, 101, and 102, Shearwater Court East
- **Secondary Class** can receive up to 1 share per unit and includes these buildings:
 - 15 Freedom Way
 - 4 Constellation Place

How Shares Are Calculated

You can earn 1 point for each true statement:

- You owned the unit.

- You lived in the unit.
- You owned the unit for at least 3 years during the Class Period.
- You lived in the unit for at least 3 years during the Class Period.

Primary Class units receive 1 share per point (up to 4 total shares).

Secondary Class units receive $\frac{1}{4}$ share per point (up to 1 total share).

If more than one person submits a valid Claim for the same unit, the shares for that unit will be divided proportionally.

Examples:

- If you owned and lived in a unit for 3 or more years, you would receive:
 - 4 shares for a unit in the Primary Class
 - 1 share for a unit in the Secondary Class
- If you lived in a unit for 3 or more years but didn't own it, you would receive:
 - 2 shares for a unit in the Primary Class
 - $\frac{1}{2}$ share for a unit in the Secondary Class

HOW YOU RECEIVE PAYMENT - SUBMITTING A CLAIM

8. How can I make a Claim?

If you are an eligible Settlement Class Member and you wish to receive a cash payment, you need to complete and submit a Claim Form in a timely manner. The Claim Form is available on the Settlement Website at www.PortLiberteSettlement.com, by calling the Settlement Administrator toll free at **877-206-2311**, by emailing info@PortLiberteSettlement.com, or by writing the Settlement Administrator at **Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111**.

The fully completed Claim Form must be submitted online through www.PortLiberteSettlement.com, or via U.S. Mail to the Settlement Administrator at **Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111**. The deadline for submission of the Claim Form online or by mail is **[date]**. Accordingly, mailed Claim Forms must be postmarked or delivered no later than **[date]**, and accurately addressed to the Settlement Administrator. If you do not participate in the claims process by **[date]**, you will not receive any settlement benefits. You may attend the Court hearing described below if you wish, but your attendance or non-attendance will not affect your eligibility to submit the Claim Form or receive a cash payment. You do not need to appear in Court, and you do not need to hire an attorney in this case.

9. When would I get my payment?

The Court will hold a hearing on **[date]** to decide whether to approve the Settlement. If Judge Ahmad approves the Settlement, and after that, no appeal is taken, then you will be receiving your payment promptly. If an appeal is taken, then resolving it may take some time, perhaps up to, or more than, a year. Please be patient.

Questions? Visit www.PortLiberteSettlement.com, call **877-206-2311**, or email info@PortLiberteSettlement.com

If you change your postal address before settlement benefits are issued, you should update your information online at www.PortLiberteSettlement.com or by sending a letter to the Settlement Administrator to ensure that you receive your cash payment. Remember, cash payments will be sent to the postal address that the Settlement Administrator has on file, so it is important that you update that address if it changes before the settlement benefits are distributed.

10. What am I giving up to get a payment or to stay in the Settlement Class?

If you are in the Settlement Class definition and do not exclude yourself from the Settlement Class, and the settlement is approved and becomes final, the settlement will be legally binding on you, and you will be bound by all judgments entered in the case. In exchange for the settlement benefits, you will release all claims against Defendants about the legal issues in this lawsuit. The Settlement Agreement, available at www.PortLiberteSettlement.com, describes the claims you are releasing (giving up) by staying in the Settlement Class (called “Released Claims”).

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you do not want a cash payment from the Settlement, but you want to keep the right to sue or continue to sue Defendants, on your own, about the legal issues in this case, then you must take steps to get out. This is called excluding yourself or “opting out” of the Settlement Class.

11. How do I get out of the Settlement?

To exclude yourself from the Settlement, you must send a letter by mail to the Settlement Administrator. Your request must include the following:

- a. Your full name, mailing address, telephone number, and email address;
- b. A statement that you are a Class Member and want to be excluded from the Port Liberté Settlement; and
- c. Your signature or the signature of an individual authorized to act on your behalf.

Any Class Member who wishes to be excluded from the Settlement Class can only opt out for himself or herself and, except for minors, cannot opt out for any other person. Nor can any person within the Settlement Class authorize any other person to opt out on his or her behalf.

You must mail your exclusion request, **postmarked by [date]**, to: **Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111.**

12. If I do not exclude myself, can I sue Defendants for the same thing later?

No. Unless you exclude yourself, you give up the right to sue Defendants for the legal claims associated with the operation of Defendants’ industrial businesses at the Claremont Terminal that the Settlement resolves. If you have a pending lawsuit, speak to your lawyer in that lawsuit immediately. You must exclude yourself from this Settlement Class to continue your own lawsuit. Remember, the exclusion deadline is **[date]**. Any exclusion request postmarked after that date will not be valid, and the sender will be a Settlement Class Member and bound by the Settlement, the Settlement Agreement, the Release, and any and all Court orders entered in this Action.

THE LAWYERS REPRESENTING YOU

13. Do I have a lawyer in this case?

The Court decided that the law firms of Matsikoudis & Fanciullo, LLC of Jersey City, New Jersey and Law Offices of G. Martin Meyers, P.C. of Denville, New Jersey are qualified to represent you and all Settlement Class Members. These law firms are called “Class Counsel.” Both firms are experienced in handling similar cases. More information can be obtained about these law firms, their practices, and their lawyers’ experience by contacting the following Class Counsel:

William C. Matsikoudis, Esq.
 Derek S. Fanciullo, Esq.
 MATSIKOUDIS & FANCIULLO, LLC
 128 Monticello Avenue, STR 1
 Jersey City, New Jersey 07304
 (201) 915-0407
 Email: bmatsikoudis@mf-legal.com
 Website: www.mf-legal.com

G. Martin Meyers, Esq.
 Justin A. Meyers, Esq.
 LAW OFFICES OF G. MARTIN MEYERS, P.C.
 35 West Main Street, Suite 106
 Denville, New Jersey 07834
 (973) 625-0838
 Email: justin@gmeyerslaw.com
 Website: www.gmeyerslaw.com

14. How will the lawyers be paid?

Class Counsel have pursued this lawsuit on a contingency basis and have paid all costs of the lawsuit. These attorneys have not yet been paid or recovered any of their costs associated with the lawsuit. As part of the Settlement, Class Counsel will request a payment of 33.33% (\$491,617.50) of the Settlement Fund for their reasonable attorneys’ fees, plus reimbursement of out-of-pocket litigation costs of \$52,884.92. Class Counsel’s petition for fees and costs will be filed with the Court no later than **[date]** and may be reviewed by any interested party. The Court will determine reasonable attorneys’ fees and costs at the Final Approval Hearing based on Class Counsel’s Application and any responses to that Application. Defendants are also paying two-thirds of the costs of this and other notice to the Settlement Class and to administer this settlement. Class Counsel’s attorneys’ fees and out-of-pocket litigation costs will come out of the settlement fund. In addition, one-third of the notice and settlement administrative costs will also come out of the settlement fund. No Settlement Class Member will pay anything.

OBJECTING TO THE SETTLEMENT

You can tell the Court that you do not like or agree with the Settlement or some part of it.

15. How do I tell the Court that I do not like the Settlement?

If you are a Settlement Class Member, and have not excluded yourself from the Settlement Class, you can object to the settlement and/or to Settlement Class Counsel’s request for attorneys’ fees and costs. To object, you must file with the Court and send to the Settlement Administrator, Class Counsel, and Defendants’ Counsel a written objection which includes the following:

- a. The name of this lawsuit: “Lionel Medina, et al. v. Simsmetal East, LLC, et al.”;
- b. Your full name, mailing address, telephone number, and email address;
- c. State whether you are represented by counsel, and if so the identity of such counsel;
- d. Provide proof of membership in the Settlement Class;
- e. Contain a detailed statement of each objection asserted, including the grounds for objection and reasons for appearing and being heard, together with any evidence and documents in support of the objection; and
- f. Your signature or the signature of an individual authorized to act on your behalf.

To be considered by the Court, your objection must be filed with the Clerk of the Court by **[date]** *and* also must be mailed to the Settlement Administrator postmarked no later than **[date]**, with copies to Class Counsel and Defendants’ Counsel at the following addresses:

THE COURT	SETTLEMENT ADMINISTRATOR
Clerk of the Court Superior Court of New Jersey, Law Division, Hudson County Hudson County Administration Building 595 Newark Avenue Jersey City, New Jersey 07306	Port Liberté Settlement c/o JND Legal Administration PO Box 91232 Seattle, WA 98111
CLASS COUNSEL	DEFENDANTS’ COUNSEL
William C. Matsikoudis, Esq. Matsikoudis & Fanciullo, LLC 128 Monticello Avenue, STR 1 Jersey City, New Jersey 07304 Ph: (201) 915-0407 Email: bmatsikoudis@mf-legal.com	Leo J. Hurley, Jr., Esq. Connell Foley LLP Harborside 5 185 Hudson Street, Suite 2510 Jersey City, New Jersey 07311 Ph: (201) 521-1000 Email: lhurley@connellfoley.com David E. Sellinger, Esquire Greenberg Traurig, LLP 500 Campus Drive, Suite 400 Florham Park, New Jersey 07932 Ph: (973) 360-7900 Email: sellingerd@gtlaw.com

Questions? Visit www.PortLiberteSettlement.com, call 877-206-2311, or email info@PortLiberteSettlement.com

Class Members may object either on their own or through an attorney hired at their own expense. If an objecting Class Member hires an attorney to represent him or her, that attorney must file with the Court and serve upon Class Counsel and Defendants' Counsel, a notice of appearance no later than 20 days before the Final Approval Hearing.

Note that you can ask the Court to deny approval of the settlement by filing an objection, but you can't ask the Court to order a different settlement; the Court can only approve or reject the settlement that is now before it. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object. You have the right to consult with your own attorney, at your own expense, before deciding how best to proceed.

16. What is the difference between objecting and excluding?

Objecting is simply telling the Court that you do not like something about the Settlement. You can object only if you stay in the Settlement Class. Excluding yourself is telling the Court that you do not want to be part of the Settlement Class or the Settlement. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FINAL APPROVAL HEARING

17. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Final Approval Hearing on **[date]** at **[time]** at the Superior Court of New Jersey, Law Division, Hudson County, Hudson-Brennan Courthouse, 583 Newark Avenue, Jersey City, New Jersey 07306 in Courtroom 4D. At this hearing, the Court will consider whether the Settlement is fair, reasonable and adequate. If there are objections, the Court will consider them. Judge Ahmad will listen to people who have asked to speak at the hearing within the time to do so set by the Court. At or after the hearing, the Court will also decide whether to approve the Settlement and how much to pay Class Counsel. We do not know how long these decisions will take.

18. Do I have to come to the hearing?

No. Class Counsel will answer any questions Judge Ahmad may have. But you are welcome to come at your own expense. If you send an objection, you may come in person to the Court for the Final Approval Hearing, retain your own attorney to appear for you at the Final Approval Hearing, or not attend at all, and the Court will consider your objection.

19. May I speak at the hearing?

You may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must send a letter saying that it is your "Notice of Intention to Appear in *Medina, et al. v. Simsmetal East LLC, et al.*, Docket No. HUD-L-1589-24." Be sure to include your name, address, telephone number, and your signature. Your Notice of Intention to Appear must be postmarked no later than **[date]** and be sent to: (1) the Court at the Hudson-Brennan Courthouse, 583 Newark Avenue, Jersey City, New Jersey 07306; (2) JND Legal Administration, **Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111**; (3) William C. Matsikoudis, Esq., MATSIKOUDIS & FANCIULLO, LLC, 128 Monticello Avenue, STR 1, Jersey City, New Jersey 07304; (4) Leo J. Hurley, Jr., Esq., CONNELL FOLEY LLP, Harborside 5, 185 Hudson Street, Suite 2510, Jersey City, New Jersey 07311; and (5) David

E. Sellinger, Esq., GREENBERG TRAUERIG, LLP, 500 Campus Drive, Suite 400, Florham Park, New Jersey 07932.

You cannot speak at the hearing if you excluded yourself from the Settlement Class.

IF YOU DO NOTHING

20. What happens if I do nothing at all?

If you do nothing – including not completing a Claim Form – you will be a member of the Settlement Class and will forfeit the opportunity to receive any monetary compensation. You will also give up any rights to sue Defendants separately about the claims that have been or could have been asserted in this lawsuit.

GETTING MORE INFORMATION

21. Are there more details available?

The pleadings, the Settlement Agreement, and other papers filed in this lawsuit are available for your inspection in the Superior Court of New Jersey, Law Division, Hudson County, Hudson County Administration Building, 595 Newark Avenue, Jersey City, New Jersey 07306.

Additional information may be obtained on the Settlement Website at www.PortLiberteSettlement.com. You may also contact the Settlement Administrator toll free at **877-206-2311**, by emailing info@PortLiberteSettlement.com, or in writing at **Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111**. Additionally, you may contact Class Counsel, whose contact information is listed above or visit Class Counsel’s website at www.mf-legal.com.

PLEASE DO NOT TELEPHONE THE COURT OR THE CLERK OF THE COURT.

Date: _____, 2025

Exhibit D

*The court authorized this Notice.
This is not a solicitation from a lawyer.*

**IF YOU ARE OR WERE AN
OWNER OR TENANT OF A
CONDOMINIUM UNIT IN
CERTAIN BUILDINGS AT
PORT LIBERTÉ, YOU MAY
BE ELIGIBLE TO RECEIVE
A CASH PAYMENT.**

**You must file a Claim Form
to receive a cash payment.**

Questions?

Visit www.PortLiberteSettlement.com
or call 877-206-2311

Port Liberté Settlement
c/o JND Legal Administration
PO Box 91232
Seattle WA 98111

«Barcode»

Electronic Service

Forwarding Service Requested

Postal Service: Please do not mark barcode

«Full_Name»
«CARE_OF_NAME»
«ADDRESS_1»
«ADDRESS_2»
«CITY», «STATE» «ZIP»
«COUNTRY»

ACTIVE 716325190v3

WHAT IS THIS CASE ABOUT?

Residents of Port Liberté filed a class action lawsuit claiming that the operators of two businesses at Claremont Terminal created a nuisance, acted negligently and are strictly liable for certain environmental conditions. The Defendants in the case, Simsmetal East LLC, Sims Group USA Holdings Corporation and Sims Municipal Recycling of New York, LLC, deny all liability.

WHO IS INCLUDED?

If you received this notice, the parties' records indicate you are eligible for a cash payment. You are eligible for a payment (meaning that you're a "Class Member") if you owned or leased a unit at 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, or 4 Constellation Place that have windows, doors, balconies, or other open-air access facing Defendants' business operations at Claremont Terminal at any time between April 26, 2018 and the ____, 2026 . Important information is available on the Settlement Website, www.PortLiberteSettlement.com.

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides that Defendants will establish a Settlement Fund valued in the amount of **\$1,475,000**. Class Members who file valid Claims will receive a check. Payment amounts will be based on the number of settlement shares allocated to each Class Member and depend on four things: (1) whether you owned or leased the unit; (2) the number of years that you owned or leased the unit and resided in the unit; (3) the building in which the unit is located; and (4) the number of other Claimants (for more detail, see www.PortLiberteSettlement.com). In the event that the Settlement Fund, net of attorneys' fees and costs and one-third of the cost of notice and settlement administration, is not sufficient to enable the above payments, the per-claim payments will be decreased on a pro-rata basis. This notice is not an assurance as to the actual amount that any particular Class Member may receive.

In addition, the Settlement provides that Defendants are undertaking a number of remedial measures at their respective facilities at Claremont Terminal to minimize and mitigate the alleged environmental impacts of the noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions that allegedly result from their respective industrial business operations. These measures are described in detail in the Settlement Agreement.

To receive a cash payment, you must submit a valid Claim Form online at www.PortLiberteSettlement.com or

ACTIVE 716325190v3

WHAT ARE MY OTHER OPTIONS?

If you don't want to make a Claim, and don't want to be bound by the Settlement and any Judgment in this case, you must send a written request to exclude yourself from the Settlement, postmarked no later than **[date]**. If you exclude yourself, you won't get a payment through this Settlement. If you don't exclude yourself, you may object to the Settlement or to the request for fees by the attorneys representing the Class. The detailed Long Form Notice, available at www.PortLiberteSettlement.com, explains how to exclude yourself or object.

WHAT HAPPENS NEXT?

The Court will hold a hearing in the case – *Lionel Medina, et al. v. Simsmetal East, LLC, et al.*, Docket No. HUD-L-1589-24, in the Superior Court of the State of New Jersey, Law Division, Hudson County in Jersey City, New Jersey – on **[date]** at **[time]**, to consider whether to approve the Settlement, and attorneys' fees not to exceed \$491,617.50, plus reimbursement of out-of-pocket litigation costs of \$52,884.92. You may appear at the hearing, but you don't have to. The Court has appointed attorneys (called "Class Counsel") to represent the Class. These attorneys are listed in the detailed Long Form Notice. You may hire your own attorney to appear for you, but you will have to pay that attorney. The hearing date may change, so please check the Settlement Website regularly for updates.

WHERE CAN I GET MORE INFORMATION?

For more information such as Key Dates, Important Documents, Answers to Frequently Asked Questions, and to File Your Claim, visit www.PortLiberteSettlement.com by scanning the below QR code, call 877-206-2311, or email info@PortLiberteSettlement.com.

To receive a cash payment, you must submit a valid Claim Form online at www.PortLiberteSettlement.com or by mail on or before **[date]**.



YOUR CLAIM ID:	<<Claim_ID>>
YOUR PIN:	<<XXXXXXXXXX>>

PLEASE REFER TO YOUR UNIQUE ID AND PIN TO FILE A CLAIM

ACTIVE 716325190V3

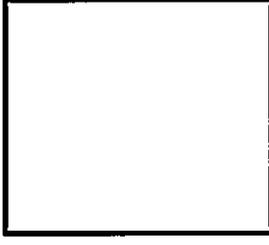
Carefully separate this Address Change Form at the perforation

Name: _____

Current Address: _____

Address Change Form

Only return this form if your mailing address has changed.
If your mailing address has changed, fill out the form below and return it by mail so we can update your records. If your address is the same, you do not need to return this form.



Port Liberté Settlement
c/o JND Legal Administration
PO Box 91232
Seattle WA 98111

ACTIVE 716325190v3

Exhibit E

IF YOU ARE OR WERE AN OWNER OR TENANT OF A CONDOMINIUM UNIT IN CERTAIN BUILDINGS AT PORT LIBERTÉ, YOU COULD GET BENEFITS AND YOU MAY BE ELIGIBLE TO RECEIVE A CASH PAYMENT.

A settlement has been reached with Sirmsmetal East LLC, Sims Group USA Holdings Corporation and Sims Municipal Recycling of New York, LLC ("Defendants") in a class action lawsuit, alleging that the operation of Defendants' industrial businesses at the Claremont Terminal in Jersey City produced noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions, that caused the market value of certain units in certain buildings at Port Liberté to decrease and interfered with the use and enjoyment of the units. Defendants deny all of the claims alleged in the lawsuit. The Court has not decided who is right. Instead, the parties have agreed to settle the case.

WHO IS INCLUDED?

The Settlement includes all owners and lessees of certain units at 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way, and 4 Constellation Place that have windows, doors, balconies, or other

ACTIVE 716325185V3

open-air access facing Defendants' business operations at Claremont Terminal at any point between April 26, 2018 and _____, 2026.

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides that Defendants will establish a Settlement Fund valued in the amount of \$1,475,000. Class Members who file valid Claims will receive a check. Payment amounts will be based on the number of settlement shares allocated to each Class Member and depend on four things:

- (1) whether you owned or leased the unit;
- (2) the number of years that you owned or leased the unit and resided in the unit;
- (3) the building in which the unit is located; and
- (4) the number of other Claimants (for more detail, see www.PortLiberteSettlement.com). In the event that the Settlement Fund, net of attorneys' fees and costs and one-third of the cost of notice and settlement administration, is not sufficient to enable the above payments, the per-claim payments will be decreased on a pro-rata basis. This notice is not an assurance as to the actual amount that any particular Class Member may receive.

In addition, the Settlement provides that Defendants are undertaking a number of remedial measures at their respective facilities at Claremont Terminal to minimize and mitigate the alleged environmental impacts of the noise, odors, light, air pollution from dust, particulate matter and other causes, fires, and explosions that allegedly result from their respective industrial business operations. These measures are described in detail in the Settlement Agreement.

If you do nothing: (1) you will be bound by the Settlement; (2) you will release claims

YOUR OPTIONS

yourself), you may object and you or your lawyer may request to appear and speak at the settlement approval hearing. Objections and requests to appear are due by [date].

against Defendants and related parties concerning the conditions described above; and (3) your interests will be represented by Class Counsel who have been appointed by the Court. If you do not want to be legally bound by the Settlement, then you must exclude yourself by [date]. Unless you exclude yourself, you will not be able to sue Defendants and related parties for any claim asserted in the lawsuit or released by the Settlement. If you stay in the Settlement (i.e., you don't exclude

WANT MORE INFORMATION?

Go to www.PortLiberteSettlement.com for more information. You can also contact the Settlement Administrator toll free at

**THE SETTLEMENT
APPROVAL HEARING**

877-206-2311, by emailing info@PortLiberteSettlement.com, or by writing the Settlement Administrator at Port Liberté Settlement, c/o JND Legal Administration, PO Box 91232, Seattle, WA 98111.

The Superior Court of the State of New Jersey, Law Division, Hudson County will hold a hearing in this case (Medina et al. v. Simsmetal East, LLC, et al., Docket No. HUD-L-1589-24) on [date] to consider whether to approve the Settlement, attorneys' fees of up to \$491,617.50 and expenses of up to \$52,884.92.

Exhibit F

EXHIBIT F

LIONEL MEDINA, EKATERINA VOROBEOVA, KARISTA VAETH and JENNIFER SCULLION, on behalf of Themselves and all others Similarly Situated,
Plaintiffs,

vs.

SIMSMETAL EAST LLC, SIMS MUNICIPAL RECYCLING OF NEW YORK, LLC, SIMS GROUP USA HOLDINGS CORPORATION,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION HUDSON COUNTY
Docket No.: HUD-L-001589-24

CIVIL ACTION

**ORDER GRANTING PRELIMINARY
APPROVAL TO PROPOSED
CLASS ACTION SETTLEMENT**

This matter having come before the Court on an unopposed motion by Plaintiffs under *Rule* 4:32-2(e) for preliminary approval of a proposed class action settlement, approval of a proposed form of class settlement notice and notice plan, and setting a hearing date for the formal public hearing on whether to grant final approval to the proposed class settlement, and the Court having considered the motion papers and presentation, and for good cause shown;

IT IS ORDERED this _____ day of _____, 2025, as follows:

1. The Court grants preliminary approval of the proposed class action Settlement as being within the range of potential final approval. All capitalized terms set forth in this Order have the same meaning as in the parties' Settlement Agreement dated _____, 2025 (the "Agreement"), filed with Plaintiffs' motion.

2. This matter shall preliminarily proceed as a class action, for settlement purposes only, with a Settlement Class defined as follows:

All owners and residents during the class period of the condominium units in eight buildings within the Port Liberté community with addresses of 1 Independence Way, 205 Shearwater Court West, 206 Shearwater Court West, 207 Shearwater Court West, 208 Shearwater Court West, 100 Shearwater Court East, 101 Shearwater Court East, 102 Shearwater Court East, 15 Freedom Way,

EXHIBIT F

and 4 Constellation Place that have windows, doors, balconies, or other open-air access facing Defendants' business operations.

3. For settlement purposes only, the Court preliminarily appoints Plaintiffs Lionel Medina, Ekaterina Vorobeva, Karista Vaeth, and Jennifer Scullion as the named Class Representatives and William C. Matsikoudis, Esq. and Derek S. Fanciullo, Esq. of Matsikoudis & Fanciullo, LLC and G. Martin Meyers, Esq. and Justin A. Meyers, Esq. of Law Offices of G. Martin Meyers, P.C. as Class Counsel.

4. It is apparent from the file and presentation of counsel that the proposed Settlement Class meets the requirements of *Rule* 4:32-1(a) and (b)(3), such that class notice should be provided. The Court specifically makes the following findings:

a. The members of the Settlement Class are so numerous as to make joinder impracticable.

b. There are questions of law and fact common to the Settlement Class, and such questions predominate over any questions affecting only individual Settlement Class Members for purposes of the Settlement.

c. Plaintiffs' claims and the defenses to such claims are typical of the claims of the Settlement Class Members and the defenses to such claims for purposes of the Settlement.

d. Plaintiffs and their counsel can fairly and adequately protect, and have fairly and adequately protected, the interests of the Settlement Class Members in this action with respect to the Settlement.

e. The proposed class action Settlement is superior to all other available methods for fairly and efficiently resolving this action.

5. The Court appoints JND Legal Administration, 1201 2nd Avenue, Suite 3400,

EXHIBIT F

Seattle, Washington 98101 as the Settlement Administrator. One-third (1/3) of the costs incurred by the Settlement Administrator shall be paid, collectively, by Defendants Simsmetal East LLC and Sims Group Holdings USA Holdings Corporation (collectively, “Simsmetal”), one-third (1/3) shall be paid by Sims Municipal Recycling of New York, LLC (“SMR”, and, together with Simsmetal, “Defendants”), separate and apart from their payments to the Settlement Fund, and the remaining one-third (1/3) shall be paid out of the Settlement Fund.

6. The Court approves the content of the proposed Class Long Form Notice, the Class Email Notice, the Class Postcard Notice, the Class Publication Notice, and the Claim Form submitted by Counsel and the proposed manner of notice distribution and claim process set forth in the Settlement Agreement. The Court finds that the manner and content of each of these documents will provide the best notice practicable to the Settlement Class under the circumstances. One-third (1/3) of the costs incurred in connection with the preparation and dissemination of any notices to the Settlement Class shall be borne by each of Simsmetal and SMR, separate and apart from their payments to the Settlement Fund, and the remaining one-third (1/3) shall be separately paid out of the Settlement Fund.

7. The Court directs Class Counsel to provide to the Settlement Administrator, within 15 calendar days of the entry of this Order, (a) a list of any and all persons whom records made available to Class Counsel indicate are Settlement Class Members; and (b) their last known email and postal addresses. Such information shall include, at a minimum, the list of owners and residents maintained by the Port Liberté Homeowners’ Association that have been obtained by Class Counsel. The Court further directs that the Settlement Administrator shall thereafter arrange for such searches of commercial databases as it deems appropriate to supplement the list provided by Class Counsel with names and last known addresses of owners and residents.

EXHIBIT F

8. The Court further directs that the Settlement Administrator shall disseminate the Class Email Notice and the Class Postcard Notice pursuant to paragraph 5.4 of the Settlement Agreement to all persons whom the parties' records and the other records obtained by the Settlement Administrator indicate may be Settlement Class Members, at their last known email and/or mailing address. Specifically, the Settlement Administrator will send a first Email Notice on or before 21 calendar days after entry of this Order and will send a Second Email Notice to those Settlement Class Members who, as of that date, had not submitted a valid Claim 42 calendar days after the entry of this Order to all persons for whom the Settlement Administrator has a valid email address. The Settlement Administrator will also send a postcard notice via U.S. Mail to all persons for whom the Settlement Administrator has a valid mail address on or before 30 calendar days after entry of this Order.

9. The Court further directs that the Settlement Administrator shall cause the Class Publication Notice to be published in the manner set forth in paragraph 5.4(c) of the Settlement Agreement, specifically, by publication in the electronic version of The Star-Ledger (www.nj.com/starledger) starting 30 calendar days after entry of this Order, and then on a second occasion 45 days after entry of this Order.

10. Within 19 calendar days of the entry of this Order, the Settlement Administrator shall create a Settlement Website (either www.PortLiberteSettlement.com or a substantially similar domain name), which will contain information describing the Settlement and will contain the Settlement Agreement, the Claim Form (Exhibit A to the Settlement Agreement), the Class Email Notice (Exhibit B to the Settlement Agreement), the Class Long Form Notice (Exhibit C to the Settlement Agreement), the Class Postcard Notice (Exhibit D to the Settlement Agreement), the Class Publication Notice (Exhibit E to the Settlement Agreement), Class Counsel's contact

EXHIBIT F

information, and a copy of Plaintiffs' operative First Amended Complaint (the "FAC"). The Class Long Form Notice, Class Email Notice, Class Postcard Notice, Class Publication Notice, and Claim Form shall also be posted by Class Counsel in a prominent location on Class Counsel's website, www.mf-legal.com.

11. Any person included within the Settlement Class who wishes to be excluded, or to "opt out," from membership in the Settlement Class must do so in writing by mailing a Request for Exclusion from the Settlement to the Settlement Administrator. Any such Request for Exclusion must be post-marked no later than 20 business days before the Final Approval Hearing scheduled in this matter. Any Settlement Class Member who has filed an Objection to the fairness, reasonableness, or adequacy of the Settlement pursuant to paragraph 12 of this Order shall be deemed not to have opted out of the Settlement Class pursuant to this paragraph. In the event and to the extent that the parties advise the Court that a Settlement Class Member has made a submission to the Court and the parties which appears to assert both an Objection to the proposed Settlement and a Request for Exclusion from the Settlement Class, such Settlement Class Member shall be deemed to have objected to the Settlement. Any Request for Exclusion that fails to satisfy the requirements of the Settlement Agreement, or is not properly or timely submitted, shall not be effective, and the person making such a Request shall be deemed to have waived all rights to opt out of the Settlement.

12. Any Settlement Class Member who has not timely filed a written Request for Exclusion from the Settlement Class pursuant to paragraph 11 of this Order may file an Objection to the fairness, reasonableness or adequacy of the Settlement. Any member of the Settlement Class who so objects may appear at the Final Approval Hearing, in person or through counsel, to show cause why the Settlement should not be approved as fair, adequate and reasonable. Any such

EXHIBIT F

Objections to the proposed Class Settlement must be submitted to the Hudson County Civil Clerk, post-marked no later than 20 business days before the Final Approval Hearing scheduled in this matter, with a copy also mailed to the Settlement Administrator and to the parties' counsel. Any Objection that fails to satisfy the requirements set forth in the Settlement Agreement, or that is not properly and timely submitted, shall not be effective, will not be considered by this Court, and will be deemed waived, and those Settlement Class Members shall be bound by the final determination of this Court.

13. Except for good cause shown, no person (other than the parties and their respective representatives and counsel) may appear or be heard at the Final Approval Hearing, or file papers, briefs, or other submissions regarding the Final Approval Hearing, unless by 20 business days before the Final Approval Hearing such person or his or her counsel files with the Clerk of this Court and simultaneously serves on counsel for all parties at the addresses set forth in the Settlement Agreement a timely, written notice of request to appear at the Final Approval Hearing.

14. Pursuant to *Rule 4:32-2(e)(1)(C)*, a formal, public hearing on whether to grant final, binding approval to the proposed class action Settlement shall be held on _____, at the Superior Court of New Jersey, Law Division, Hudson County, Hudson-Brennan Courthouse, 583 Newark Avenue, Jersey City, New Jersey 07306 in Courtroom 4D at _____. Any person wanting to be heard on that date by phone or virtually shall contact Hudson County Civil Case Management for directions on how to appear. During this Final Approval Hearing, the Court shall determine whether:

a. This action meets each of the prerequisites for class certification set forth in *Rule 4:32-1(a)* and (b)(3), and may properly be maintained as a class action under *Rule 4:32-2(a)*;

EXHIBIT F

b. The Settlement should receive final approval as fair, reasonable, adequate, and in the best interests of the Settlement Class, in light of any Objections presented by Settlement Class Members and the parties' responses to any such Objections;

c. A Final Approval Order granting final approval of the Settlement, entering final judgment and dismissing the FAC with prejudice, as provided in the Settlement Agreement, should be entered; and

d. The applications of Plaintiffs' counsel for the payment of attorneys' fees and expenses are reasonable and should be approved.

e. The Final Approval Hearing may be postponed, adjourned or continued, and the format of the hearing may likewise be altered, by further order of this Court, without further notice to the parties or the members of the Settlement Class.

15. Any memoranda of law or other documents in support of final approval of the proposed class Settlement, copies of any Objections or Requests for Exclusion that have been submitted to Class Counsel or Defendants' Counsel, and an affidavit, certification or declaration attesting that class notice has been distributed in a manner consistent with this Order, must be submitted to the Court ten business days before the Final Approval Hearing.

16. If the Settlement is finally approved, the Court shall enter a separate Final Approval Order finally approving the Settlement, entering judgment and dismissing the FAC. Such order and judgment shall be fully binding with respect to all members of the Settlement Class. In addition, Plaintiffs shall submit their application for an award of attorneys' fees and expenses no later than 52 days after the entry of this Order.

17. In the event that the proposed Settlement set forth in the Settlement Agreement is not granted final approval by the Court, or in the event that the Settlement Agreement becomes

EXHIBIT F

null and void pursuant to any of its other terms or is otherwise not consummated, then the provisions of paragraph 8.3 of the Settlement Agreement shall be given full effect, any and all orders entered by the Court in connection with the proposed Settlement shall become null and void, and the Settlement Class defined in paragraph 2 of this Order shall be immediately decertified without further order of this Court. In such event, all proceedings in this Court related to the proposed Settlement shall be withdrawn without prejudice to the rights of any and all parties, who shall be restored to their respective positions as of the date of the execution of the Settlement Agreement, and this action will revert to its status as of that date.

18. Neither the Settlement Agreement, nor any of its terms or provisions, nor any of the related negotiations or proceedings connected with the Settlement Agreement, shall be construed as an admission or concession by Defendants of the truth of any of the allegations made by Plaintiffs, or of any liability, fault or wrongdoing of any kind. Neither the Settlement Agreement nor any submission by any party in connection with Plaintiffs' motions for preliminary or final approval of the Settlement or Plaintiffs' application for an award of attorneys' fees and expenses, any appeal from such motions or application, or any related motions or proceedings may be used in this action or in any other proceeding for any purpose other than as specified in the Settlement Agreement.

19. This Court enters a Preliminary Injunction barring and enjoining Plaintiffs and all Settlement Class Members, to the extent permissible by existing law, from bringing, filing, commencing, prosecuting (or further prosecuting), maintaining, intervening in, participating in, or receiving any benefits from any other lawsuit, arbitration proceeding, or administrative, regulatory or other proceeding in law or equity that asserts, arises from, concerns, or is in any

EXHIBIT F

way related to the released Claims identified in the Settlement Agreement, until such time as this Court has ruled on the fairness of the Settlement terms following the Final Approval Hearing.

SO ORDERED:

Hon. Kalimah H. Ahmad, J.S.C.

Exhibit G

LIONEL MEDINA, EKATERINA VOROBEOVA,
KARISTA VAETH and JENNIFER SCULLION,
on behalf of Themselves and all others Similarly
Situated,

Plaintiffs,

vs.

SIMSMETAL EAST LLC, SIMS MUNICIPAL
RECYCLING OF NEW YORK, LLC, SIMS
GROUP USA HOLDINGS CORPORATION,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION HUDSON COUNTY
Docket No.: HUD-L-001589-24

CIVIL ACTION

**CERTIFICATION OF THOMAS
OUTERBRIDGE**

Thomas Outerbridge declares and states as follows:

1. I am the President of Sims Municipal Recycling of New York LLC (“SMR”). I provide this certification in support of the proposed class settlement in the above action. The following facts are true to the best of my personal knowledge or based on the business records of SMR and information provided by employees and officers of SMR.
2. SMR operates a recycling facility (the “Facility”) located at 165 Linden Avenue East, which is on the Claremont Terminal, in Jersey City, New Jersey. SMR’s facility at that location includes: (a) the Material Recovery Facility building (the “MRF”); (b) the glass plant; (c) a maintenance shop; and (d) an office building and operations trailer.

3. Attached hereto is an aerial map of the Claremont Terminal. The MRF is shown at the location marked “A” on the map; the glass plant is shown at the location marked “B” on the map; the maintenance shop is shown at the location marked “C” on the map; the office and operations trailer are shown at the location marked “D” on the map.
4. In addition to SMR’s facility, up to approximately 3 of the barges shown in the waterway on the map are barges used by SMR. Barges used by SMR are periodically staged at or near the premises of Sea Wolf Marine (“Sea Wolf”), an independent company that has no corporate relationship to SMR. Sea Wolf is shown at the location marked “E” on the map; the barges used by SMR which were staged in the waterway at the time of the aerial image are shown at the location marked “F” on the map.
5. On the evening of January 6, 2025, I participated in a meeting with plaintiffs’ counsel, William Matsikoudis, Aspen-Jade Tucker, and Justin Meyers, along with Joe Cocciardi, plaintiffs’ industrial hygiene expert, as well as Thomas Ferretti, Operations Manager for SMR, and SMR Outside Counsel, David Sellinger and Caleb Holmes, in Mr. Matsikoudis’s office, located on an upper floor in the condominium building located at 206 Shearwater Court, Jersey City, New Jersey. From that office, there was an

unobstructed view of Claremont Terminal. It was possible to view the MRF, a portion of the glass plant, and the entire Northeast-facing side of Claremont Terminal facing Port Liberte. During that visit, I pointed out to Plaintiffs' counsel the following: the structures on SMR's premises; certain exterior lights located on SMR's premises which were observable from Mr. Matsikoudis's office; and the areas of SMR's activities along or near the waterway on the Northeast-facing side of Claremont Terminal where SMR conducts operations, including the location of a crane and certain barges used by SMR.

Relevant Company Background

6. SMR was established in 2008. At that time, it was a part of Sims Metal East LLC (hereinafter, collectively with Sims Group Holdings USA Holdings Corporation, "SimsMetal"). In 2022, Circular Services purchased the controlling interest in SMR. SimsMetal retained a minority interest until December 2024 when Circular Services purchased that interest from SimsMetal.
7. At present, SMR's relationship with SimsMetal as relevant to the business operations at Claremont Terminal is solely as a lessee from SimsMetal of the premises on which SMR's facility is located at Claremont Terminal.

SMR's Operations

8. As relevant to the Facility's operations at Claremont Terminal, SMR has recycling contracts with New York City, Jersey City and Bayonne. Pursuant to those contracts, SMR recycles household metal, glass and plastic at the Facility. The Facility does not handle solid waste or paper.
9. SMR conducts its recycling operations at the MRF and the glass plant.
10. In addition, SMR utilizes a number of barges which transport paper that is recycled at other locations. There are no recycling operations involving paper conducted at the Facility. Those barges are towed by Sea Wolf under contract with SMR. From time to time, approximately 2-4 of those barges are temporarily staged in the waterway between Claremont Terminal and Port Liberte.
11. In SMR's operations, the materials processed at the MRF are sorted, compacted into bales and shipped offsite by truck. Similarly, the processing at the glass plant involves sorting the glass materials. Those materials are not baled at the MRF, but are shipped directly from the glass plant.
12. At both the MRF and glass plant, no heat or water is used in the recycling process. No smelting is conducted at the Facility.

13. The exterior shell of the MRF structure is constructed from a fabric material mounted on shipping containers that extend along the full length of the MRF and in effect act as the Northeast-facing wall of the MRF.
14. The glass plant's structure is constructed of building materials customarily used in industrial buildings.
15. The hours of operation of the MRF are from 8 am until 12am, with operations at present occurring in two shifts. The MRF receives recyclables 24 hours per day but processing of those recyclables does not occur outside of the MRF's operating hours. In the future SMR intends to also operate a third shift, during which processing would occur. The glass plant runs 24 hours per day, 5 days per week and occasionally on Saturdays.

Facts relating to odor

16. During the processing of recyclable materials at the glass plant, there are residual components of food (organics) that accompany inbound recyclables, which could have an odor. However, the glass arriving at the Facility is fresh, so it is typically processed before the organic decomposition process begins. Approximately 20% to 30% of the material arriving at the glass plant for recycling is residual waste. That percentage varies by the municipality responsible for sending the recyclables.

17. The recyclable materials processed at the MRF consist primarily of residential (household) metal, glass and plastic containers. During the processing of recyclable materials at the MRF, there is non-recyclable material such as wood and textiles. That waste is simply material that is not desired for recycling purposes. That material has no more odor than does the recyclable material processed at the MRF.
18. The outgoing bales of residue from the MRF are each approximately 850-1400 pounds. The monthly amount of such residue is approximately 1400 tons.
19. The outgoing residue from the glass plant is trucked out from the glass plant in covered trucks. The monthly amount of such residue is approximately 3000 tons.
20. At the meeting with Plaintiffs' Counsel on January 6, 2025, plaintiffs' counsel inquired about an odor of "garbage" experienced at Port Liberte. He also stated that he had gone to Claremont Terminal over the weekend before that meeting and experienced a distinct "garbage" smell during his visit. On information and belief, although it is possible that the odors reported by Plaintiffs' counsel came from the Facility, the Facility is not the source of

the odor that Plaintiffs' counsel reported experiencing on occasion at Port Liberte or during his weekend visit to Claremont Terminal.

21. On information and belief, the best practice in the industry for mitigating odor is to turn the recyclables quickly. That is what SMR does. The entire sorting process at the MRF takes 3-5 minutes, and the output is shipped out daily. Recyclable material arriving by barge is typically removed within 3-4 hours to the MRF or glass plant where it is sorted. The entire process at the glass plant takes 3-5 minutes. The waste or residue output from the glass plant is shipped out daily as well. Color-sorted glass output is also shipped out daily to glass bottle manufacturers. Glass that is not color-sorted is crushed to make an aggregate material that is stockpiled until shipment to area construction sites.
22. The materials processed at the MRF arrive primarily by truck. In addition, approximately twice per month, materials to be recycled arrive on barges, which are pushed by tugboats.
23. The glass material processed at the glass plant arrives by barge every 2 or 3 days and is trucked from the MRF location to the glass plant, which is approximately 2,000 feet from the MRF.

Facts relating to Nighttime Noise

24. Facts Relating to Noise Decibel measurements are taken at SMR during its hours of operation for OSHA purposes. Hearing protection is required inside the MRF building depending on the length of time the person spends inside the MRF building. No hearing protection is required for persons outside of the building.
25. The level of noise at the glass plant is similar to the level at the MRF.
26. SMR receives recyclables by truck both during its hours of operation and afterward throughout the night. Deliveries occur six days per week. With respect to nighttime deliveries after 11 pm, no processing occurs at present during that time period. *But see* paragraph 15 above.
27. SMR has some motor vehicles of its own (a maintenance truck and dump trucks) which are used to move materials and equipment within the Facility. Deliveries to the glass plant by truck occur before 10 pm. To the extent SMR's own vehicles (trucks and other mobile equipment) are used during SMR's operations at night, those vehicles do not use back-up beepers at night. Most garbage trucks making incoming deliveries do not have back-up beepers, but it is possible that some trucks making deliveries at night from some municipalities may have back-up beepers which they use at night.

With respect to deliveries to the MRF, the unloading of trucks occurs within the MRF building.

28. Unloading of barges at SMR occurs only on weekdays between the hours of 8 am to 6 pm. The barges are unloaded by the crane which is located at the side of the waterway and is visible from Port Liberte. The crane is not noisy. The crane is never used at night.
29. Finished product goes out entirely by truck. Most of the shipments go out during the day. However, some truck shipments may go out until 11 pm, and approximately once or twice a week, truck shipments go out in the early morning hours.
30. In addition, limited barge traffic, involving paper-carrying barges, occurs at night. There is no processing of paper at the facility. Paper-carrying barges are staged in the waterway near the MRF. Paper-carrying barges arrive every 2-3 days and typically leave the day after they arrive.
31. In addition, empty barges used by SMR are sometimes staged in the waterway.
32. Tugboat operators involved in transporting SMR barges have been instructed to use radios, and not loudspeakers or bullhorns, in order to communicate.

Facts relating to Light

33. During our meeting with Plaintiffs' counsel, we observed the lights across the channel at the Claremont Terminal. The lights about which plaintiffs' counsel expressed concern were not on SMR's premises. My colleague, Thomas Ferretti, identified two sets of lights on structures at Claremont Terminal that are associated with SMR. Mr. Ferretti explained that one of those sets of lights was on the exterior wall of the glass plant, which is some distance away (approximately 3,000 feet) from the Port Liberte condominiums in question. If anything, it appeared that those lights pointed in a direction other than Port Liberte. Mr. Ferretti also pointed to two small lights which appeared to be exterior lights located near the MRF which are there for safety at night. Those were the only exterior lights at the Facility which I could observe from Mr. Matsikoudis's office.
34. In September 2025, SMR investigated and adjusted downward the direction of, and added hoods to, the lights mounted on the exterior of the SMR Glass Plant that are visible from parts of Port Liberté. In addition, SMR investigated the lights located to the east of the receiving building of the MRF and determined that none of those lights are pointed at Port Liberté,

and that all of them are used in connection with SMR's business, and, accordingly, no adjustments to those lights are necessary.

No Ships or Trains Involved

35. There are no ships involved in deliveries to or shipments from the Facility. SMR is not involved in any respect with any ships docked at Claremont Terminal. SMR does not receive or ship any materials by rail to or from this facility.

Facts relating to Fires and Explosions

36. With respect to fires and explosions that have occurred at Claremont Terminal in the past, on information and belief, the notable occurrences of explosions and large fires in recent years have not been at SMR. At SMR's Facility, there have been occasional small smoldering fires caused by lithium batteries and other items that were improperly included (despite prohibitions in SMR's recycling contracts on such items being sent to the Facility) in the materials shipped to the Facility for processing. Such occurrences occur primarily inside the Facility, not outside, and, on information and belief, those are not occurrences that would have been observed by Port Liberte residents. At the Fire Department's request, in the event that there is a fire of

any size, SMR notifies the Fire Department and it comes to the Facility; however, its assistance at the Facility has only rarely been needed. SMR handles the vast majority of these occurrences itself.

Facts relating to Dust

37. Dust from SMR's operations at the Facility is minimal. All of the exterior ground surfaces at the Facility are paved. With respect to dust inside the glass plant, SMR, pursuant to its air permit, conducts bi-annual monitoring, as well as regular monitoring of exterior dust conditions

Permits

38. SMR holds a recycling permit issued by the State of New Jersey. In addition, SMR shares a NJPDES permit with SimsMetal, although SMR is in the process of obtaining its own stormwater permit. The glass plant has an air quality permit, which is in place only to address the potential of dust from glass breaking. SMR is also subject to the Hudson County Plan and has Fire Department and Building Department permits.

I hereby certify that the above statement made by me is true. I understand that if any of these statements are willfully false, I may be subject to punishment.

A handwritten signature in blue ink, appearing to read 'T. Outerbridge', with a long horizontal line extending to the right.

Thomas Outerbridge

Dated: 11/11/2025



Exhibit B

2006 WL 1520751

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division,
General Equity Part, Burlington County.

Harry and Rita SCHMOLL, Husband and
wife; Leonard and Eleanor Egnack, husband
and wife, on behalf of themselves and
(all others similarly situated), Plaintiffs,
and

Mount Laurel Township, Plaintiff–Intervenor,

v.

J.S. HOVNANIAN & SONS, LLC., and
John Doe Corporations 1–5, Defendants.

BUR-C-00141-02

|

Decided Feb. 9, 2006.

Synopsis

SYNOPSIS

Background: Homeowners brought class action against builder, seeking equitable relief to require builder to inspect homes to determine if sufficient air combustion airflow existed in utility rooms as was required by construction code. The parties entered into a settlement and submitted it for approval.

Holdings: The Superior Court, Chancery Division, Burlington County, General Equity Part, [Hogan](#), J.S.C., held that:

class settlement was fair and reasonable;

trial court was not required to defer on issue of attorney fees;

attorney fee request of \$417,510.12 was excessive;

homeowners prevailed for purposes of Consumer Fraud Act's fee shifting provision; and

20% contingency enhancement of the lodestar was appropriate for purposes of fee shifting.

Ordered accordingly.

Attorneys and Law Firms

[Philip Stephen Fuoco](#), Haddonfield and [Joseph A. Osefchen](#) ([Philip Stephen Fuoco](#) attorney); [Steven P. DeNittis](#) and [Norman Shabel](#), Mount Laurel (Shabel & DeNittis, attorneys, Marlton), for plaintiffs Harry and Rita Schmoll, Leonard and Eleanor Egnack, and all others similarly situated.

[Michael L. Mouber](#), Marlton, for plaintiff-intervenor, Mount Laurel Township. (Parker, McCay & Criscuolo, attorneys).

[Richard Hunt](#), Marlton, for defendant J.S. Hovnanian & Sons.

Opinion

[HOGAN](#), J.S.C.

*1 This decision represents the court's findings following the fairness hearing held on February 6, 2006, for the approval of the settlement of the above class action.

In addition to consideration of whether the class action settlement is fair, reasonable and adequate, the award of counsel fees and expenses is also at issue.

BACKGROUND

Plaintiffs' complaint in the Chancery Division primarily sought equitable relief to require the defendant builder to inspect the homes of the Holiday Village East Development in Mount Laurel Township, New Jersey, constructed after November 30, 1992, and which contain natural gas-powered furnaces, hot water heaters and clothes dryers located in the utility room of each home.

These inspections were allegedly required because of the allegation that defendant violated the New Jersey Uniform Construction Code. Plaintiffs contend there was insufficient air combustion airflow in the utility rooms.¹ All of the allegations have been denied by the defendants and have been vigorously opposed.

Plaintiffs sought a court determination that if an inspection found such violations, that defendant be ordered to make the necessary correction to the defects found. Plaintiffs also initially sought damages under various legal theories, but by the commencement of the trial those damage claims had been abandoned.

In the complaint, the plaintiffs recited numerous legal theories for liability, including implied warranty of habitability, implied covenant of construction in a workmanlike manner, negligence, strict liability as a mass builder and violations of the Consumer Fraud Act under *N.J.S.A. 56:8-1, 56:8-166*. At the fairness hearing and in their briefs, plaintiffs relied only upon the Consumer Fraud Act for the fee-shifting authority.

On August 1, 2003, Judge Bookbinder granted class certification to the owners of homes constructed by defendant in the Holiday East Development in Mount Laurel Township.

On February 6, 2004, Judge Bookbinder further permitted Mount Laurel Township to intervene as a party plaintiff and granted leave for the Township to file its own complaint, which it promptly did.

It appears that the purpose of Mt. Laurel's intervention was to protect its rights in the event the court entered equitable relief that directly or indirectly required the use of Township resources. They essentially "piggy backed" on plaintiffs' claim and sought no independent relief. The Township seeks no counsel fees or expenses.

On December 17, 2004, the court in a written decision denied defendant's motion to transfer the matter to the Law Division and to dismiss Mount Laurel's complaint. The Township's public nuisance cause of action was dismissed. In the same decision, plaintiffs' motion for partial summary judgment was denied.

Trial commenced on April 18, 2005, and proceeded on April 19 and 20, 2005. On June 29, 2005, the parties entered into a Stipulation of Settlement. Pursuant to the Stipulation of Settlement, on August 31, 2005, the court entered an Order of preliminary approval authorizing that a notice of settlement be sent to each class member and setting the date for the fairness hearing.

*2 As evidenced by the certification of mailings filed with the court and representation of counsel at oral argument, the

court is satisfied the Order has been complied with and that proper notice consistent with due process has been afforded the class members. This initial notice provided for a fairness hearing on December 2, 2005, at 1:30 p.m.

On December 2, 2005, the court conducted a fairness hearing and considered the argument of counsel related to the award of counsel fees. Other than the named plaintiff Harry Schmoll, no general members of the class appeared. Defendant's counsel represented that they received no written objections from any class members and only received a few phone calls from individuals seeking information. Likewise, the court announced that it had received no written objections. All of the parties urged the Court to grant final approval of the settlement.

By letter of December 6, 2005, the court was notified by defendant's counsel that it appeared that the public notice of the settlement that was submitted at the December 5, 2005, fairness hearing contained a significant error, in that the notice provided a requirement to supply a carbon monoxide detector to class members. This was not a term that had been agreed to under the Stipulation of Settlement previously entered into and preliminarily approved by the court. By letter of December 7, 2005, plaintiffs' counsel agreed that the class notice was in error and that it had been published in the *Burlington County Times*² on November 3, 2005. On that same day, the court directed that all counsel appear on December 12, 2005, to resolve the issue.

On December 12, 2005, on the record the matter was discussed fully as to the process for going forward. The Court determined that even though it appeared that the correct notice was mailed to the class home owners, the fact that the public notice that was published in the newspaper was erroneous could lead to confusion among the class members and could adversely affect their decision-making as to whether to participate in the inspection process. The court, therefore, ordered that the class be re-noticed, and that the correct notice be republished, and that the court conduct a second fairness hearing on February 6, 2006.

By certification of Stephen DeNittis, Esq., dated January 9, 2006, Mr. DeNittis certifies that the revised notice was mailed to the class homeowners. The notice was also published in *The Central Record*, a weekly newspaper, which circulates in Mt. Laurel Township.

On February 6, 2006, counsel for the parties appeared for the fairness hearing. No clients or members of the public attended. As the court had no further questions, counsel agreed to rely on their oral arguments they made before the court at the first hearing on December 6, 2005.

THE SETTLEMENT

As in all cases, our courts have long subscribed to policy that encouraged the settlement of lawsuits between the parties, inclusive of class action proceedings. *Chattin v. Cape May Greene Inc.*, 216 N.J.Super. 618, 626, 524 A.2d 841 (App.Div.), certif. denied, 107 N.J. 148, 526 A.2d 209 (1987) (citing *Jannarone v. W.T. Co.*, 65 N.J.Super. 472, 168 A.2d 72 (App.Div.), certif. denied, 35 N.J. 61, 171 A.2d 147 (1961)). However, in class actions, settlements receive a scrutiny not otherwise provided to non-class action settlements before they become enforceable. Our court rules require notice of a proposed settlement of a class action to be given to the members of the class and the court must approve the settlement. R. 4:32–4. While individual parties to non-class actions are in a position to agree to the terms of a settlement, individuals of a class are generally not in that position; thus it becomes the responsibility of the court to determine if the class action settlement is fair and reasonable to the members of the class. *Chattin*, supra, 216 N.J.Super. at 627, 524 A.2d 841.

*3 Both the plaintiffs' counsel and defendant's counsel argue in favor of the approval of the settlement. There have been no written objections by class members after notice of the settlement. While no class members appeared at the hearing, nonetheless the court is obligated to independently consider the settlement as a substitute for the consents of the individual class members. Of course the fact that there is no opposition is a fact for consideration as well.

The standards for approval of class actions that have been developed in the federal courts have been followed by our state courts and generally involve nine factors for consideration. *Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 317 (3d Cir.1998). They are listed below with the Court's comment:

1. *The complexity, expense and likely duration of the litigation;*

As will be further discussed, the court is not of the belief that this case was complex. It involved neither novel issues of law nor a complex fact pattern. The case was vigorously defended, which added to the burden of class counsel. The settlement had the effect of terminating an ongoing trial and its continued inherent expense.

2. *The reactions of the class to the settlement;*

The class posed no objections or requests for exclusion, which permits the inference of satisfaction with the proposed settlement.

3. *The state of the proceeding and the amount of the discovery completed;*

The trial had commenced before the settlement occurred.

4. *The risk of establishing liability;*

As will be further discussed, the risk of establishing liability based upon whether there were construction code violations was fairly low.

5. *The risks of establishing damages;*

This factor as it relates to damages is not so relevant as the relief sought was equitable. However, as to equitable relief, the risk was moderate, but on the low side of the moderate range.

6. *The risks of maintaining the class action through the trial;*

The risk of maintaining the class was not high. There have been no efforts by defendant to move to de-certify the class once the class was certified. There appears to be no basis in any event.

7. *The ability of defendant to withstand a greater judgment;*

Since the class is not seeking a money judgment, this factor is largely irrelevant. It is not disputed that defendant is a

significant builder in the housing industry and could certainly withstand a greater judgment in terms of damages or equitable remedy.

8. The risk of reasonableness of the settlement fund in light of the best possible recovery;

9. The risk of reasonableness of the settlement in light of all the attendant risks of litigation.

Perhaps [Factors 8](#) and [9](#) are the most helpful in evaluating the settlement. The court is satisfied that the settlement is reasonable in light of the best recovery possible. The fact of the matter is that the settlement provides the class with essentially the entire relief that they sought when the suit was commenced. The settlement provides the opportunity for the class members to voluntarily have their utility rooms inspected, and if there are violations, to have the defendant builder make the corrections at its cost. As indicated above, counsel for both parties are in agreement that the settlement is reasonable and in the interests of their clients.

***4** These factors must be considered in light of the fact that plaintiff only seeks equitable relief as there is no fund in court. Also, in considering the settlement as to fairness, the analysis does not turn on the merits of the case. [Eichenholtz v. Brennan, 52 F.3d 478 \(3d Cir.1995\)](#). Because it is a case for equitable relief rather than money damages, certain of these factors may have less bearing and others more importance.

After reviewing the settlement in light of the above factors, including reviewing the agreement itself and its related documents, and after considering the comments of counsel and their respective written submissions, the court can find no reason that suggests that this settlement should not be approved. The Court concludes and finds that the settlement is fair and reasonable in every respect.

COUNSEL FEES:

Plaintiffs' counsel seeks fees and cost in the amount of \$417,510.12. Defendant's objections fall into two categories. First, that the court's determination of reasonable counsel fees should be deferred until it is determined how many of the class members actually participate in the settlement and as to those that do participate, how many of those class members' homes actually have air-combustion violations in their respective utility rooms. Defendant envisions the ability to potentially

argue that in fact plaintiffs are not the prevailing party under the settlement and thus are not entitled to any award of fees.

Secondly, defendants object to the amount of the fees in the application as not being reasonable and in compliance with applicable case law.

The Timing Issue:

The applicable terms of the Stipulation of Settlement executed by the parties (emphasis added) provide:

3. The amount of attorney fees, if any to be paid by Hovnanian shall be determined by the Court, unless the parties can resolve the amount amicably. If the matter cannot be resolved, Class counsel shall submit their fee petition at least twenty-one days prior to the scheduled date of the fairness hearing and Hovnanian shall file their objections ten days thereafter. It is acknowledged and agreed that Mount Laurel is not seeking reimbursement of attorney's fees as a result of the lawsuit or of this settlement. The Court will either hear argument concerning fees at the fairness hearing, or, at its option, may schedule a separate hearing regarding same after acknowledging plaintiffs' Class counsels' request and Hovnanian's objections at the fairness hearing. It is acknowledged that Hovnanian intends to take the position that the fee argument should take place after the inspection results are received. The parties agree to abide by the Court's decision in this regard, and shall be allowed to supplement their respective positions subsequent to the fairness hearing, in the event the Court accepts Hovnanian position. The Court may consider all relevant evidence including testimony adduced to date, and may allow for a plenary hearing, as it deems necessary in making its fee determination.

***5** While defendant urges the court to now exercise the deferral option, plaintiffs strenuously oppose such deferral. The court is bound to follow the same legal basis for determining counsel fees whether or not the issue is deferred. Plaintiffs' position is that the settlement concludes the active litigation and provides the full measure of the equitable relief they sought against defendant and that the award of attorney fees should not be based upon the proportionality of the monetary value of the settlement. Defendant, on the other hand, argues that they expect that the majority if not all of the participating class members' homes will be found to be compliant with the regulatory scheme of the Department of Community Affairs' "engineered approach to air combustion."³ It asserts, even if there was a *de minimis*

violation of the venting provisions of the Department's administrative building codes in place when the class member homes were constructed, that the end result will show that defendant is not liable or, in the alternative, that the violations were minimal, requiring only minimal alterations to the utility rooms, if any. This argument is the same defense defendant raised during the entire litigation, including during the trial. Defendant also argues that the court must take into consideration the results of the inspections to be made and factor into its fee determination the extent to which the class members' homes actually need repairs and the attendant cost.

Plaintiffs invoke *R. 4:42*, which they assert prohibits the entry of a delayed order for attorneys' fees and "requires that any fee award be made prior to the entry of an order for final judgment." They argue that the primary relief they sought was equitable and it is this relief which they received under the Stipulation of Settlement. As such they, therefore, have prevailed and are entitled to fee shifting under the Consumer Fraud Act. They further argue that the monetary value of their repairs resulting from the equitable relief is not the measure for determining the counsel fees.

Without question, plaintiffs were seeking equitable relief in the nature of a court order to provide the opportunity to the class members to have their homes inspected, and if a home is found to be in violation of the Department of Community Affairs' building codes as to combustion air in their utility rooms, then to require defendant to make such alterations at its expense. While defendant denied any violations and defended itself vigorously, after trial began, defendant agreed to settle the case and agreed to the following relief as summarized in the corrected Class Action Settlement Notice sent to each class member:

A. All members of the Class shall be given an opportunity to have their utility room inspected by the Mt. Laurel Building Department at no cost to the Class member in order to determine whether their utility room has adequate combustion air as required by the New Jersey Uniform Construction Code.

**6 B. If such an inspection reveals that there is inadequate combustion air, corrective work will be performed in accordance with specification previously approved by the Mt. Laurel Building Department. Hovnanian will be responsible for the cost and performance of such corrective work.*

The Stipulation of Settlement itself provides that the litigation is "hereby fully and finally settled, subject to the approval of the Court...."

What defendant now argues in support of deferring the attorney fees issue is that plaintiffs at best accomplished limited success and that waiting until all the inspections are complete will prove that there were very few or no violations and thus little if any liability. As will be discussed, while the question of limited success is a factor in whether to decrease a lodestar, it lends no support as to whether the fee issue should be deferred. If defendant wished to test its defenses that it had limited or no liability, it had the option to continue the trial to the end and receive a court ruling on the merits. Instead they chose to end the litigation and agreed to settle the merits of the dispute. The analysis required by the Supreme Court in *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995), will be just as applicable in the future as it is today. What defendants are proposing would most likely lead to a plenary hearing on the attorney fees issue. In fact the Stipulation of Settlement contemplates that potential.

Our courts discourage a plenary hearing on the issues of attorney fees. "We hold to the common sense position that a plenary hearing should be conducted only when the certifications of counsel raise material factual disputes that can be resolved solely by the taking of testimony. We expect that such hearings will be a rare, not routine, occurrence." *Furst v. Einstein Moomjy, Inc.*, 182 N.J. 1, 24, 860 A.2d 435 (2004).

Citing *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 377 (3d Cir.1987), the Court in *Furst* stated, "We strongly discourage the use of an attorney-fee application as an invitation to become mired in a second round of litigation."

The law seems clear that counsel fees in fee-shifting cases are not based on the dollar cost or dollar value of the relief obtained. *Furst, supra*, 182 N.J. at 24, 860 A.2d 435. *Szczepanski v. Newcomb Med. Ctr.*, 141 N.J. 346, 366, 661 A.2d 1232 (1995); *Grubbs v. Knoll*, 376 N.J. Super. 420, 432, 870 A.2d 713 (App.Div.2005). That being the case, whether or not the class members take advantage of the equitable relief granted them, and whether or not the costs to remedy any of the defects uncovered are minimal, would have no bearing on whether or not plaintiffs are entitled to fees under fee shifting. Therefore, postponing the attorney fee issue to some undefined date in the future would serve no positive purpose and would unjustifiably delay the attorney fee determination

to which plaintiffs' attorneys are entitled. Likewise, such an indeterminate wait for the local housing code official to complete the inspection process would further exacerbate the strictures of *R. 4:42*.

*7 While the parties provided in their agreement an “option” for the court to delay the fee determination, such an option cannot bind the court. Clearly the intent for such a provision was to facilitate a settlement, while preserving to the time of the fair hearing the parties' opportunity to brief and argue to the court their respective positions on the issue.

The court declines to exercise the “option” and will not defer the attorney fee issue.

Plaintiffs' attorneys have submitted a joint petition for attorney fees and costs, which include certifications, memorandums and various exhibits supporting the application. The joint application is by the Law Firm of Philip Stephen Fuoco, and from the Law Offices of Shabel & DeNittis, P.C. These attorney certifications contain information regarding attorney hourly rates, background of counsel, and a description of the legal effort on behalf of plaintiffs, with each entry displaying the attorney who provided the service, the date of the service, the time in hours and tenths and a description of the service. At the conclusion is a summary of the total hours for each attorney, with a total raw fee before any adjustment or enhancements. These certifications contain an itemized statement of costs expended by the firms in furtherance of their case.

The Shabel firm's certification, signed by both Mr. Shabel and Mr. DeNittis, delineates in accordance with the Rules the class action experience for both Mr. Shabel and Mr. DeNittis with varying hourly rates approved by other courts. In this case, Mr. Shabel charges \$395 per hour and Mr. DeNittis charges \$250 per hour. These rates are consistent with the rates charged in many previous cases that these attorneys have litigated and which are detailed in their certification. The fees they have charged historically have been approved in the Superior Court in Burlington and Camden Counties. The court is satisfied that the rates are within the range of rates charged within the community of Burlington and Camden County where these lawyers practice. The Shabel Firm seeks \$234,825.00 in raw fees, and \$23,093.09 in costs.

Joseph A. Osefchen, Esq., executed the certification for the Fuoco firm. The certification provides the background of the attorneys who worked on the case, with a summary of hours

worked and hourly rates and costs expended. Attached to the certification is a billing statement showing the services by category and within each category, the date, the attorney who provided the service, the time expended and a one-line abbreviated description of the service.⁴ Also included is the same type of information for paralegal services. The total value of the fee the Fuoco firm seeks is \$84,390.25 in raw fees plus \$381.00 in costs, as set forth in the certification.

As in the Shabel firm certification, the Fuoco firm certification also provided the experience and hourly rates, \$495 for Mr. Fuoco and \$300 for Mr. Osefchen. Also included are the certifications of three practitioners who certify to the “range” of prevailing market rates for comparable services involving complex class action fee shifting in this legal community.⁵

*8 All of plaintiffs' counsel demonstrate significant legal experience, although they cite other class action cases in which they participated without providing information sufficient for a meaningful comparison with the present case.

Before any adjustments the two firms combined have set the proposed lodestar at \$321,601.00, exclusive of \$23,474.09 of out-of-pocket costs.

Plaintiffs' counsel have voluntarily reduced their proposed lodestar by an initial ten percent “across the board” or \$32,160.17. They further reduced the lodestar by \$7,015.00 for time expended when more than two plaintiffs' attorneys participated at a hearing; they are charging only for the two lowest billing rates.⁶ Finally, they have reduced the lodestar further, deleting any billings for paralegal services, thereby reducing the un-enhanced lodestar to \$278,340.08. Plaintiffs' counsel seeks a fifty percent enhancement of this amount, for a total fee of \$417,510.12

Defendant, Hovnanian, after challenging the right to counsel fees, challenges the amount of fees themselves. They argue that the fees are unreasonable because the service time of 1,085 hours was “excessive and redundant,” that the hourly rates are unreasonable and not in line with the Rules of Professional Conduct (“RPC”), and that the fees should not be enhanced.

In determining any application for counsel fees, the court must first analyze such a request in light of [RPC 1.5\(a\)](#), which sets forth the factors the Court must consider; secondly, *R. 4:42–9(b)*, which sets forth the mechanism for the application;

thirdly, the applicable fee-authorizing statute, which in this case is *N.J.S.A. 56:8–19*, the Consumer Fraud Act, which sets forth the authority. These items must not be analyzed independently of one another, but rather in conjunction with one another in order for the court to come to the appropriate conclusion.

Initially, the joint fee application is in substantial compliance with *R. 4:42–9(b)*, in that the appropriate certifications have been filed, which address the applicable factors under [RPC 1.5\(a\)](#).

The factors with the court's comment are set forth below:

[RPC 1.5. Fees](#)

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

Plaintiffs' counsel in their pleadings and arguments have consistently classified this law suit as “complex,” which in part provides support for extensive fees. The court is not persuaded that this case raised novel or unique legal issues or factual issues such as to classify the matter as complex. Certainly, because it is a class action, the legal mechanics were more extensive, but not so much that the matter requires the platoon of four highly skilled and experienced class action lawyers from two different firms.

*9 Factually, this case involved whether the combustion air in utility rooms of a class of a few hundred homes met the standard of the New Jersey building code. It was argued by defendant that if such a defect existed at all, it was a de minimis variation from the standard. The potential problem was first discovered when homeowners were having repairs in the utility rooms and the issue arose on inspection by the Township inspector.

While the initial complaint of plaintiffs listed numerous causes of action, by the time of trial they had abandoned all of the causes, except for a violation of the Consumer Fraud Act. Plaintiffs abandoned their claim for damages and were seeking an equitable remedy by way of court-ordered remedy to such members of the class who had a violation and

wanted it fixed. The Township code official has not sought a mandatory fix.

This case involved basic statutory and administrative code interpretation and determination of violations that are not novel or complex to determine. An inspection of the utility room in a participating home will quickly and definitively determine any violation.⁷ The fact that the parties retained expert witnesses is certainly not unusual in a construction defect case.

This case has not raised any novel or complex theories of law. In the court's opinion, the need for plaintiffs to involve two law firms was excessive. There is nothing in the certifications that suggest that one firm or the other needed the expertise of the other to conduct this case. None of the certifications suggest specifically or generally that this case raised such complex or novel issues that one firm needed professional help from the other. In fact, the wide-ranging experience of all the lawyers demonstrates that either of these firms would be independently capable of representing this class well in what involved a fairly uncomplicated fact pattern. The reality is that these two firms divided the representation among themselves, resulting in not only duplication of services, such as review of documents and conferences among themselves, but also of services that were not efficiently provided because of the natural accrual of time and overhead between independent organizations.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

Plaintiffs' counsel failed to address this factor. The inference is that the complexity and nature of this case undertaking did not prevent either firm from representing other clients.

(3) The fee customarily charged in the locality for similar legal services;

As discussed above, the court is satisfied that the hourly rates charged by the Shabel firm are in line with rates for similar services within the community in Burlington and Camden Counties. However, the rates of the Fuoco firm, and particularly the rate of Mr. Fuoco, for a case of this type is excessive. In the certification it is pointed out that Mr. Fuoco has participated in over 100 class actions involving ERISA, civil rights, consumer fraud and other causes of action. The highest rate he has had approved is \$420. Here he seeks a rate of \$495 without explanation as to what makes this case more

complex than the example cases he has listed.⁸ Clearly, with expertise should come efficiency. His firm performed only 255.65 hours out of the total of 1085 hours expended by both firms together. The supporting certifications of independent counsel state that \$420 is in the range of rates for the community. Because of the lack of factual or legal complexity, the court finds that \$420 is reasonably in the range for a case of this nature in the Burlington and Camden County community. The burden here is on counsel to demonstrate his fees follow the well-established standards.

***10** (4) *The amount involved and the results obtained;*

The court is of the opinion that the results obtained by plaintiffs are significant. Plaintiffs have secured the opportunity to have the utility room in their homes inspected and a determination made as to whether it is in violation of the air combustion standard to which the parties and the Township have agreed. If there is a violation, defendant will make the necessary improvements at its expense. While the evidence at trial and in the pleadings is unsettled as to the exact expense, it has been suggested at various times by the parties that the cost could range from a few dollars to several hundred dollars per home.

(5) *The time limitations imposed by the client or by the circumstances;*

The certifications do not address that there were any time limitations imposed by the client or circumstances.

(6) *The nature and length of the professional relationship with the client;*

The certifications do not address this factor.

(7) *The experience, reputation, and ability of the lawyer or lawyers performing the services;*

The experience and skill of the lawyers was addressed in the certifications and has been heretofore discussed above.

(8) *Whether the fee is fixed or contingent;*

While counsel did not include a copy of the contingent fee agreement to the fee application, they have certified that they have taken the case based solely upon a contingent fee arrangement, at no cost or risk to the class. Fees and costs are only recoverable from defendant, to the extent the court permits.

The court also must satisfy itself that there is legal authority to shift the fees. Here plaintiffs' rely upon *N.J.S.A. 56:8–19* of the Consumer Fraud Act. This provision (emphasis added) provides:

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

The primary relief sought and received by plaintiffs through this litigation, which concluded in a settlement, was equitable in nature. In fact plaintiffs abandoned any claim for damages that was originally part of their initial pleadings. Defendant entered the settlement without admission that it violated the Consumer Fraud Act. The question to be resolved is whether there can be fee shifting under the Consumer Fraud Act when the parties agree to an equitable solution, and when there is no court-determined or admitted violation of the Consumer Fraud Act. The answer must be in the affirmative. The words of the Consumer Fraud Act quoted above show the Legislature contemplated not only a private cause of action for monetary damages, but actions for equitable relief. The statute provides for the award of reasonable attorneys' fees in all actions under this section. *N.J.S.A. 56:8–19*. In Consumer Fraud actions, fee shifting applies in favor of the prevailing party when equitable remedies are achieved even if no monetary damages are awarded or agreed to in the case of a settled case. See *New Jerseyans for a Death Penalty Moratorium v. New Jersey Dep't. of Corrs.*, 185 N.J. 137, 883 A.2d 329 (2005) (where fee shifting was permitted in a non-damage case, under the Open Public Records Act).

***11** Defendant, though, argues in its brief and oral argument and insists that since it has not admitted liability under the act and the individual inspections have not yet been completed, that fee-shifting cannot apply. In other words, defendant maintains that in this settlement the plaintiffs are not the prevailing party for counsel fee purposes.

Clearly, the success of plaintiffs in this settlement demonstrates that they have prevailed. As stated in *H.I.P. v. K. Hovnanian at Mahwah VI, Inc.*, 291 N.J.Super. 144, 154, 676 A.2d 1166 (Law Div.1996), “Fundamentally, a prevailing party is one who achieves a substantial portion of the relief it sought.” As in the instant case, the plaintiff there “achieved via settlement and consent order qualitatively and as a matter of principle, a large portion of what it hoped for by way of judgment.” *Id.*; see also, *Ashley v. Atl. Richfield Co.*, 794 F.2d 128, 131 (3d Cir.1986); *Warrington v. Village Supermarket, Inc.*, 328 N.J.Super. 410, 417–19, 746 A.2d 61 (App.Div.2000).

The landmark case in New Jersey on this subject is *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995). The analysis first requires the court to determine the lodestar fee by ascertaining the number of hours reasonably expended multiplied by a reasonable hourly rate. In the instant case both of plaintiffs' law firms together expended 1,085.60 hours of lawyer time. As previously stated, the use of two law firms to handle a case where there were no novel legal issues or complex factual or scientific issues was inappropriate.⁹ While plaintiffs have prevailed substantially, in obtaining the right to have the class members' homes inspected on a voluntary basis, it is still far from clear what this legal exercise will practically accomplish, as there is no evidence yet as to how many homes will participate in the settlement, and of those who do participate how many violations may be found.

Undoubtedly, plaintiffs' attorneys also believe that their billings are excessive. While they gave no reason, they arbitrarily decided to reduce the application by ten percent across the board.

The court has examined the billing certifications submitted, entry-by-entry. The Shabel firm's billings are chronological and generally detailed. The Fuoco firm's billings are broken down by task and provide less detail. In either case, it is clear that significant time was spent in duplicative effort and consulting between the lawyers. For example, on October 16, 2002, Mr. DeNittis made an entry for a site inspection of two homes; he took photos and measurements and spoke to the parties, and the time billed for that task is 6.7 hours. Thereafter, there is an entry by Mr. Shabel for the same date that says, “site inspection w/ Steve DeNittis” for another 6.7 hours.¹⁰ This represents a joint charge of \$4321.50 for going to two homes and looking at their utility rooms. The billings are replete with services that both these attorneys partnered, but which were unnecessary given the nature of this case.

*12 Throughout the billings are charges for conferences between Mr. Shabel and Mr. DeNittis. For example, on November 19, 2002, they each charged 1.2 hours for a conference to discuss prior phone calls and again on November 21, 2002, they each charged 1.1 hours for a conference between themselves. These entries do not disclose what the conferences were about and are examples of the significant intra-office communication, which is not justified. On March 11, 2004, each of the attorneys charged 0.75 hours for reviewing the same fax from the Township solicitor. On March 20, 2005, and March 21, 2005, Mr. DeNittis spent 16 hours reviewing the “entire file.” On March 22, 2005, Mr. Shabel spent 4 hours reviewing a draft witness list, an exhibit list and “important documents.”

On March 23, 2005, Mr. DeNittis spent 6 hours on research and drafting on a motion in limine regarding Carl Walter. On March 24, 2005, 8.2 hours were spent drafting the Carl Walter motion and research on Vinciguerra report. On March 25, 2005, there was a charge for 6.2 hours for a draft of a motion in limine for Vinciguerra report. On March 26, 2005, 3.2 hours for research on whether the case is a jury trial or bench trial was billed, and on the same day another 8 hours to draft a third motion in limine. On March 28, 2004, there was a charge of 0.3 hours to “circulate” the motions to the other three attorneys. On the same day, March 28, Mr. Shabel charged 6 hours to review the motions. Also on March 28 Mr. Shabel charged 2.5 hours to have a conference with Mr. DeNittis, who also charged 2.5 hours for the same conference. Again, no detail is given of the purpose of such meeting. As well, the Fuoco firm also reviewed these motions.

On the next day, March 29, Mr. DeNittis charged 1 hour for a conference with Mr. Shabel and Mr. Shabel charged an hour for the same conference.¹¹ On March 30, 2005, the two attorneys each billed 1.5 hours for meeting with each other, with little detail. On April 1, 2005, Mr. DeNittis charged for 4 hours to “Review defendant's responses to Requests for Admissions, all of defendant's discovery requests.” Likewise Mr. Shabel charged on the same day 3.5 hours for the exact same service. These are only illustrations of the types of entries that demonstrate to the court the inefficiencies and unjustifiable expenditure of time that runs throughout the Shabel firm billings. A review of these billings show no attempt to manage the time spent in any efficient manner.

Likewise, many of the billings for extensive communication between the two law firms appear unnecessary, as will be discussed.

As to the time expended by the Shabel firm, the court after a careful review of the time entries concludes that Mr. Shabel's time should be reduced from 177.50 hours to 100 hours and Mr. DeNittis' time should be reduced from 652.45 hours to 400 hours.

The Fuoco billings are set up by task. There are numerous tasks such as conference, conference with co-counsel, research, review, telephone, brief writing, and brief writing: class actions issues, among others. It is clear that this firm had relatively little interaction with the client class. Undoubtedly, the firm provided important and valuable services in the research and brief writing areas, but extensive conferences, telephone conferences and review of other lawyers' work appears out of line, certainly not completely necessary for a case of this nature. Of the 38.95 hours that Mr. Fuoco spent on this case, 7.85 hours was for reviewing documents that in many cases were prepared by one of the other lawyers or reviewed by other lawyers. It should be noted that the description of the various reviews is not informative. The entry merely states "review motions and briefs," or "review class issues," or "review discovery issues." Such a description makes it difficult if not impossible to cross check the entry.

*13 Like Mr. DeNittis, in the Shabel firm, Mr. Osefchen provided the majority of the services for his firm. While his services appear to be mostly in the area of research and brief preparation, under the task of "Conference" there are nearly 15 hours of entries showing conferences and telephone calls with the Shabel firm, with only a few exceptions. The

PSF	From 38.95 Hrs to 25 Hrs	@	\$420.00	=	\$ 10,500.00
NS	From 177.50 Hrs to 100 Hrs	@	\$395.00	=	39,500.00
SD	From 652.45 Hrs to 400 Hrs	@	\$250.00	=	100,000.00
JAO	From 216.70 Hrs to 150 Hrs	@	\$257.00	=	38,550.00

The lodestar is therefore \$188,550. The Court finds that this sum represents the time reasonably spent by plaintiffs' lawyers multiplied by the hourly rates determined above in this case. The analysis of the time expenditures is not to suggest that there was an intentional effort on the part of

entries provide little explanation. In addition, there is a task called "Conference co-counsel" with another 8.75 hours of telephone calls and conference with the Shabel firm, again with little explanation. Scattered throughout the billings there are further conferences with the Shabel firm and a task called "Strategy and Analysis," which also contains more conferences with the Shabel firm. The court does not question the fact that the two firms needed to communicate, but the nature of this case and the relief that was being sought did not justify the need for two firms with two separate overheads, to conduct such extensive inter- and intra-firm communication.

After carefully considering the time entries of the Fuoco firm, the court is reducing the hours expended by Mr. Fuoco from 38.95 hours to 25 hours and the time expended by Mr. Osefchen from 216.70 to 150 hours. The time reductions for these firms represent, in the court's opinion, a more appropriate expenditure of time in a case of this nature.

As indicated heretofore, clearly counsel jointly also recognized that their bill for services is too high, as they reduced their proposed lodestar voluntarily by ten percent.¹² They also further reduced the billings for joint appearances of counsel, when more than two attorneys appeared in court. While the court does not want to place their good faith in the category of "no good deed goes unpunished," the court believes that the excessive time expenditures warrants a further reduction.

Having reviewed the hourly rates, and the time expended, the court finds, with the appropriate adjustments, the lodestar for this case to be as follows:

PSF	From 38.95 Hrs to 25 Hrs	@	\$420.00	=	\$ 10,500.00
NS	From 177.50 Hrs to 100 Hrs	@	\$395.00	=	39,500.00
SD	From 652.45 Hrs to 400 Hrs	@	\$250.00	=	100,000.00
JAO	From 216.70 Hrs to 150 Hrs	@	\$257.00	=	38,550.00

counsel to inflate their bills; rather it demonstrates a lack of coordination and efficiency. This may be the result of having two independent firms representing the same client. Plaintiffs' counsel in their application did not seek costs for paralegal services, which they specifically removed.

Defendant argues that the potential violations are *de minimis*, and should inspections find violations, that the sum of money necessary to fix the violations is minor as compared to the significant fees that plaintiffs' counsel seeks. Our Supreme Court has substantially adopted the rule that fee-shifting statutes do not require proportionality between damage recoveries and counsel fee awards. However, at the same time the Court has stated:

**14 Nevertheless, if the specific circumstances incidental to a counsel-fee application demonstrate that the hours expended, taking into account the damages prospectively recoverable, the interest to be vindicated, and the underlying statutory objectives, exceed those that competent counsel reasonably would have expended to achieve a comparable result a trial court may exercise its discretion to exclude excessive hours from the lodestar calculation.*

[*Rendine v. Pantzer*, *supra*, 141 N.J. at 336, 661 A.2d 1202.] Additionally, the Court continued: “Similarly, a trial court should reduce the lodestar fee if the level of success achieved in the litigation is limited as compared to the relief sought.” *Id.* at 336, 661 A.2d 1202.

On the first point, while this is not a damage award case, and the remedy is equitable, the court in the discussion above has already taken into consideration the nature of this case, its lack of legal and factual complexity, and the homeowners' interests should they choose to avail themselves of the settlement provisions. The conclusion has been a reasonable reduction in both the hours and where appropriate, the hourly rate. The court concludes that the statutory objective of the Consumer Fraud Act has been accomplished, in giving these homeowners the opportunity to correct a potential air combustion violation, which while minor in cost to fix, could have significant impact on property and life if left unaddressed.

With regard to the second point concerning the level of success achieved, the Supreme Court has provided further guidance. The Court has “not established a per se requirement that there be a close relationship between recovery and fees awarded.” *New Jerseyans For a Death Penalty Moratorium v. New Jersey Dep't. of Corrs.*, *supra*, 185 N.J. at 154, 883 A.2d 329 (citing *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 574, 730 A.2d 843 (1999)).

The consideration of the level of success is to be qualitative and not quantitative. “The fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the law suit.” *Id.* at 154, 883 A.2d 329 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983)).

In determining the qualitative success the court should not merely add up the counts of the complaint and determine which counts were successful. Plaintiffs' complaint had many counts and varying theories of recovery, but following discovery and motions for summary judgment, the underlying focus on the Consumer Fraud Act surfaced. Plaintiffs pursued that cause of action up until the parties entered into a settlement following the commencement of trial. The stated goal of this suit was to correct what is perceived to be a potential air-combustion problem in the utility rooms of the class. That goal was initially pursued on several legal and equitable theories.

Ultimately, the goal was successful in that a settlement was reached where plaintiffs have achieved substantially the relief they sought. While defendant insists that plaintiffs have not prevailed in the settlement, such insistence is without support in the record. What became clear in the record as this case unfolded is that on many occasions defendant could have settled the merits of the case on terms similar to the present settlement. Defendant initially chose to proceed with the litigation, which was its right to do. Once trial had begun, defendant could have continued the trial and awaited a decision of the court, which may or may not have supported its position. Instead, defendant capitulated to the relief that plaintiffs sought all along, while not admitting to liability. The fact remains that plaintiffs prevailed in securing the relief to which they felt entitled and for which they brought the lawsuit. In the court's opinion, plaintiff achieved a considerable degree of qualitative success and on this basis the lodestar should not further be reduced on this basis.

Enhancement:

**15* The court has determined the lodestar to be \$188,550. *Rendine* requires a consideration of “whether to increase that[the] fee to reflect the risk of nonpayment in all cases which the attorney's compensation entirely or substantially is contingent on a successful outcome.” *Rendine*, *supra*, 141 N.J. at 337, 661 A.2d 1202. In this case it is represented that the attorneys took this case on a complete contingency. That is to say, that their clients would not be expected to pay any counsel fees under any circumstances. Likewise, the clients

are not responsible to pay any of the out-of-pocket costs of suit.

In addition, there is no fund in court, and no damages by the time of trial were sought. Plaintiffs only sought equitable relief under the Consumer Fraud Act to provide them with the option to have their respective utility rooms inspected for air combustion violations and to have the defendant builder correct the violation at the builder's expense.

The Court in *Rendine*, in requiring a risk of non-payment consideration, also permits a trial court, in its discretion, to consider the likelihood of success in the enhancement consideration.

In examining the risk of nonpayment, plaintiffs' counsel had a significant risk. They had agreed with their clients that if the case were unsuccessful, they (the attorneys) would not be paid. While the court would not classify this case as "complex" in its facts or the law to be applied, in any class action there is a significant level of legal activity required. It is not disputed that should the inspections disclose air combustion violations the cost of the fix for an individual utility room will be fairly inexpensive, perhaps a few hundred dollars, or even much less. While proof by a plaintiff of difficulty in hiring an attorney is not a prerequisite to a contingency enhancement, in a case such as this where the relief is equitable in nature and the potential recovery is potentially minimal, it is not beyond reason that the utility room conditions might never be addressed without such a complete contingency arrangement provided by plaintiffs' attorneys, at the risk of receiving no compensation should the case have failed on the merits.

Defendant's counsel argues that plaintiffs' counsel have taken no steps to minimize the risk, but does not suggest what those steps might have been. To the contrary, the settlement that was reached by the parties was in substantial part available to defendant from the beginning of these proceedings. As in *Rendine*, plaintiffs' counsel's risk actually increased because of defendant's decision to litigate the case to trial, when there were natural points along the way that this same settlement may well have occurred. As early as February 3, 2003, plaintiffs' counsel, in a letter to defendant's counsel, made an offer to settle the litigation on suggested terms that are essentially the same as the resolution the parties entered into, only nearly two-and-a-half years later and after further litigation.

***16** Generally, defendants must not be deterred from defending themselves, but clearly when this case was first filed there was a calculation by defendant not to settle, and a second calculation to settle the matter two-and-a-half years later after the trial began. This strategy is clearly the prerogative of defendant and its counsel, but the effect was to heighten the risk to plaintiffs by way of outlay of additional time and expense.

Likewise, "cases in which the likelihood of success is unusually strong, a court may properly consider the inherent strength of the prevailing party's claim in determining the amount of contingency enhancement." *Rendine, supra*, 141 N.J. at 341, 661 A.2d 1202. Plaintiffs faced a risk of non-payment because of the nature of the equitable relief they sought. Nevertheless a court finding that there was a clear code violation, even a de minimis violation, which even defendant conceded, was a likely possibility. Had the trial continued to the end, and the Court found violations, the natural but not necessarily exclusive remedy would have been an Order to the defendant to inspect and fix the violations, which was the essential relief that the parties settled upon. While of course very few if any cases are "air tight," a review of the facts in this case as presented through certifications, the testimony at trial, and the building code provisions, leads the court to conclude that plaintiffs' likelihood of success was very good. This finding offsets to some degree the risk of the contingent fee arrangement.

Our Supreme Court in *Rendine, supra*, 141 N.J. at 343, 661 A.2d 1202 states:

We conclude that contingency enhancements in fee shifting cases ordinarily should range between five and fifty percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty five percent of the lodestar.

The nature of this class action case is one of limited public interest, in that it affects a relatively small universe of people who will participate, anywhere from a handful to several hundred. No new legal theory or even extensions of legal principles are involved. This case is a consumer case with a limited but important impact on the homeowners who fall into the class. After considering the risk of nonpayment as set forth above, the court finds that this case falls into a category best described as on the lower end of the moderate range for enhancement. Therefore, the court finds that a twenty percent enhancement of the lodestar is an appropriate enhancement in a fee shifting case of this nature.

The court in summary finds the lodestar to be \$188,550. The enhancement shall be twenty percent or \$37,700.10 for a total fee of \$226,260 plus out-of-pocket expenses of \$23,474.09,¹³ for a total judgment of \$249,734.09, payable by J.S. Hovnanian and Sons, LLC. Counsel for plaintiffs shall prepare a judgment consistent with this decision.

All Citations

Not Reported in A.2d, 2006 WL 1520751

Footnotes

- 1 The term air combustion refers to the amount of air or airflow into and out of an enclosed utility room that contains natural gas-burning appliances such as the home's heater or boiler, or gas clothes dryer. The applicable building codes have set standards to insure there is adequate ventilation to these appliances to prevent incomplete combustion and the buildup of various gases with their inherent dangers to the occupants of the home.
- 2 Actually, this reference in the December 7, 2005, letter was in error. Plaintiffs' counsel meant to say the *Central Record*. In response to a written inquiry by the court, Mr. DeNittis explained in his letter of January 24, 2006, that his earlier letter erroneously said the notice was published in the *Burlington County Times*, when in fact it was published in *The Central Record*.
- 3 This term refers to a regulatory interpretation approach to analyzing air combustion airflow, approved by the New Jersey Department of Community Affairs as part of the Stipulation of Settlement. This approach appears to provide more flexibility for finding compliance with the applicable construction code.
- 4 The quality of the description is not uniform, as will be discussed.
- 5 It should be noted that all three certifications are based on hourly rates of \$420 for Mr. Fuoco and \$257 for Mr. Osefchen.
- 6 This adjustment apparently does not consider which of the attorneys provided the services.
- 7 Even the potential repairs if a violation is found are not complex—replacing a door or a vent panel, for example.
- 8 Mr. Fuoco did not co-sign the certification for this application.
- 9 Because the contingent fee agreement was not provided the court, it is unclear as to whether both firms are parties to the agreement.
- 10 According to their letterhead, the Shabel firm is located in the adjoining community to the Hovnanian development.
- 11 While obviously a mistake, the March 29 entry of Mr. Shabel for the one hour conference with Mr. DeNittis actually states it was a conference with "Norman Shabel."
- 12 There is no explanation as to why they selected ten percent as opposed to a different percentage.
- 13 Defendant's counsel posed no objection to these costs and they appear to the Court to be appropriate.

Exhibit C

2007 WL 2085357

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Robert A. JONES, o/b/o himself and
all others similarly situated, Plaintiff,

v.

COMMERCE BANCORP, INC.;
Commerce Bank, N.A., Defendants.

Civil No. 05-5600 (RBK).

1

July 16, 2007.

Attorneys and Law Firms[Joseph A. Osefchen](#), The Law Firm of Philip Stephen Fuoco,
[Philip Stephen Fuoco](#), Haddonfield, NJ, for Robert A. Jones.[Jordana Cooper](#), [Kit Applegate](#), Blank Rome, LLP, Cherry
Hill, NJ, for Commerce Bancorp, Inc., Commerce Bank, N.A.**OPINION**[KUGLER](#), United States District Judge.

*1 This matter comes before the Court on a motion by Plaintiff Robert A. Jones (“Plaintiff”) for preliminary approval of a proposed class action settlement. Specifically, Plaintiff moves for an order: (1) preliminarily approving the proposed class settlement; (2) certifying the settlement class for purposes of the proposed settlement; (3) directing that notice of the proposed settlement be given to members of the settlement class; and (4) setting a date for formal hearing on the proposed settlement. Defendants Commerce Bancorp, Inc. and Commerce Bank (collectively “Commerce” or “Defendant”) do not oppose the motion. For the reasons set forth below, the Court grants Plaintiff’s motion.

I. Background

Plaintiff states in the Second Amended Class Action Complaint (the “Complaint”) that five middle and upper-level Commerce Bank employees obtained confidential customer account information, including account numbers and balances, from the bank’s computer database and sold

the information to Orazio Lembo (“Lembo”). (Compl.¶¶ 11–14.) Lembo then sold this information to third parties, including as many as forty debt collection entities. (Compl.¶ 12.) The Hackensack Police Department arrested the involved Commerce employees on April 27, 2005. (Compl.¶ 11.) According to the police, the employees sold confidential information to Lembo over a four-year period. (Compl.¶ 15.) Lembo possessed confidential banking information of over a half a million bank customers, including numerous Commerce customers (Compl.¶ 16.)

The police told Commerce the names of its customers whose information Lembo possessed. (Compl.¶ 17.) Commerce then sent a form notice to affected customers, including Plaintiff, which stated that “confidential account information” may have been “inappropriately viewed or misused by former bank employees.” (Compl.¶ 18.) The notice did not mention that the arrested employees were actually current employees, that they obtained the confidential information from Commerce records, or that they resold the information to Lembo. (Compl.¶¶ 19–21.) Commerce did not offer to change account numbers, provide free checks, or provide credit monitoring services to customers with compromised accounts; rather, Commerce suggested these customers place a fraud alert on their credit reports. (Compl.¶¶ 22–24.)

Plaintiff alleges that Commerce had a legal duty to take reasonable steps to protect customer account information from unauthorized access, use, or distribution by Commerce employees and to promptly alert customers when this occurred. (Compl.¶ 25.) Plaintiff further alleges that Commerce failed to take adequate precautions to safeguard customer information. (Compl.¶ 27.)

Plaintiff alleges counts of negligence, invasion of privacy, breach of the common law duty of bank confidentiality, violation of the New Jersey Consumer Fraud Act, breach of contract, breach of express warranty, and violations of N.J.S.A. §§ 2A:38A-3 and 2A:38A-5. The proposed settlement stipulates that Commerce provide new bank account numbers, purchase new checks bearing the new account numbers, and purchase credit monitoring services to detect fraud on behalf of Plaintiff and the class he represents.

II. Preliminary Approval of Proposed Class Action Settlement

*2 Review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing. *In re Initial Pub. Offering Sec. Litig.*, 226 F.R.D. 186,

191 (S .D.N.Y.2005). Courts make a preliminary evaluation of the fairness of the settlement, prior to directing that notice be given to members of the settlement class. *In re Nasdaq Mkt. Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y.1997). Preliminary approval is not binding, and it is granted unless a proposed settlement is obviously deficient. *Cf. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir.2005) (quoting *Manual for Complex Litigation, Third*, § 30.42 (West, 1995)) (“A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.”); *In re Nasdaq Mkt. Makers Antitrust Litig.*, 176 F.R.D. at 102 (quoting *Manual for Complex Litigation, Third*, § 30.41 (West, 1995)) (“Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.”).

The standards for preliminary approval are met in this case. The proposed settlement appears to be the result of serious negotiation between counsel for Plaintiff and Defendant. Furthermore, Commerce agreed in the proposed settlement to provide virtually all of the relief sought in the Complaint. (Pl.'s Br. 7). The proposed settlement is thus clearly reasonable and does not present any obvious deficiency. Lastly, the proposed settlement does not appear to unreasonably favor class representatives or any segment of the class. The Court emphasizes that the reasonable amount of payments to the class representative and class counsel are subject to approval.

III. Certification of Settlement Class

Plaintiff moves, pursuant to [Federal Rule of Civil Procedure 23](#), to certify a settlement class of “all Commerce Bank Customers who received a form notice from Commerce Bank” informing them of a security breach of their confidential information.

1. Standard for Class Certification

- (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are

typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

- (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

...

- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

*3 [Fed.R.Civ.P. 23](#).

2. Class Certification

Plaintiff argues that the putative class in this case meets each of the four requirements of [Rule 23\(a\)](#) for class certification: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. In addition, Plaintiff argues, citing [Rule 23\(b\)\(3\)](#), that the action is maintainable because questions of law and fact common to the class predominate over questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Numerosity is satisfied because there are more than 1700 putative class members. There is no threshold number necessary to satisfy the numerosity requirement, but courts in this Circuit generally hold that classes of close to one hundred members are sufficient. *See Eisenberg v. Gannon*, 766 F.2d 770, 785–86 (3d Cir.1985) (“The allegation of more than [ninety] geographically dispersed plaintiffs met the numerosity requirement....”); *Weiss v. York*, 745 F.2d 786, 809 (3d Cir.1984) (determining that a ninety-two plaintiff class was sufficiently numerous to satisfy [Rule 23\(a\)\(1\)](#)); *Id.* at 809 n. 35 (stating that numbers exceeding one hundred will, with exception, sustain the numerosity requirement).

Here, the potential class is approximately seventeen times larger than classes considered sufficiently numerous by courts in this Circuit. Due to the size of the class, and because Defendant does not challenge certification under the numerosity requirement, Plaintiff satisfies numerosity.

Plaintiff further demonstrates commonality. To demonstrate commonality, plaintiff needs to show that “at least one common question of fact or law exists among the putative class.” *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir.2001). Class members do not need to share identical claims or claims arising from the same factual scenario. See *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 310–11 (3d Cir.1998) (stating that a finding of commonality does not require that all class members share identical claims); *Baby Neal v. Casey*, 43 F.3d 48, 57 (1994) (“[F]actual differences among the claims of the putative class members do not defeat certification.”). In this case, putative class members received the same letter, sent pursuant to the same circumstances. Because there is a common issue of law arising from the same factual scenario, and due to the fact that Defendant does not challenge commonality, Plaintiff satisfies the commonality requirement.

Likewise, Plaintiff satisfies the typicality requirement. A named Plaintiff's claims are typical where each class member's claims arise from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. *Robinson v. Metro–North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir.2001). The typicality requirement precludes certification of classes where the legal theory of the named plaintiff potentially conflicts with the legal theory of the absentees; it requires that common claims are comparably central to the named and absentee party claims. *Baby Neal*, 43 F.3d at 57. Typicality ensures that the interest of the class and class representative are aligned so that the latter works to remedy the injuries to the former. *Id.* Because Plaintiff's “essential legal claim” (that Defendant breached its legal duty to protect customer account information and to promptly alert customers when the security breach occurred) and the “factual matrix that suggests this claim” (the form letter itself) are the same as those of all plaintiffs in the proposed class, Plaintiff demonstrates typicality. See *Weiss v. York Hosp.*, 745 F.2d 786, 810 (3d Cir.1984). In addition, Defendant does not challenge typicality.

*4 Plaintiff further demonstrates adequacy of representation. Adequacy of representation is a two-part

inquiry that applies to both Plaintiff's counsel and Plaintiff. First, adequacy of representation asks whether plaintiff's attorney is qualified, experienced, and able to conduct the litigation. *In re Prudential*, 148 F.3d at 312 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 800 (3d Cir.1995)). Second, “it serves to uncover conflicts of interest between the named parties and the class they seek to represent.” *In re Prudential*, 148 F.3d at 312 (citing *Amchem Products v. Windsor*, 521 U.S. 591, 594 (1997)). In this case, Plaintiff shows that his attorneys are qualified, experienced, and generally able to conduct this litigation, and because Plaintiff shares the class interest in establishing that Commerce breached its legal duty, Plaintiff is an adequate class representative. As with the other prongs of the analysis, Defendant does not challenge the adequacy of representation.

Thus, Plaintiff establishes the [Rule 23\(a\)](#) elements of numerosity, commonality, typicality, and adequacy of representation. [Rule 23\(b\)\(3\)](#) requires the district court to make two additional findings: predominance and superiority. For class certification, common questions of law and fact must predominate over questions affecting only individual members. *In re Prudential*, 148 F.3d at 314 Furthermore, the class action device must be superior to all other available means of handling the litigation. *Id.* Class treatment is superior where individual claims are small or modest. *Id.* at 315. As to the element of predominance, Plaintiff argues that the class “was affected and treated uniformly and will be treated thus under the terms of the proposed settlement.” (Pl.'s Br. 10.) Plaintiff further points out that class action is the best method for this claim because “where, as here, the claims reflect a lack of monetary damages, superiority is readily satisfied.” (*Id.* .) There is no evidence that any litigation concerning this controversy, other than Plaintiff's individual complaint, has already commenced; further, there is no evidence that this forum is an undesirable one for the concentration of this litigation, or that the management of this class action would present any particular difficulties. In light of Defendant's failure to challenge these assertions, this Court holds that Plaintiff has met the predominance and superiority requirements under [Rule 23\(b\)\(3\)](#).

Because the proposed class meets the requirements of [Rule 23\(a\)](#) and [\(b\)\(3\)](#), the class is suitable for certification. However, a court that certifies a class must appoint class counsel. [Fed.R.Civ.P. 23\(g\)\(1\)\(A\)](#). In appointing class counsel, the court *must* consider “the work counsel has done in identifying or investigating potential claims in

the action,” “counsel's experience in handling class action and other complex litigation,” “counsel's knowledge of the applicable law,” and “the resources counsel will commit to representing the class.” Fed.R.Civ.P. 23(g)(1)(C) (i) (emphasis added). While Plaintiff's counsel does not specifically provide evidence of any of these considerations, the Court acknowledges that counsel possesses experience handling class actions and other complex litigation, counsel investigated potential claims and developed legal theories to support those claims, and counsel appears familiar with the applicable laws. See *Bristow v. Lycoming Engines*, No. 06–1947, 2007 WL 1752602, at *5 (E.D. Cal. June 15, 2007). Accordingly, this Court can appoint class counsel and certify the class.

III. Approval of Class Notice

*5 Plaintiff moves, pursuant to [Federal Rule of Civil Procedure 23](#), that this Court direct notice to all class members. The Court “must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.” Fed.R.Civ.P. 23(e)(B). Plaintiff submitted a proposed notice of class certification and settlement, with opt-out instructions, and a proposed claim form. The Court approves both documents.

The proposed class certification and settlement notice appears to give class members a fair opportunity to consider the proposed settlement and raise objections. The notice reasonably inform class members of: (1) appropriate information regarding the litigation, the class, the class representative, class counsel, and the essential terms of the settlement agreement; (2) appropriate information about counsel's forthcoming application for attorney's fees; (3) appropriate information about how to participate in the

settlement; (4) appropriate information about this Court's final approval procedure; and (5) appropriate information about how to challenge or opt-out of the settlement. See *Rosenburg v. IBM Corp.*, No. 06–00430, 2007 WL 128232, at *5 (N.D.Cal. Jan. 11, 2007). Furthermore, the objection process is spelled out in detail and the notice states with specificity that class members may object to the settlement, the class representative, the class counsel, the award of attorney's fees, and the award to the class representative. The notice is clear that class members need to complete a claim form to receive the benefits of the settlement, and the claim form adequately informs class members of the process they must follow. Lastly, the proposed distribution of notice to class members by first class mail is reasonable because no alternative method of distribution is more likely to notify class members who may not receive notice pursuant to the proposed distribution plan.

IV. Final Approval Hearing

The Court schedules a hearing to determine whether to grant final approval of the proposed settlement for Monday, October 15, 2007 at 9:30 AM.

IV. Conclusion

For the foregoing reasons, the Court grants Plaintiff's motion and preliminarily approves the proposed class action settlement, certifies the settlement class, directs that notice be given to members of the settlement class, and sets a date for the final settlement hearing.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2085357

Exhibit D

2006 WL 1652598

Only the Westlaw citation is currently available.

United States District Court,
E.D. California.Vicki WEST and Wendy Fagundes,
individually and on behalf of
others similarly situated, Plaintiffs,

v.

CIRCLE K STORES, INC., Defendant.

No. CIV. S-04-0438 WBS GGH.

I

June 13, 2006.

Attorneys and Law FirmsKelly Mcinerney, Kevin J. McInerney, Charles A. Jones,
Mcinerney & Jones, Reno, NV, for Plaintiffs.Jeffrey L. Kessler-Pro Hac Vice, Dewey Ballantine, New
York, NY, Matthew Walsh, Dewey Ballantine, Los Angeles,
CA, for Defendant.**MEMORANDUM AND ORDER RE: PRELIMINARY
MOTION TO APPROVE CLASS ACTION SETTLEMENT**

WILLIAM B. SHUBB, District Judge.

*1 Plaintiffs Vicki West and Wendy Fagundes¹ seek to bring a class action suit against defendant Circle K Stores, Inc. for alleged violations of the California Labor Code, Cal. Lab.Code §§ 226.7, 227.3, and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code §§ 17200-17210. Presently before the court is plaintiffs' motion for preliminary approval of settlement with defendants. For the following reasons, plaintiffs' motion is granted.

I. Factual and Procedural Background

On March 3, 2004, plaintiffs filed a class action complaint claiming that defendant failed to pay (1) overtime wages, (2) administrative leave wages, and (3) accrued but unused vacation wages, all in violation of state law. (Compl.¶ 17.) On July 15, 2005, this court granted in part plaintiffs' motion to amend their complaint. (July 15, 2005 Order at 2-3.) The amendments dropped some of the claims of one

proposed subclass (managers) and added Wendy Fagundes as a named plaintiff, representing an additional class of employees claiming that defendant failed to pay meal and break wages. (*Id.* at 3-4.)

On March 20, 2004, plaintiffs moved to certify two distinct classes based on their remaining claims: (1) a "meal period class" defined as "all hourly store employees employed by defendant in California since October 1, 2000, who did not receive off-duty meal periods" and (2) a "vacation class" defined as "all employees employed in California by defendant at any time since March 3, 2000, who forfeited accrued but unused vacation under defendant's vacation policy." (Pl.'s Mot. for Class Cert. 1.) However, before the court could hear that motion, the parties attended a day long mediation with Justice Richard Neal (retired) where they agreed to settlement terms. Accordingly, the parties now seek preliminary approval of their Joint Stipulation of Settlement and Release.

II. Discussion**A. Legal Standard**

The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992). Nevertheless, where, as here, "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.2003). In conducting the first inquiry, the court "must pay 'undiluted, even heightened, attention' to class certification requirements" because, unlike in a fully litigated class action suit, the court will not have future opportunities "to adjust the class, informed by the proceedings as they unfold." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998) (quoting *Amchem*, 521 U.S. at 620). "[T]he parties can[not] agree to certify a class that clearly leaves any one requirement unfulfilled" and consequently, the court cannot blindly rely on the fact that the parties have stipulated that a class exists for purposes of settlement. *Berry v. Baca*, No. CV 01-02069, 2005 WL 1030248, at *7 (C.D.Cal. May 2, 2005); see also *Amchem*, 521 U.S. at 622 (observing that nowhere does Rule 23 say that certification is proper simply because the settlement is fair). In the second part of its inquiry, the "court must carefully consider 'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing

that ‘[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness....’ “ *Staton*, 327 F.3d at 952 (quoting *Hanlon*, 150 F.3d at 1026); see also Fed.R.Civ.P. 23(e).

*2 Additionally, approval of a class action settlement takes place in two stages. See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 227 F.R.D. 553, 556 (W.D.Wash.2004) (noting that in the first stage of the approval process “the court preliminarily approve[s] the Settlement pending a fairness hearing, temporarily certifie[s] the Class ..., and authorize[s] notice to be given to the Class”). Accordingly, in this first order the court will only “determine[] whether a proposed class action settlement deserves *preliminary* approval” and lay the ground work for a future fairness hearing (see schedule below). *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D.Cal.2004). At that subsequent hearing, after notice is given to class members, the court will entertain any objections by putative class members to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement. *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir.1989) (holding that prior to approving the dismissal or compromise of claims containing class allegations, district courts must, pursuant to Rule 23(e), hold a hearing to “inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial”).² Following that fairness hearing, the court will make a final determination as to whether the parties should be allowed to settle a class action pursuant to the terms agreed upon. *DIRECTV, Inc.*, 221 F.R.D. at 525.

B. Certification of the Class

A class action must meet four prerequisites identified in Federal Rule of Civil Procedure 23(a), in addition to meeting the requirements of at least one of the three subdivisions of Federal Rule of Civil Procedure 23(b). See Fed.R.Civ.P. 23(a), (b). Additionally, although a district court has discretion in determining whether the moving party has satisfied each Rule 23 requirement, see *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *Montgomery v. Rumsfeldo*, 572 F.2d 250, 255 (9th Cir.1978), the court must conduct a rigorous inquiry before certifying a class, see *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403-05 (1977). As noted above, although the parties have stipulated that a class exists for purposes of settlement, this does not relieve the court of its duty to conduct this inquiry.

Typically, when parties settle before the class is certified, the court is denied adversarial briefs on the class certification issue. However, in this case the court is in a unique position, as the parties have already fully briefed a motion for class certification. Although defendant now agrees, at least for the purposes of settlement, that class treatment is appropriate, it composed a lengthy brief in opposition to plaintiffs' motion for certification. The court will therefore consider several of defendant's original arguments in deciding whether the issues in this case should be treated as class claims pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3).

1. Rule 23(a)

*3 Rule 23(a) restricts class actions to cases where:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These requirements are more commonly referred to as numerosity, commonality, typicality, and adequacy of representation. See Fed.R.Civ.P. 23(a); *Hanlon*, 150 F.3d at 1019.

a. Numerosity

Courts have not established a precise threshold for determining numerosity. See *Gen. Tel. Co. v. E.E.O.C.*, 446 U.S. 318, 330 (1980). However, a class consisting of one thousand members “clearly satisfies the numerosity requirement.” *Sullivan v. Chase Inv. Servs., Inc.*, 79 F.R.D. 246, 257 (N.D.Cal.1978). To evidence the vacation class size, plaintiffs offer excerpts from the depositions of Linda Prince and Robert Crandall, which support their claim that 1,752 employees forfeited accrued but unused vacation during the class period. (Mar. 20, 2006 Jones Decl. Ex. C (Prince Dep. 10:9-17); Ex. E (Crandall Dep. 55:13-57:2).) However, before defendant agreed to settle, it contended that this figure is not accurate because it includes employees who were not actually terminated, but rather were transferred to defendant's affiliated company (ConocoPhillips) following a sale of defendant's stock. While this may be true, in order to eliminate this segment of the vacation class, the court would have to consider the merits of the parties' legal arguments, which it cannot do at the class certification stage.³ See *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir.1975) (acknowledging that in accepting allegations regarding class

size, the resulting class order may be “speculative in the sense that the plaintiff may be altogether unable to prove his allegations”). Therefore, accepting plaintiffs’ alleged class size as true, and recognizing that the joinder of 1,752 plaintiffs would be impracticable, the court holds that the numerosity requirement is satisfied as to the vacation class.

Likewise, numerosity is also satisfied for the meal period class—a fact that defendant has never disputed. Since March 3, 2000, defendant has employed up to 14,000 hourly employees who might have claims for wrongfully withheld meal breaks. (Rodriguez Decl. ¶ 1.) Again, although courts have not established a precise number for the numerosity requirement, joinder of 14,000 people in a single case would clearly be impracticable.

b. Commonality

Rule 23(a) also requires that “questions of law or fact [be] common to the class.” *Fed.R.Civ.P. 23(a)(2)*. The Ninth Circuit construes commonality liberally. See *Hanlon*, 150 F.3d at 1019. It is not necessary that *all* questions of law and fact be common. “The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.” *Id.*

*4 Here, a significant common question exists as to whether the defendant, by policy or practice, failed to carry over accrued but unused vacation time from year to year on behalf of the class members. Had this case gone to trial, additional common legal issues would have included: 1) whether termination is necessary before the forfeiture of accrued but unused vacation time is unlawful; 2) whether, under *California Labor Code § 227.3*, transfer of ownership constitutes a termination of the employee relationship, requiring payment of all accrued but unused vacation; and 3) whether the defendant’s policy or practice of manually carrying over accrued but unused vacation time only upon request violates *California Labor Code § 227.3* as a “use it or lose it policy.” Such commonality among the class members, in issues of both law and fact, is sufficient to meet requisites of **Rule 23(a)(2)**.

Commonality with respect to the meal period class presents a closer question. The purpose of this class is to recover additional pay allegedly owed for missed meal breaks in violation of *California Labor Code § 226.7*. *Cal. Lab.Code § 226.7(b)* (requiring employers to pay employees “one additional hour of pay at the employee’s regular rate of

compensation for each work day that [a] meal or rest period[, as required by subsection a,] is not provided”). However, the California Code of Regulations further provides that “[a]n ‘on duty’ meal period [is acceptable] when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement [must] state that the employee may, in writing, revoke the agreement at any time.” *Cal.Code Regs. tit. 8, § 11070(11)(C)*.

At all times during the proposed the class period, defendant required employees to sign some form of “meal period agreement” (or waiver) that included the nature of the work exception. Nevertheless, defendant originally argued that evaluating the enforceability of the waiver would require an individual inquiry into the nature of each employee’s work on every shift where that employee missed a meal break. Depending on the traffic in a given store on a given shift, defendant argued, the nature of the work may have precluded an off-duty meal break, and these individual inquiries defeat commonality.

However, this argument would again involve the court in a determination of the merits of the case. The parties have not provided the court with any authority establishing that the nature of the work exception applies on a case-by-case, shift-by-shift basis. Indeed, such a rule would potentially eviscerate the protections provided by *California Labor Code § 226.7*, as every employer would defend against a claim of missed meal periods by arguing that, because of the nature of the employee’s work on that day, he was too busy to take a break. Instead, the exception was more likely provided to allow employers some relief when the nature of the work in their business overall does not permit a mid-shift meal break. Significantly, the court is also not aware of any authority establishing that the nature of the work in a convenience store qualifies for the **§ 11070(11)(c)** exception. Consequently, because the court cannot resolve this question without considering the merits of the case, the court must recognize that a potential and significant common question exists for the meal class.

c. Typicality

*5 **Rule 23(a)** further requires that the “claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” *Fed.R.Civ.P. 23(a)(3)*. Typicality requires that named plaintiffs have claims “reasonably coextensive with those of absent class members,” but their claims do not have to be “substantially identical.” *Hanlon*, 150 F.3d at 1020.

The test for typicality “is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D.Cal.1985)).

In this case, all putative vacation class members suffered the same injury when their accrued but unused vacation time was forfeited without compensation. The source of this injury arises from a similar policy or practice instituted by the defendant regarding the forfeiture of *accrued* but unused vacation.⁴ Moreover, there is no indication of uniqueness as to either defendant's conduct toward the named plaintiff or the injury suffered as a result of that conduct (allegedly, lost vacation time). Therefore, the requirement of typicality has been met.

The analysis is again somewhat more strained with respect to the meal period class. Defendant originally challenged recognition of Fagundes as the class representative because as a supervisor and a long term employee (nearly 11 years) in a business with nearly 100% turnover, her claims are arguably not typical. In particular, Fagundes, who signed an outdated meal period agreement, has additional grounds on which to challenge defendant's practices because her agreement lacks the “revokable at will clause” that is presently required by *Cal.Code Regs. tit. 8, § 11070(11)(C)*.

Nevertheless, “[w]hen the same unlawful conduct was directed at or affected both the named plaintiffs and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that underlie individual claims.” *Stephenson v. Bell Atl. Corp.*, 177 F.R.D. 279, 285 (D. N.J.1997) (citing *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir.1994); *Herbert Newberg & Alba Conte, Newberg on Class Actions* § 3.13, at 3-76, 3-77 (3d ed.1992)). Here, like those that served under her, Fagundes allegedly was improperly denied earned meal breaks in violation of *Cal. Lab.Code* § 226.7. Although she has an additional ground on which to attack defendant's policy, the court cannot say with certainty that this argument would succeed and that plaintiff would thus not need to “prove what others in the class must establish.” *Greeley v. KLM Royal Dutch Airlines*, 85 F.R.D. 697, 701 (S.D.N.Y.1980). This is not a case where the proposed class representative's legal arguments are completely distinct from those of an identifiable subset of the class. Rather, Fagundes' legal arguments are coextensive

with those of the class she proposes to represent. Therefore plaintiffs can satisfy the typicality requirement for the meal period class.

d. Adequacy of Representation

*6 Finally, *rule 23(a)* requires representative parties who “will fairly and adequately protect the interests of the class.” *Fed.R.Civ.P. 23(a)(4)*; see *Hanlon*, 150 F.3d at 1020. To resolve the question of legal adequacy, the court must answer two questions: (1) do the named plaintiff and her counsel have any conflicts of interest with other class members and (2) will the named plaintiff and her counsel vigorously prosecute the action on behalf of the class? *Hanlon*, 150 F.3d at 1020.

Defendant initially contended that the named plaintiff's duty to ensure some of the putative class members took their vacation days, while a supervisor in defendant's employ, represents a conflict of interest with non-supervisor class members. However, in those circumstances where a conflict of interest might exist, such a conflict will only bar certification when “the conflict is serious and irreconcilable.” *Mateo v. M/S Kiso*, 805 F.Supp. 761, 772 (N.D. Cal 1992); see also *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 335 (C.D.Cal.1998) (“[O]nly a conflict that goes to the very subject matter of litigation will defeat a party's claim of representative status.” (quoting 10B *Charles Alan Wright et al., Federal Practice and Procedure* § 1768, at 327-28 (3d ed.1998))). Here, the possible conflict of interest must implicate the *forfeiture* of vacation time, and it does not. Instead, the named plaintiff's alleged duty pertained to the *accrual and use* of vacation time, a subject not in dispute.

Further, the fact that plaintiff's employment with defendant ended in 2003 has no bearing on her adequacy as a class representative. To prove the elements associated with her forfeiture of accrued vacation time claim, West must necessarily engage in a course of litigation that will prove the elements of injury as to the entire class, including those members who were injured in 2004 and beyond. Significantly, defendant has not argued that it changed its policy or practice with respect to the *forfeiture and carrying over* of vacation during the time subsequent to the named plaintiff's termination.

Additionally, West has shown that her counsel is adequately experienced in class actions. (See Mar. 20, 2006 Jones Decl. ¶ 4.) As such, the court can safely assume that her counsel has vigorously sought to maximize the return on its labor and

to vindicate the injuries visited on the entire class. Therefore, the court holds that West is an adequate class representative.

Likewise, Fagundes does not have substantive conflicts with the proposed meal period class and therefore is an adequate representative for this group. Although in theory, as a supervisor in charge of scheduling meal breaks, Fagundes could be partially responsible for failing to provide meal breaks, the court is not aware of any source for such personal liability on the part of the employee with respect to Cal. Lab.Code § 226.7.⁵ Cf. *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App. 4th 949, 962-63 (2005) (holding that an employer's "obligation to provide the plaintiffs with an adequate meal period is not satisfied by [shifting responsibility to employees to take their meal breaks], because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" (quoting Wage Order applicable to the transportation industry)). Significantly, plaintiff acted in accordance with *defendant's* well established policies that left little room for discretion. (See, e.g., Mar. 20, 2006 Jones Decl. Ex. B (Farthing Dep. 90:20-91:14 (describing defendant's meal break policy and noting that employees *could* take an off-duty meal break *only* after January, 2003 *and only* if "there were two or more employees working *and* the nature of the business allowed" (emphasis added)).) The claims of her fellow class members will not be that *she* denied them their meal breaks, but rather that their breaks were denied pursuant to *defendant's* policies. These facts distinguish this case from the discrimination cases originally relied on by defendant, where supervisors were held to be inadequate representatives because they played a part in discriminatory practices that could be attributed to their employer. See *Wagner v. Taylor*, 836 F.2d 578 (D.C.Cir.1987); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558 (W.D.Wash.2001).

*7 Moreover, as noted by defendants, the Ninth Circuit has declined to adopt a per se rule prohibiting the representation of a subset of non-supervisory employees by supervisory employees. "[W]hether employees at different levels of the internal hierarchy have potentially conflicting interests is context-specific and depends upon the particular claims alleged in a case." *Staton*, 327 F.3d at 958. As with typicality, the question boils down to whether the supervisor's claims are coextensive with those of the non-supervisory employees. *Id.* Because the court has already made this determination in favor of plaintiffs, Fagundes can adequately represent the meal period class.

2. Rule 23(b)

An action that meets all the prerequisites of Rule 23(a) may be maintained as a class action only if it also meets the requirements of one of the three subdivisions of Rule 23(b). See *Eisen*, 417 U.S. at 163. In this case, plaintiff seeks certification of two independently represented classes under Rule 23(b)(3), "which is appropriate 'whenever the actual interests of the parties can be served best by settling their differences in a single action.'" *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1777 (2d ed.1986)). A class action may be maintained under Rule 23(b)(3) if (1) "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting individuals members," and (2) "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

a. Predominance

Because the Rule 23(a)(3) already considers commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues. *Hanlon*, 150 F.3d at 1022. Here, defendant originally contended that differences among the class members in vacation accrual caps, vacation accrual rates, and the ability to take vacation days raise individual issues that predominate any common legal or factual issues. (Def.'s Opp'n to Class Cert. 37-39.) However, differences in accrual caps and rates are quantitative measures that are irrelevant to the appropriate overarching liability question: whether the defendant's employment agreements amount "to an impermissible 'use or lose it' policy or a valid 'no additional accrual' policy" under California Labor Code § 227.3. *Boothby v. Atlas Mech., Inc.*, 6 Cal.App. 4th 1595, 1603 (1992); Cal. Labor Code § 227.3. Because of the uniform language among the several vacation policies, and the alleged uniform implementation of these policies, common issues of law and fact would predominate if this case were to go to trial.⁶ (See Farthing Decl. Exs. A-C.) Importantly, individual differences in accrual caps, accrual rates, and amount of vacation time accrued would have pertained to damages only and individual issues regarding damages will not, by themselves, defeat certification under Rule 23(b)(3). See *Blackie*, 524 F.2d at 905-09 ("Courts have generally declined to consider conflicts, particularly as they regard to damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit.").

*8 Likewise, assuming, as the court has, that the nature of the work exception is intended to apply to the nature of the work in general and not the circumstances on any given shift, common claims would have predominated in the meal period class action as well. Individual matters, such as whether a putative class member worked long enough to qualify for a meal break and whether she was permitted to take the earned break, as in the vacation class, would relate only to damages. The predominant issue, and one appropriate for class treatment, is whether defendant's policies, which routinely resulted in employees having to take on-duty meal "breaks," were lawful.

b. *Superiority*

In addition to the predominance requirement, [Rule 23\(b\)\(3\)](#) provides a non-exhaustive list of matters pertinent to the court's determination that the class action device is superior to other methods of adjudication. See [Fed.R.Civ.P. 23\(b\)\(3\)\(A\)-\(D\)](#). These matters include:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

Id. Some of these factors, namely (D) and perhaps (C), are irrelevant if the parties have agreed to a pre-certification settlement. [Amchem](#), 521 U.S. at 620. Additionally, the court is unaware of any concurrent litigation regarding the issues of the instant case. In the absence of competing lawsuits, it is also unlikely that other individuals have an interest in controlling the prosecution of this action or other actions, although objectors at the fairness hearing may reveal otherwise. As it stands today however, the class action device appears to be the superior method for adjudicating this controversy. As such, the vacation class is properly maintained under [Rule 23\(b\)\(3\)](#).

The superiority consideration also favors certification of the meal period class, despite the availability of an informal wage claim processing service provided by the Division of Labor Standards Enforcement ("DLSE") (especially in light of the fact that the parties have settled the case). The administrative

hearing option (a "Berman hearing") described by defendant in its opposition to class certification "is conducted 'in an informal setting preserving the right [s] of the parties' and 'is designed to provide a speedy, informal, and affordable method of resolving wage claims.'" [Lolley v. Campbell](#), 28 Cal.4th 367, 372 (2002) (quoting Cal. Lab.Code § 98(a) and [Cuadra v. Millan](#), 17 Cal.4th 855, 858 (1998)). Claimants need only submit a form to initiate the process. Cal. Lab.Code § 98(a). However, the procedure is not necessarily as quick and easy as defendants describe it. Notably, successful claimants will need to participate in a hearing or mediation where their employer will undoubtedly be represented by counsel. *Id.* Additionally, the Commissioner has discretion to delay a proceeding and there is an appeals process that might further delay recovery. *Id.*; Cal. Lab.Code § 98.2 (requiring that appeals be taken to a California Superior Court).

*9 While these procedures might nevertheless be preferable to a protracted class litigation, in light of the fact that the parties here have proposed a settlement procedure that will allow for virtually dispute-free claims to be processed in a matter of months with minimal involvement on the part of the claimant or the government, permitting the parties to proceed with class certification and settlement seems to be the superior approach. Additionally, the fact that claimants/class members might not be able to recover the exact number of meal breaks missed and will sacrifice some of their recovery to attorneys' fees must be weighed against the fact that the settlement reaches back farther than the DLSE proceedings would permit. Given these circumstances, a meal period class action presents a superior method for pursuing the claims at issue here and certification is proper under [Rule 23\(b\)\(3\)](#).

C. *Fairness, Adequacy, and Reasonableness of Proposed Settlement*

Having determined that class treatment appears to be warranted,⁷ the court must now address whether the terms of the parties' settlement are fair, adequate, and reasonable. In conducting this analysis, the court must balance several factors including:

the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental

participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026. *But see Molski v. Gleich*, 318 F.3d 937, 953-54 (9th Cir.2003) (noting that a district court need only consider *some* of these factors—namely those designed to protect absentees). Given that some of these factors cannot be fully assessed until the court conducts its fairness hearing, “a full fairness analysis is unnecessary at this stage...” *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, No. 04-2195, 2006 WL 1367414, at *7 (E.D.N.Y. May 18, 2006). Accordingly, the court will simply conduct a cursory review of the terms of the parties' settlement for the purpose of resolving any glaring deficiencies before ordering the parties to send the proposal to class members.

1. Terms of the Settlement Agreement

The key terms of the stipulation and settlement are as follows:

1. Class Definitions: the meal period class is defined as “All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement.” The vacation class is defined as “All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year.” The agreement excludes from the class employees of franchises who do/did not actually work for defendant Circle K Stores, Inc. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 6).)

*10 2. Settlement Amount: Defendant agrees to a “total payout” settlement of five million dollars (\$5,000,000). Of this amount, three million eight hundred thousand dollars (\$3,800,000) is allocated to the meal period class and one million two hundred thousand dollars (\$1,200,000) is allocated to the vacation class. (*Id.* ¶ 16.)

3. Deductions: attorneys' fees (up to 30%), plaintiffs' costs (up to \$25,000), “service payments” to the class representatives (up to \$15,000 each), and claims administration costs (up to \$150,000) will be deducted from defendant's total liability of \$5,000,000. With the exception of the service payments, the meal period class will bear 76% of these costs and fees; the vacation class will bear the remainder. (*Id.* ¶ 15(d).)

4. Award Allocations: Meal period class members who file timely claims will receive a proportionate share of the

\$3,800,000 class settlement amount, minus costs, fees, and service payments. A member's share will be based on the number of weeks she worked for defendant during the class period and this number will be determined based on the total number of days worked divided by seven. (*Id.* ¶ 15(d)(i)(a).) The parties estimate that this approach will at a minimum yield an \$8 per week payment for each class member, resulting in payments in excess of \$2,600 for employees that worked throughout the entire class period. (P. & A. in Supp. of Mot. for Prelim. Approv. 8.) Vacation class members who file timely claims will likewise receive a proportionate share of the \$1,200,000 class settlement amount, minus costs, fees, and service payments. After all claims are filed, the vacation class award will be divided by the number of claimed vacation hours, yielding a per hour payment. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 15(d)(i)(b)).) The parties anticipate that this will result in at least a \$13 per hour payment for employees who, on average, were making \$7 per hour. (P. & A. in Supp. of Mot. for Prelim. Approv. 8-9.)

5. Claims Procedures: Members of each class will receive two forms sent out by the Claims Administrator, Rosenthal & Company LLC. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶¶ 15(d)(ix), 22(h)).) One will be a preprinted Class Claims Form that, based on defendant's records, will establish either the number of weeks worked (for meal period class members) or the number of vacation days owed (for vacation class members). (*Id.* ¶ 15(d)(ix)(a)-(b).) Class members will also receive a Request for Exclusion Form that will advise them on how to opt out of the class action settlement. (*Id.*) These forms will be sent, along with a notice announcement detailing the history of this litigation and further explaining the terms of the settlement, no more than twenty (20) days from the date of this order. (*Id.* ¶ 18(c).) Class members will have sixty (60) days from the date that notice is mailed to submit a claim and forty-five (45) days to request exclusion (in other words, to opt out). (June 1, 2006 Jones Decl. Ex. D (Proposed Notice).) Payments to class claimants will be mailed by the claims administrator within twenty (20) days of the final approval of the settlement. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶ 20).)

*11 6. Release: Class members who do not opt out of the class action, even if they do not file a claim, are forever barred from bringing claims for failure to provide meal

or rest breaks from October 1, 2000 until this settlement is finally approved, and from bringing claims for failure to annually carry over accrued but unused vacation from March 3, 2000 until this settlement is finally approved. (June 1, 2006 Jones Decl. Ex. D (Proposed Notice).) The release does not cover employees who did not actually work for defendant, but rather worked for a franchisee. Additionally, the release does not apply to claims arising after December 2003 against ConocoPhillips (which sold defendant Circle K Stores, Inc. through a stock sale in December 2003 and absorbed some of defendant's existing employees through "migration"). (*Id.*; Apr. 7, 2006 Jones Decl. Ex. F (Prince Dep. 74:8-75:3).)

2. Preliminary Determination of Adequacy

Again, at this preliminary approval stage, the court need only "determine whether the proposed settlement is within the range of possible approval." *Gautreaux v. Pierce*, 690 F.2d 616, 621 n. 3 (7th Cir.1982) (quotation marks omitted). The court is really only concerned with "whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys...." *Tenuto v. Transworld Sys., Inc.*, No. CIV. 99-4228, 2001 WL 1347235, at *1 (E.D. Pa. Oct. 31, 2001).

Accordingly, it is sufficient to note that the stipulation and settlement appear to be, for the most part, the result of vigorous, arms-length bargaining. Counsel for both parties have been actively engaged in this litigation for over two years and have diligently pursued the necessary discovery. Significantly though, despite having a factually well-developed case, both sides still face significant uncertainty because the claims (in particular the meal period class claim) encompass unsettled legal issues. These circumstances and attendant risks favor settlement. *Hanlon*, 150 F.3d at 1026.

Additionally, the terms of the settlement provide for significant recovery for class members⁸ while at the same time offering a manageable approach to calculating awards. The proposed attorneys' fees, at no more than 30%, are also potentially within reason.⁹ Likewise, the detailed notice proposed by the parties clearly explains to class members what their options are and is more than adequate. See Fed.R.Civ.P. 23(c)(2) (requiring only "the best notice practicable under the circumstances" "[f]or any class certified under Rule 23(b)(3)"); *Churchill Vill., L.L.C. v. Gen. Elec.*,

361 F.3d 566, 575 (9th Cir.2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.' " (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir.1980))).

*12 The only aspect of the settlement and notice that gives this court pause is the proposed "service payment" for the class representatives. In addition to the right to file claim forms, the settlement proposes a \$15,000 "enhancement award" for each named plaintiff. The court recognizes that "a class representative is entitled to some compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action." *In re Oracle Secs. Litig.*, No. C-90-0931, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) (citing *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 571 (7th Cir.1992)). "Such payments, however, must be reasonable in light of applicable circumstances, and not 'unfair' to other class members." *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 368 (S.D.Miss.2003); see also *In re Oracle Secs. Litig.*, 1994 WL 502054 at *1 (reducing requested payment of \$2,500 to \$500 for spending "between two and five hours undergoing depositions and ... respond[ing] to a few narrow document discovery requests").

The proposed payment is not particularly unfair to other class members, given that it will not significantly reduce the amount of settlement funds available to the rest of the class. However, the court has no way of knowing whether the payments are reasonable in light of applicable circumstances because plaintiffs have provided only general and largely conclusory statements about their involvement. They have failed to account for the number of hours spent on this case and have not described any personal sacrifices they made on behalf of the class. Cf. *Nilsen v. York County*, 382 F.Supp.2d 206, 215 (D.Me.2005) (awarding incentive payments of up to \$6,500 to class representatives who "sacrificed their privacy to vindicate the privacy rights of the class members" by revealing in court documents and to the media that they had been subjected to illegal strip searches). Significantly, although Fagundes, who remains in defendant's employ, may have risked retaliation by her employer, the same cannot be said for West, who left Circle K in 2003.

Moreover, prior to settlement, both named plaintiffs declared that they "seek nothing for [themselves] in addition to the relief [they] seek on behalf of the class as a whole." (Mar. 20, 2006 Jones Decl. Ex. N (Fagundes Decl. ¶ 9), Ex. P (West

Decl. ¶ 7).) This change in the relief sought by plaintiffs, and the fact that it is roughly six times the amount they would likely receive as ordinary class members pursuant to the terms of their own settlement, raises the specter that the named plaintiffs have been “bought out” to circumvent a more costly class action litigation. At the fairness hearing, based on detailed evidence of plaintiffs' involvement in this case, the court will determine what portion of this amount is actually justified.¹⁰

In all other respects, the court preliminarily finds that the stipulation and terms of parties' settlement are acceptable.

***13** IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary approval of settlement be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that

(1) the following classes be provisionally certified for the purpose of settlement in accordance with the terms of the stipulation: (a) All hourly employees employed by Circle K Stores, Inc. in the state of California from October 1, 2000 through the date the Court grants preliminary approval of this Settlement; and (b) All employees employed by Circle K Stores, Inc. in the state of California from March 3, 2000 through the date the Court grants preliminary approval of this Settlement who did not have all their accrued but unused vacation carried forward from year to year.

(2) if the stipulation does not receive the court's final approval, should final approval be reversed on appeal, or should the stipulation otherwise fail to become effective for any reason (including any party's exercise of a right to terminate under the stipulation), the court's grant of certification of the class shall be vacated and become null and void without further action or order of the court.

(3) the stipulation and the settlement provided therein are preliminarily approved as fair, reasonable, and adequate within the meaning of [Federal Rule of Civil Procedure 23](#), subject to final consideration at the fairness hearing provided for below.

(4) for purposes of the stipulation and carrying out the terms of the settlement only:

a. Vicki West is appointed as the representative of the vacation class.

b. Wendy Fagundes is appointed as the representative of the meal period class.

c. the law firm of McInerney & Jones is appointed as lead counsel for the classes and shall be responsible for the acts and activities necessary or appropriate to present this stipulation and the proposed settlement to the court for approval and, if the settlement is finally approved, to implement the settlement in accordance with the terms of the stipulation and orders of the court.

(5) Rosenthal & Company LLC, 300 Bel Marin Keys Boulevard, Novato, California, is hereby approved and appointed as the Claims Administrator to carry out the duties of the Claims Administrator set forth in the stipulation.

(6) the form and content of the Notice of Settlement of Class Action (June 1, 2006 Jones Decl. Ex. D) is approved with the exception of section six, addressing scheduling matters related to the Final Settlement Approval Hearing. These provisions are modified as provided below in order line eleven.

(7) the form and content of the Class Claim Form (June 1, 2006 Jones Decl. Ex. E) is approved.

(8) the form and content of the Request for Exclusion Form (June 1, 2006 Jones Decl. Ex. F) is approved.

(9) no later than thirty (30)¹¹ days from the date of this order, the Claims Administrator shall cause a copy of the Notice, the Claim Form, and the Exclusion Form to be mailed by first class mail to all class members who can be identified through reasonable effort from defendant's records. Defendant is hereby ordered and directed to provide the Claims Administrator with class member information pursuant to the terms of the stipulation.

***14** (10) a hearing (the “Final Fairness Hearing”) shall be held before this court on October 16, 2006 at 1:30 p.m. in Courtroom 5 to determine whether the proposed settlement, on the terms and conditions set forth in the stipulation, is fair, reasonable, and adequate and should be approved by the court; to determine whether a judgment as provided in the stipulation should be entered finally approving the settlement; and to consider class counsel's applications for attorneys' fees, reimbursement of costs, and service payments. The court may continue the Final Fairness Hearing without further notice to the members of the class.

(11) any person who has standing to object to the terms of the proposed settlement may appear at the Final Fairness Hearing in person or by counsel, if an appearance is filed as hereinafter provided, and be heard to the extent allowed by the court in support of, or in opposition to, (1) the fairness, reasonableness, and adequacy of the proposed settlement; (2) the requested award of attorneys' fees, reimbursement of costs, and service payments to class representatives; and/or (3) the propriety of class certification. To be heard in opposition, a person must, within forty-five (45) calendar days after notice is mailed, (a) serve by hand or through the mails written notice of his, her, or its intention to appear, stating the name and case number of this litigation and each objection and the basis therefor, together with copies of any papers and briefs, upon class counsel and upon counsel for defendant, and (b) file said appearance, objections, papers and briefs with the court, together with proof of service of all such documents upon counsel for the parties. Responses to any such objections and class counsel's application for attorneys' fees, reimbursement of costs, and class representative service payments shall be served by hand or through the mails on the objectors (or on the objector's counsel if any there be) and filed with the Clerk of this Court no later than fourteen (14)

calendar days before the Final Fairness Hearing. Objectors may file optional replies no later than one week before the Final Fairness Hearing in the same manner described above. Any settlement class member who does not make his, her, or its objection in the manner provided herein shall be deemed to have waived such objection and shall forever be foreclosed from objecting to the fairness or adequacy of the proposed settlement as memorialized in the stipulation, the judgment entered, and the award of attorneys' fees, expenses, and service payments unless otherwise ordered by the court.

(12) pending final determination of whether the settlement should be finally approved, the court preliminarily enjoins all class members (unless and until the class member has submitted a timely and valid Request for Exclusion Form) from filing or prosecuting any claims, suits or administrative proceedings (including but not limited to claims with the California DLSE) regarding claims to be released by the settlement.

All Citations

Not Reported in F.Supp.2d, 2006 WL 1652598

Footnotes

- 1 In their brief in support of their motion to certify the class, plaintiffs corrected the spelling of "Fagundes", which had previously been spelled "Fegundes."
- 2 Part of the reasoning in *Diaz* appears to have been overruled by the Supreme Court in *Amchem*. Namely, *Diaz* assumed that a court could approve settlement without certifying the class. See *Diaz*, 876 F.2d at 1408 ("Before certification, the dismissal is not res judicata against the absent class members and the court does not need to perform the kind of substantive oversight required when reviewing a settlement binding upon the class."). As the discussion above illustrates, however, this reasoning is incompatible with the Court's holding in *Amchem*.
- 3 In contesting the number of putative vacation class members, defendant originally argued that the law would not support plaintiff's claims. Namely, defendant contended that, under California law, forfeiture cannot occur absent a termination of employment and that a change in ownership does not effectively amount to termination. As noted above, these arguments speak directly to the merits of plaintiffs' claims. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir.1971))).
- 4 In opposing class certification prior to settlement, defendant originally argued that typicality is frustrated by the existence of four vacation policies encompassed by the class definition. (Def.'s Opp'n to Mot. for Class Cert. 35-36.) Specifically, defendant pointed out that two distinct vacation policies apply to store managers and two distinct vacation policies apply to store level employees. (Farthing Decl. ¶¶ 6-7.) However, a brief review of the policies suggests, at least as to the forfeiture or carrying over of *accrued* vacation time, that any differences among the policies are insignificant. (Compare Farthing Decl. Ex. A (Section V), with Farthing Decl. Ex. B (Section V) and Farthing Decl. Ex. C (Section V).) Distinctions regarding how vacation was accrued, and how much time an employee could store up, have no bearing on the typicality inquiry here.

- 5 Moreover, to permit employers to hold supervisors responsible for not taking their own meal breaks simply because of the position they hold, as defendant originally argued, would effectively deny supervisors the protections afforded by § 226.7. The court has not been advised of any authority suggesting that the law should be applied in this way.
- 6 In their reply to the defendant's opposition to certification, plaintiffs abandoned their assertion that defendant's vacation policies were "unfair and unreasonable because workloads and chronic understaffing precluded employees from taking vacation." (Pl.'s Reply to Def.'s Opp'n to Class Cert. 24.) Therefore, to the extent that this argument raised individual issues, that concern is no longer relevant.
- 7 The court notes that it has conducted a full analysis of the class certification question at this stage to determine early on if all of the effort that will necessarily go into preparing for the fairness hearing is appropriate. This initial determination that class certification is warranted is not, however, binding on the court and the parties are discouraged from changing their positions on the terms of the settlement in reliance on this order. The court is not required to make a final determination that class treatment is appropriate until the final settlement approval, and it therefore does not herein make that final determination. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir.1995) (holding that while the trustworthiness of the negotiation process used to approve the settlement can be relied on to justify provisional certification of a settlement class, "final settlement approval depends on the finding that the class met all the requisites of Rule 23"). Moreover, because the analysis of the superiority component of the Rule 23(b)(3) requirements depends in part on the terms of the settlement, the parties cannot assume that the court's class certification analysis would necessarily be the same if circumstances changed.
- 8 In particular, the settlement creates an opportunity for class members to file claims that might otherwise be time-barred.
- 9 The stipulation recognizes that counsel must still submit an application for attorneys' fees, which it will do prior to the fairness hearing, and that the ultimate award will be determined by the court based on that application. Depending on the form of plaintiffs' counsel's application, the amount could be less than 30%. See *Staton*, 327 F.3d at 968 (discussing awards of attorneys' fees in the context of a pre-certification class action settlement and noting that "[t]his circuit has established 25% of the common fund as a benchmark award for attorney fees." (quoting *Hanlon*, 150 F.3d at 1029)).
- 10 The Ninth Circuit has warned district courts that "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness," and consequently "[t]he settlement must stand or fall in its entirety." *Hanlon*, 150 F.3d at 1026. However, because the terms of the stipulation and settlement contemplate a service payment of "not more than", or "up to", \$15,000 per plaintiff "[s]ubject to [c]ourt approval", any modification of this award will be well *within* the terms of the agreement. (June 1, 2006 Jones Decl. Ex. A (Joint Stip. of Settlement & Release ¶¶ 15(d), (d)(xi)).)
- 11 The terms of the parties' stipulation and settlement provide for twenty (20) days. However, at oral argument the parties requested that the court provide the Claims Administrator with thirty (30) days to prepare and send out the appropriate forms.

Exhibit E



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March 14, 2017

Robert Fornes
 Sandler O’Neil Partners
 12 Chapel Avenue
 Jersey City/NJ/07305

Re: Porte Liberte Homeowners Association - Sims Claremont Terminal Report

Project Number 41713

Dear Mr. Fornes,

The Vertex Companies, Inc., (VERTEX) is pleased to provide this report summarizing our recent efforts on behalf of the Porte Liberte Homeowners Association (HOA). The Port Liberte HOA retained VERTEX to provide information and recommendations regarding impacts from operations at the Sims Claremont Terminal (Terminal) with the objective to protect HOA properties from significant adverse impacts from the Terminal site operations.

This report identifies regulatory permits that have been issued for operation of the Sims Claremont Terminal and summarizes interviews with the Corporate Safety, Health, Sustainability and Community Relations personnel at Sims Metal Management, New York regarding the Claremont Terminal site operations that may impact HOA properties, and site environmental monitoring and management actions that are in place or may be put in place that will support HOA objectives to ensure protection of HOA properties from significant impacts from operation of the Sims Claremont Terminal.

About Sims Metal

Management Website:
www.simsmm.com

Sims Metal Management is the world’s largest listed metal recycler with approximately 270 facilities and 6,600 employees globally. Sims’ core businesses are metal recycling and electronics recycling. The Company employs approximately 250 men and women at the Claremont Terminal from the Jersey City and the surrounding area.

The Sims Corporate mission includes objectives to manage their site in such a way as to protect neighboring communities and property from adverse impacts associated with their operations: They state, “Our core business of recycling expresses our inherent commitment to the environment. We are committed to conducting our business in a manner that

GLOBAL SHECS POLICIES

SIMS SUSTAINABILITY REPORT		2016
<p>COMMUNITY</p> <p>Sims is committed to being a respected, responsible corporate citizen by working constructively with our communities and other stakeholders in engaging in the honest and ethical conduct of our business.</p>	<p>OTHER ENVIRONMENT COMMITMENTS</p> <p>We are committed to conducting our business in a manner that protects the environment, supports the ecologically sound and sustainable use of resources and provides the minimization of waste and the</p>	

Our Global SHECS policies can be found on the Company’s website (www.simsmm.com).



Meetings Summary

- VERTEX informed Mr. Cunningham that the Port Liberte Home Owners Association (HOA) retained VERTEX to provide information and recommendations regarding impacts from operations at the Sims Claremont Terminal, and that the HOA objective is to take the steps necessary to protect HOA properties from significant adverse impacts from the Terminal site operations.
- Mr. Cunningham affirmed Sims Corporate commitment to being a respected, responsible corporate citizen, and working constructively with the HOA to manage their site in such a way as to protect the community and property from adverse impacts associated with their operations.
- Regarding what environmental programs Sims currently has in place to monitor and protect adjacent properties from being impacted by their operations, Mr. Cunningham replied that site operations currently do not include area air monitoring, except for periodic opacity observation for compliance with the facility Air Permit.
- Regarding whether Sims is considering or has planned additional measures to improve their site management to control of offsite impacts from their operations, Mr. Cunningham replied that they currently have nothing in the works in this regard.
- Regarding whether air monitoring data for perimeter site operations could be recorded and routinely reported to the HOA Board, Mr. Sims replied that he would review this question in house for a reply. Following this meeting, in a follow-up telephone communication on 3/2/2017 *Mr. Cunningham relayed that he had the opportunity to meet with Joe Payesko, President - East Region and relayed that Sims is interested in improving their lines of communication with the HOA and would be interested in receiving what monitoring HOA would propose for Sims to carry out that would satisfy the HOA interests.*

Concept Community Monitoring Program Elements

As requested, the following outlines conceptual elements for a community monitoring program.

As a large national business, Sims Metal Management has developed and implemented programs for monitoring and mitigating off-site impacts to the environment from their operations. For example, their Statewide Air Sampling and Analysis Plan for perimeter monitoring for their facilities in California.

VERTEX believes the focus of a site monitoring program should be fugitive air emissions generated from operations at the Claremont Terminal in order to prevent significant exposures at Porte Liberte HOA properties.

Sims Metal Management like other metal shredding facilities process end-of-life vehicles, appliances, and other forms of scrap metal to recover ferrous and non-ferrous metals for re-use in new metal products. The metal shredding process generates large amounts of metal shredder waste, which consists of plastics, rubber, glass, foam, fabrics, automobile fluids,

dirt, and residual metals. The metal shredding process can also potentially create significant amounts of fugitive air emissions.

As such, the Monitoring Program should be designed to ensure that concentrations of contaminants of potential concern (COPCs) from the perimeters do not exceed levels where HOA properties might be adversely impacted. These may include the measurements for the following:

- particulate matter (PM) in the form of total suspended particulates (TSP);
- PM less than 10 micrograms (μm) (PM₁₀);
- PM less than 2.5 μm (PM_{2.5});
- metals including aluminum, antimony, arsenic, barium, beryllium, cadmium, calcium, chromium, cobalt, copper, iron, lead, manganese, molybdenum, nickel, selenium, silver, tin, vanadium, and zinc, (metals may be run for each TSP, PM₁₀, and PM_{2.5} sample);
- asbestos;
- PCBs;
- odor
- noise
- wind speed and direction

Use of Data: The plan should contain an approach to be followed by Sims Metal Management for site control measures and perimeter air monitoring to document the environment in the vicinity of the work; and affirmative actions to be taken to prevent unacceptable levels of airborne contaminants to leave the Site based on this monitoring. The plan should describe use of the data generated during the air quality monitoring to determine when control measures are to be undertaken.

The preparation of a proposed Monitoring Program for submission to Sims Metal Management is above and beyond the current executed scope between Porte Liberte and VERTEX. However, VERTEX can prepare a proposal to Port Liberte detailing the level of effort required to prepare specific monitoring program requirements if requested.

An example plan outline for particulate air monitoring is provided in Attachment 3 to this report.

This report was prepared for the exclusive use of The Porte Liberte Homeowners Association and is not intended for any other purpose. Our report was based on observed site conditions and the information available at the time of our site visit. We reserve the right to amend this report and our conclusions if new information becomes available and revisions are necessary and warranted.

If you have questions or comments, please contact the undersigned at (781) 952-6000. We appreciate this opportunity to assist The Porte Liberte Homeowners Association.

Sincerely,

THE VERTEX COMPANIES, INC.

A handwritten signature in black ink, appearing to read 'C. Cooper', written over the printed name.

Clifford A. Cooper, CIH
Sr. Industrial Hygienist

Attachment 1, Permits Summary

Program

Air				
<u>PI ID</u>	<u>NAME</u>	<u>ACTIVE</u>	<u>ADDRESS</u>	<u>TYPE</u>
10079	SIMS METAL EAST LLC DBA SIMS METAL MGMT	Y	1 LINDEN AVE, Jersey City, NJ 07305	AIR
Hazardous Waste				
NJD041974981	SIMS METAL EAST LLC DBA SIMSMETAL MGT	Y	1 LINDEN AVE E, Jersey City, NJ 073054726	HW GENERATOR
NRG120000101	SIMSMETAL EAST-CLAREMONT TERMINAL	N	1 LINDEN AVE E, Jersey City, NJ 07305	HW GENERATOR
Lab Certification				
09014	SIMS METAL MANAGEMENT	N	1 LINDEN AVE, Jersey City, NJ 07305	NON-COMMERCIAL ENVIRONMENTAL LAB
Land Use				
0906-04-0004.3	HUGO NEU SCHNITZER EAST	Y	LINDEN AVE, Jersey City, NJ 07305	COASTAL AND LAND USE
0906-04-0004.2	HUGO NEU SCHNITZER EAST	Y	1 LINDEN AVE, Jersey City, NJ 07305	COASTAL AND LAND USE
0906-14-0015.1	SIMS METAL MANAGEMENT	Y	1 LINDEN AVE E, Jersey City, NJ 07305	COASTAL AND LAND USE
Right-to-Know				

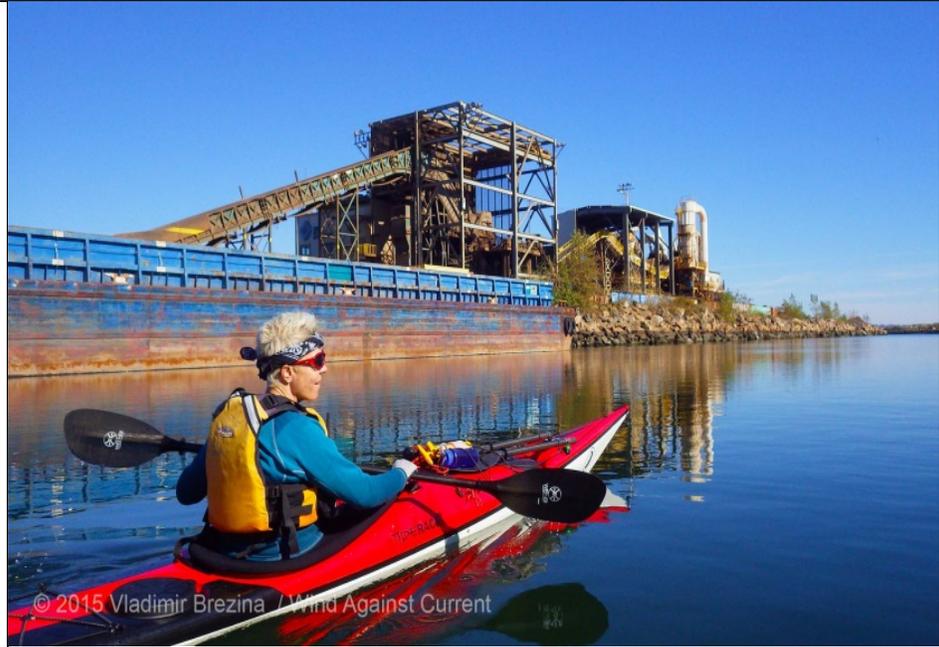
00000055221	SIMS MUNICIPAL RECYCLING OF NEW YORK LLC	Y	1 LINDEN AVE E, Jersey City, NJ 07305	POLLUTION PREVENTION/RIGHT TO KNOW
20904300000	SIMSMETAL EAST LLC	Y	ONE LINDEN AVE, Jersey City, NJ 07305	POLLUTION PREVENTION/RIGHT TO KNOW
Site Remediation				
005906	SIMS HUGO NEU EAST	Y	1 LINDEN AVE, Jersey City, NJ 07303	SRP-PI
Solid Waste				
223229	HUGO NEU SCHNITZER EAST	Y	LINDEN AVE EAST, Jersey City, NJ 07303	SOLID WASTE GENERATOR
205196	PROLERIZED SXHIABO NEU CO	N	441 FOOT OF LINDEN A, Sparrow Hill, NJ 07303	SOLID WASTE TRANSPORTER
134344	SIMSMETAL EAST CORP	Y	1 LINDEN AVE EAST, Jersey City, NJ 07305	SOLID WASTE FACILITY
Water Quality				
48756	SIMS METAL MGNT CLAREMONT TERMINAL FACILITY	Y	1 LINDEN AVE, Jersey City, NJ 07305	NJPDES

Activity Number	Status	Document Status Date	Permit Type	General Description of Application or Permit Type	Download PDF
PCP 120001	Approved	9/19/2016	Modification	This is a request for a permit from DEP to construct equipment and emit air contaminants from specific emission sources. The types of emission sources required to obtain this preconstruction permit are defined in New Jersey regulation, N.J.A.C. 7:27-8.2.	
PCP 120002	Approved	9/19/2016	Modification	This is a request for a permit from DEP to construct equipment and emit air contaminants from specific emission sources. The types of emission sources required to obtain this preconstruction permit are defined in New Jersey regulation, N.J.A.C. 7:27-8.2.	
PCP 130001	Renewed	3/04/2016	Modification	This is a request for a permit from DEP to construct equipment and emit air contaminants from specific emission sources. The types of emission sources required to obtain this preconstruction permit are defined in New Jersey regulation, N.J.A.C. 7:27-8.2.	
PCP 090002	Renewed	8/26/2014	Construction of New Source	This is a request for a permit from DEP to construct equipment and emit air contaminants from specific emission sources. The types of emission sources required to obtain this preconstruction permit are defined in New Jersey regulation, N.J.A.C. 7:27-8.2.	
GEN 080001	Renewed	2/07/2013	(GP-005) Emergency Generator	This is a General Permit, a pre-approved preconstruction permit which applies to a specific class of air pollution emission sources. By issuing a General Permit, the DEP indicates that it approves the activities authorized by the General Permit, provided that the owner or operator of the source registers with the Department and meets the requirements of the General Permit. The types of emission sources that are eligible to obtain a General Permit are listed at New Jersey regulation, N.J.A.C. 7:27-8.8.	
PCP 070004	Renewed	7/25/2012	Compliance Plan Change	This is a request for a permit from DEP to construct equipment and emit air contaminants from specific emission sources. The types of emission sources required to obtain this preconstruction permit are defined in New Jersey regulation, N.J.A.C. 7:27-8.2.	

Attachment 2 – Sims Claremont Facility Photos

Photograph: 1

Web Photo,
Claremont
Terminal



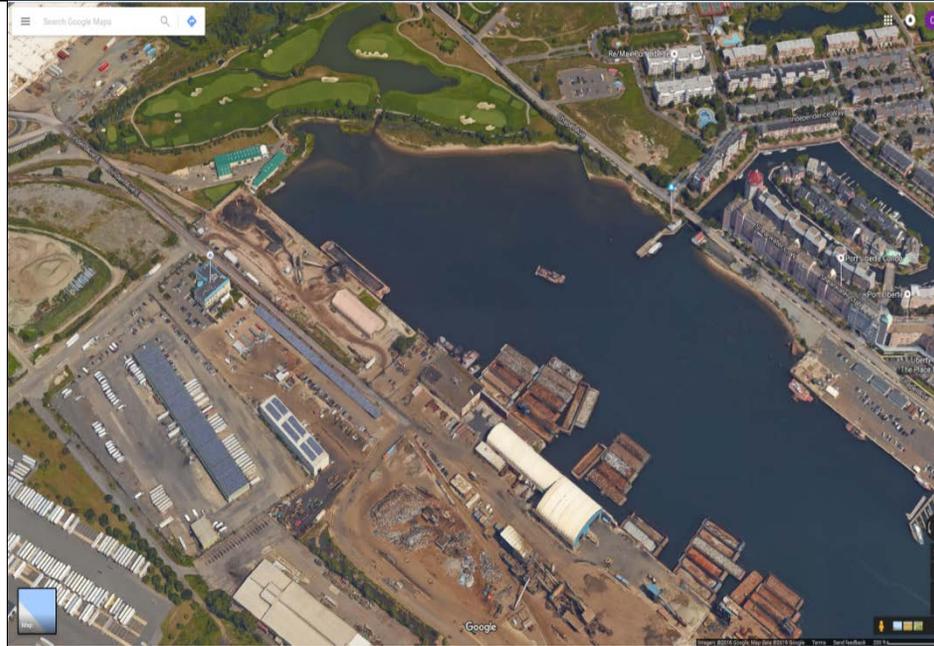
Photograph: 2

Web Photo,
Claremont
Terminal



Photograph: 3

Google Maps,
Claremont
Terminal



Photograph: 4

Web Photo,
Claremont
Terminal



Photograph: 5

Web Photo,
Claremont
Terminal

Depicts facility fire
that occurred at the
Claremont
Terminal Facility
on 8/20/2015.

Also, on May 27,
2016 Jersey City
firefighters put out
small metal fire at
Sims Metal
Management on
Linden Avenue
East in Jersey City.



Chopper 12 was overhead a fire at Sims Metal Management recycling plant in Jersey City. (August 20, 2013 5:50 PM)

Attachment 3
Concept Plan Outline for Particulate and Wind Monitoring

1. Monitoring Locations
 - a. Particulate Monitors
 - b. Wind Speed And Direction Data Monitoring
2. Stop Work/Work Modification Criteria For Monitors
 - a. Particulate Take Action Levels
 - b. Particulate Stop Work Levels
 - c. Wind Take Action Levels
 - d. Wind Stop Work Levels
3. Perimeter Air Samples Collected For Laboratory Analyses
 - a. Metals Analyses
 - b. Metals Concentrations Take Action Levels
 - c. Metals Concentrations Stop Work Levels
4. Notifications
5. Reports
6. Quality Assurance / Quality Control
7. Points Of Contact

Begin forwarded message:

From: Fred Cornell <Fred.Cornell@simsmm.com>
Subject: RE: Blasts
Date: February 6, 2009 at 6:50:15 PM EST
To: [REDACTED]
Cc: Daniel Nunes

Thank you for contacting me about this. I copied Mr. Nunes on the email, our new facility manager.

I am investigating it to find out what happened. We have a log that is supposed to be completed when this sort of thing occurs. The log was blank, so I am not sure what happened. I need to talk to night management.

You are right, this is unacceptable and we will address it immediately.

Either me or Mr. Nunes will get back to you with the results of our investigation on Monday at the latest.

One last thing, if this happens in the future, please call our hotline at 201-324-3732.

Thank you,

Fred Cornell
Regional SHEC Director
Sims|Metal Management
1 Linden Avenue, East
Jersey City, NJ 07305
201.577.3219
Fax: 201.333.4296
Cell: 201-739.9687
fred.cornell@simsmm.com
www.simsmm.com

From: [REDACTED] [REDACTED]@comcast.net]
Sent: Friday, February 06, 2009 6:13 PM
To: Fred Cornell
Subject: RE: Blasts

I am complaining about the non stop explosions last night and this morning from your facility.

These are illegal. You are supposed to insure all gas tanks and propane tanks are empty and have installed safeguards to mitigate these explosions.

There were at least five last night. This is unacceptable.

What are you doing about it?

From: Fred Cornell [<mailto:Fred.Cornell@simsmm.com>]
Sent: Friday, February 06, 2009 5:45 PM
To: Steve Shinn; [REDACTED]@comcast.net; Michael Henderson
Subject: RE: Blasts

Steve – can you read her email?

Fred Cornell
Regional SHEC Director
Sims|Metal Management
1 Linden Avenue, East
Jersey City, NJ 07305
201.577.3219
Fax: 201.333.4296
Cell: 201-739.9687
fred.cornell@simsmm.com
www.simsmm.com

From: Steve Shinn
Sent: Friday, February 06, 2009 11:07 AM
To: [REDACTED]@comcast.net; Michael Henderson; Fred Cornell
Subject: Re: Blasts

[REDACTED],

I currently work in the SF bay area. I have copied others in your area who will respond to your concerns. Thank you.

Steve

From: [REDACTED]
To: Steve Shinn
Sent: Fri Feb 06 10:47:41 2009
Subject: Blasts
Hello

I live in Port Liberte. The illegal blasts were non stoop last night. What are you doing to stop this?

Thank you



Port Liberte

Feb 6, 2009

Exhibit F

2007 WL 128232

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Francisco Division.

Thomas ROSENBURG et al., on
behalf of themselves and classes of
those similarly situated, Plaintiffs,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION, Defendant.

No. CV06–00430PJH.

1

Jan. 11, 2007.

Attorneys and Law Firms

James M. Finberg, Eve H. Cervantez, Jahan C. Sagafi, Lief Cabraser Heimann & Bernstein LLP, David A. Lowe, Kenneth John Sugarman, Steven Gary Zieff, Rudy Exelrod & Zieff LLP, San Francisco, CA, Adam T. Klein, Justin M. Swartz, Piper Hoffman, Outten & Golden LLP, Rachel Geman, Lief, Cabraser, Heimann & Bernstein, LLP, New York, NY, Claire Kennedy-Wilkins, Todd Jackson, Lewis, Feinberg, Renaker & Jackson, Oakland, CA, David Borgen, Roberta L. Steele, Goldstein, Demchak, Baller, Borgen & Dardarian, Oakland, CA, J. Braziel Derek, Lee & Braziel, LLP, Dallas, TX, Rebecca Sobie, Attorney at Law, Robert Ira Spiro, Spiro Moss Barness Harrison & Barge LLP, Los Angeles, CA, Richard Burch, Bruckner Burch, PLLC, Houston, TX, for Plaintiffs.

Aaron L. Agenbroad, Donna M. Mezias, Jones Day, San Francisco, CA, Alison B. Marshall, Glen D. Nager, Jones Day Reavis & Pogue, James E. Gauch, Washington, DC, Marla S.K. Bergman, Meir Feder, Wendy C. Butler, New York, NY, Matthew W. Lampe, Jones Day, Columbus, OH, for Defendants.

ORDER (1) CONDITIONALLY CERTIFYING SETTLEMENT CLASSES AND COLLECTIVE ACTION, (2) GRANTING PRELIMINARY APPROVAL TO PROPOSED CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION, (3) DIRECTING DISSEMINATION OF NOTICE AND CLAIM FORM TO THE CLASS, (4)

APPROVING RELEASES AND (5) SETTING DATE FOR FAIRNESS HEARING AND RELATED DATES

PHYLLIS J. HAMILTON, J.

*1 After discovery and two mediation sessions, and notwithstanding their adversarial positions in this matter, Plaintiffs and IBM (collectively, the “Parties”) negotiated a settlement of this litigation. The terms of the proposed settlement (“Settlement”) are set forth in the proposed Joint Stipulation of Settlement and Release of All Claims (“Settlement Agreement,” attached hereto as Exhibit 1).

On November 22, 2006, Plaintiffs filed a Motion For Order Conditional Certifying Settlement Classes, Preliminarily Approving Class Action Settlement, Approving Notice and Releases, and Setting Fairness Hearing (“Motion”). In their Motion, the Plaintiffs requested that this Court grant conditional certification of a nationwide settlement class and certain settlement subclasses, together with a co-extensive FLSA collective action. Plaintiffs also requested that the Court grant preliminary approval to the Settlement Agreement, including the plan of allocation in that Agreement, and that the Court approve a proposed Notice of Proposed Settlement of Class Action Lawsuit and Fairness Hearing (“Class Notice,” attached hereto as Exhibit A to the Settlement Agreement), a proposed Opt–Out Statement (attached hereto as Exhibit B to the Settlement Agreement), a proposed Claim Form (attached hereto as Exhibit C to the Settlement Agreement), and individual releases to be signed by Plaintiffs Thomas Rosenburg, James Baxter, Robert Carlo, Alan Erece, Marcia Howie, Fnu Kennedy, Vincent Letizio, Sherry Mattson, Steve Park, Michelle Peel, Denise Rambsel, Exaldo Topacio, Laurence Tosi III, Robin Daniels, Rebecca Taylor, and Frank Vasterling (attached hereto as Exhibit E to the Settlement Agreement). Having reviewed the Settlement Agreement and Motion, along with the Parties’ prior submissions in this matter, the Court now FINDS, CONCLUDES, AND ORDERS as follows:

I. Background

Thomas Rosenburg, James Baxter, Robert Carlo, Alan Erece, Marcia Howie, Fnu Kennedy, Vincent Letizio, Sherry Mattson, Steve Park, Michelle Peel, Denise Rambsel, Exaldo Topacio, Laurence Tosi III, Robin Daniels, Rebecca Taylor, and Frank Vasterling (“Plaintiffs”) contend that IBM misclassified certain employees as exempt from the overtime requirements of the Fair Labor Standards Act and various state laws. Specifically, Plaintiffs assert that, on

behalf of themselves and a proposed class and subclasses of persons alleged to be similarly situated, IBM violated federal and state wage laws by failing to pay overtime, during specified time periods, to employees holding positions at IBM that the Company coded as 498Q (bands 6–8), 498R (bands 6–8), 498S (bands 6–8), 498T (bands 6–8), 498U (bands 6–8), 499A (bands 6–8), 4325, 5343, 5338, and 594J (bands 6–8). Plaintiffs also contend that, due to this alleged misclassification, IBM violated the Employee Retirement Income Security Act by denying certain benefit credits allegedly due based upon employees' purported overtime hours. IBM has disputed, and it continues to dispute, Plaintiffs' allegations in this lawsuit, and the Company denies any liability for any of the claims that have or could have been alleged by Plaintiffs or the persons that they seek to represent.

II. Definition Of The Settlement Class And Subclasses

*2 The Parties have entered into the Settlement Agreement solely for the purposes of compromising and settling their disputes in this matter. As part of the Settlement Agreement, IBM has agreed not to oppose, for settlement purposes only, conditional certification of the following settlement class and subclasses:

1. *The Class.* The Class includes: (1) all current and former IBM employees who are or were employed by IBM in a Covered Position Code at any time during the Covered Period, and (2) to the extent that they are not included in part (1) of this definition, current and former IBM employees who participated in the United States Department of Labor, Wage Hour Division, Compliance Actions, Case Nos. 1325099 and 1283294.

2. *The California Subclass.* The California Subclass includes: all current and former IBM employees who are or were employed by IBM in a Covered Position Code in California at any time during the Covered Period applicable to persons employed in that State.

3. *The Kentucky Subclass.* The Kentucky Subclass includes: all current and former IBM employees who are or were employed by IBM in a Covered Position Code in Kentucky at any time during the Covered Period applicable to persons employed in that State.

4. *The New York Subclass.* The New York Subclass includes: all current and former IBM employees who are or were employed by IBM in a Covered Position Code in New York at any time during the Covered Period applicable to persons employed in that State.

For purposes of these definitions, the term “Covered Position Code” means the positions at IBM that the Company coded as 498Q (bands 6–8), 498R (bands 6–8), 498S (bands 6–8), 498T (bands 6–8), 498U (bands 6–8), 499A (bands 6–8), 4325, 5343, 5338, and 594J (bands 6–8). The term “Covered Period” means: (A) for employees who worked in Covered Position Codes in New York, January 24, 2000 to the date of the Order Granting Preliminary Approval of Settlement; (B) for employees who worked in Covered Position Codes in Kentucky, October 2, 2001 until the date of the Order Granting Preliminary Approval of Settlement; (C) for employees who worked in Covered Position Codes in California, from January 24, 2002 to the date of the Order Granting Preliminary Approval of Settlement; (E) for employees who worked in Covered Position Codes in Illinois and Minnesota, from March 13, 2003 to the date of the Order Granting Preliminary Approval of Settlement; and (F) for employees who worked in Covered Position Codes in all other states, from April 19, 2003 to the date of the Order Granting Preliminary Approval of Settlement.

On behalf of the Class, based on allegations that they were misclassified as exempt from overtime pay requirements, Plaintiffs assert claims for overtime pay under the FLSA and the laws of various states, and claims for benefit credits under ERISA. On behalf of the California Subclass, based on allegations that they were misclassified as exempt, Plaintiffs assert claims for overtime and premium payments, missed meal breaks, waiting time penalties, recordkeeping violations and a violation of the Unfair Competition Law. On behalf of the Kentucky Subclass, based on allegations that they were misclassified as exempt, Plaintiffs assert claims for overtime pay and recordkeeping violations. On behalf of the New York Subclass, based on claims that they were misclassified as exempt, Plaintiffs assert claims for overtime pay and spread-of-hours pay.

III. Designation Of The Class As An FLSA Collective Action

*3 The Court finds that the members of the Class are similarly situated within the meaning of Section 216(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), for purposes of determining whether the terms of settlement are fair. Accordingly, the Court conditionally certifies the Class as an FLSA collective action. The Court authorizes the Notice, Exhibit A to the Settlement Agreement, to be mailed to potential members of the FLSA collective action, notifying them of the pendency of the FLSA claim, and of their ability to joint their claims. Putative members of the FLSA collective

action who wish to join that claim must sign the Claim Form, Exhibit C to the Settlement Agreement, and return it by mail to the Claims Administrator, such that it is received by the Claims Administrator within 70 days of the mailing of the Notice and Claim Form.

IV. Rule 23 Certification of the Class And Subclasses

In examining potential conditional certification of the nationwide settlement class and subclasses, the Court has considered: (1) the allegations, information, arguments, and authorities cited in the Motion for Preliminary Approval and supporting memorandum and declarations; (2) the allegations, information, arguments, and authorities provided by the Parties in connection with the pleadings and other motions filed by each of them in this case; (3) information, arguments, and authorities provided by the Parties in multiple conferences and arguments before this Court; (4) IBM's conditional agreement, for settlement purposes only, not to oppose conditional certification of the settlement class and subclasses specified in the Settlement Agreement; (5) the terms of the Settlement Agreement, including, but not limited to, the definition of the settlement class and subclasses specified in the Settlement Agreement; and (6) the elimination of the need, on account of the Settlement, for the Court to consider any potential trial manageability issues that might otherwise bear on the propriety of class certification.

In connection with certifying the Class and Subclasses, the Court makes the following findings:

- a. The Class and Subclasses each have more than 100 members, and therefore each is therefore sufficiently numerous that joinder of all Class or Subclass Members is impracticable;
- b. There are questions of law or fact common to all Class and Subclass Members, including whether the Class and Subclass Members were properly classified as exempt from overtime and whether they regularly exercised independent judgment and discrimination on matters of substantial importance;
- c. The Class and Subclass Representatives' claims are typical of their respective Classes' claims in that the Class Representatives raise the same claims as the Class Members;
- d. The Class and Subclass Representatives can fairly and adequately represent the their respective Classes' interests, in that (1) Class Representatives have retained counsel who are qualified and experienced in the issues raised in this litigation,

and (2) none of the Class Representatives has any apparent interests antagonistic to the interests of the classes they seek to represent;

*4 e. The common questions of law and fact set forth in paragraph b., above, predominate over any questions affecting only individual members;

f. The class action device is superior to all other available methods for fairly and efficiently settling this matter.

Based on those considerations and findings, the Court hereby finds that the Class and Subclasses proposed in this matter are readily identifiable and that the requirements of [Federal Rule of Civil Procedure 23\(a\)](#) are satisfied, including numerosity, commonality, typicality, and adequacy of the representatives and their counsel.

The Court further concludes that the requirements of [Federal Rule of Civil Procedure 23\(b\)\(3\)](#) are satisfied because questions of law and fact common to the members of the settlement class and subclasses ("Class Members") predominate over any questions affecting only individual members and that a settlement class is superior to other available methods for the fair and efficient adjudication of this matter.

Therefore, solely for the purpose of determining whether the terms of settlement are fair, reasonable, and adequate, the Court conditionally certifies pursuant to [Rule 23\(a\) and \(b\)\(3\) of the Federal Rules of Civil Procedure](#) the following: (1) the Class; (2) the California Subclass; (3) the Kentucky Subclass; and (4) the New York. Subclass, as defined in Section II, above.

V. Appointment Of Class Representatives And Class Counsel

Thomas Rosenburg, James Baxter, Robert Carlo, Alan Erece, Marcia Howie, Fnu Kennedy, Vincent Letizio, Sherry Mattson, Steve Park, Michelle Peel, Denise Rambsel, Exaldo Topacio, Laurence Tosi III, Robin Daniels, Rebecca Taylor, and Frank Vasterling ("Plaintiffs") are appointed as class representatives of the Class, both under [Rule 23](#) and unde [29 U.S.C. § 216\(b\)](#). Thomas Rosenburg and Alan Erece are appointed as class representatives of the California Subclass. Frank Vasterling is appointed as class representative of the Kentucky Subclass. Exaldo Topacio is appointed as class representative of the New York Subclass.

The following law firms are appointed as class counsel for the Class and Subclasses (“Class Counsel”): James M. Finberg and Eve H. Cervantez of Altshuler Berzon, LLP; Kelly M. Dermody, Rachel Geman and Jahan C. Sagafi of Lieff, Cabraser, Heimann & Bernstein, LLP; Steven G. Zieff, David Lowe, and Kenneth J. Sugarman of Rudy, Exelrod & Zieff, LLP; Todd F. Jackson, Claire Kennedy–Wilkins, and Lindsay Nako of Lewis, Feinberg Renaker & Jackson, P.C.; Adam T. Klein, Justin M. Swartz, and Piper Hoffman of Outten & Golden, LLP; Ira Spiro and Gregory N. Karasik of Spiro, Moss, Barness, Harrison & Barge, LLP; J. Derek Braziel of Lee & Braziel, LLP; Richard Burch of Bruckner Burch, PLLC; and David Borgen and Roberta Steele of Goldstein, Demchak, Baller, Borgen and Dardarian.

VI. *Disposition Of Settlement Class And Subclasses If Settlement Agreement Does Not Become Effective*

If, for any reason, the Settlement Agreement ultimately does not become effective, IBM's agreement not to oppose conditional certification of the settlement class and subclasses shall be null and void in its entirety; this Order conditionally certifying the settlement class and subclasses shall be vacated; the Parties shall return to their respective positions in this lawsuit as those positions existed immediately before the Parties executed the Settlement Agreement; and nothing stated in the Settlement Agreement, the Motion, this Order, or in any attachments to the foregoing documents shall be deemed an admission of any kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties for any purpose in this action or in any other action. In particular, the class and subclasses certified for purposes of settlement shall be decertified, and IBM will retain the right to contest whether this case should be maintained as a class action or collective action and to contest the merits of the claims being asserted by Plaintiffs. In such a case, the Parties will negotiate and submit for Court approval a case schedule which shall, among other things, propose dates for completion of class certification and merits discovery and the filing of motions (and opposition thereto), including but not limited to Plaintiffs' motion for *Hoffman–LaRoche* notice, Plaintiffs' motion for class certification under [Fed.R.Civ.P. 23](#), and Defendant's summary judgment motions. Further, if a mutually agreed upon class settlement is not approved, the Parties agree that the stipulation regarding tolling they filed with the Court on November 8, 2006 shall be amended such that the end date for the tolling period referenced in paragraph 3 of that stipulation shall be the later of: (1) the date the Court denies the Motion for Order Conditionally Certifying Settlement Classes and Preliminarily Approving Class Action

Settlement, or (2) if such motion is timely filed, the date the Court denies the Parties' joint motion for reconsideration of such denial. All other provisions regarding tolling in that stipulation shall remain in full force and effect.

VII. *Preliminary Approval Of The Terms Of The Settlement Agreement, Including The Proposed Plan Of Allocation*

*5 The Court has reviewed the terms of the Settlement Agreement attached as Exhibit 1, and the Parties' description of the Settlement in the Motion papers. Based on that review, the Court concludes that the Settlement has no obvious defects and is within the ranges of possible Settlement approval such that notice to the Class is appropriate.

The Court has also read and considered the declarations of James Finberg and Steven Zieff in support of preliminary approval. Based on review of those declarations, the Court concludes that the Settlement was negotiated at arms length and is not collusive. The Court further finds that Class Counsel were fully informed about the strengths and weaknesses of the Class's case when they entered into the Settlement Agreement.

As to the proposed plan of allocation, the Court finds that the proposed plan is rationally related to the relative strengths and weaknesses of the respective claims asserted. The proposed plan of allocation is also within the range of possible approval such that notice to the Class is appropriate.

Accordingly, the Court hereby grants preliminary approval to the Settlement Agreement and the Plan of Allocation.

VIII. *Approval Of The Form And Manner Of Distributing Class Notice, Opt–Out Statement, And Claim Form*

Plaintiffs have also submitted for this Court's approval a proposed Class Notice, Opt–Out Statement, and a proposed Claim Form. The Court now considers each of these documents in turn.

The proposed Class Notice appears to be the best notice practical under the circumstances and appears to allow Class Members a full and fair opportunity to consider the proposed Settlement and develop a response. The proposed plan for distributing the Class Notice, and the Opt–Out Statement and Claim Form, which are to be attached to the Class Notice, likewise appears to be a reasonable method calculated to reach all members of the Class who would be bound by the Settlement. Under this plan, the Claims Administrator

will distribute the Class Notice to Class Members by first class U.S. Mail. There appears to be no additional method of distribution that would be reasonably likely to notify Class Members who may not receive notice pursuant to the proposed distribution plan.

The Class Notice and Opt-Out Statement fairly, plainly, accurately, and reasonably informs Class Members of: (1) appropriate information about the nature of this litigation, the settlement class and subclasses at issue, the identity of Class Counsel, and the essential terms of the Settlement Agreement and Settlement; (2) appropriate information about Class Counsel's forthcoming application for attorneys' fees, the proposed service payments to Plaintiffs, and other payments that will be deducted from the settlement fund; (3) appropriate information about how to participate in the Settlement; (4) appropriate information about this Court's procedures for final approval of the Settlement Agreement and Settlement; (5) appropriate information about how to challenge or opt-out of the Settlement, if they wish to do so; and (6) appropriate instructions as to how to obtain additional information regarding this litigation, the Settlement Agreement, and the Settlement. Similarly, the proposed Claim Form appears to allow members of the settlement class and subclasses a full and fair opportunity to submit a claim for proceeds in connection with the Settlement. Moreover, the Claim Form fairly, accurately, and reasonably informs Class Members that failure to complete and submit a Claim Form, in the manner and time specified, shall constitute a waiver of any right to obtain any share of the Settlement Payment.

*6 The Court, having reviewed the proposed Class Notice, Opt-Out Statement, and Claim Form (collectively "Notice Materials"), finds and concludes that the proposed plan for distributing the same will provide the best notice practicable, satisfies the notice requirements of [Rule 23\(e\)](#), and satisfies all other legal and due process requirements. Accordingly, the Court hereby Orders as follows:

1. The form and manner of distributing the proposed Notice Materials are hereby approved.
2. Promptly following the entry of this Order, the Claims Administrator shall prepare final versions of the Notice Materials, incorporating into the Notice the relevant dates and deadlines set forth in this Order.
3. Within 30 days of the date of entry of this Order, IBM will provide the Claims Administrator with the information

regarding Class Members specified in the Settlement Agreement.

4. Within 45 days of the date of this Order, the Claims Administrator shall mail, *via* first class United States mail, postage prepaid, the final version of the Class Notice, along with the Opt-Out Statement and Claim Form, using each Class Member's last known address as recorded in IBM's human resource records. The Claims Administrator shall take all reasonable steps to obtain the correct address of any Class Members for whom the notice is returned by the post office as undeliverable and otherwise to provide the Class Notice. The Claims Administrator shall notify Class Counsel of any mail sent to Class Members that is returned as undeliverable after the first mailing as well as any such mail returned as undeliverable after any subsequent mailing(s). In no event shall the Claims Administrator make any mailing to any Class Member more than 60 days after the initial mailing.

5. The Claims Administrator shall take all other actions in furtherance of claims administration as are specified in the Settlement Agreement.

IX. Procedures For Final Approval Of The Settlement

A. Fairness Hearing

The Court hereby schedules, for the 11th day of July, 2007, at the hour of 9:00 a.m., a hearing to determine whether to grant final certification of the Settlement Class and Subclasses, and the FLSA collective action, and final approval of the Settlement Agreement and the Plan of Allocation (the "Fairness Hearing"). At the Fairness Hearing, the Court also will consider any petition that may be filed for the payment of attorneys' fees and expenses to Class Counsel, and any service payment to be made to the class representatives.

B. Deadline To Request Exclusion From The Settlement

Class Members who wish to be excluded from the Settlement must submit a written and signed request to opt out to the Claims Administrator using the form ("Opt-Out Statement") provided with the Class Notice. To be effective, any such Opt-Out Statement must be sent to the Claims Administrator at the address provided in the Class Notice *via* First Class United States Mail, postmarked by 60 days after the Claims Administrator mails the Class Notice.

*7 The Claims Administrator shall stamp the postmark date on the original of each Opt-Out Statement that it receives

and shall serve copies of each Opt-Out Statement on Class Counsel and IBM's Counsel, as specified in the Settlement Agreement, not later than three calendar days after receipt thereof. The Claims Administrator also shall, within three business days of the end of the Opt-Out Period, file with the Clerk of Court, with social security numbers redacted, stamped copies of any Opt-Out Statements. The Claims Administrator shall, within three business days of the end of the Opt-Out Period, send a final list of all Opt-out Statements to Class Counsel and IBM's Counsel by both facsimile and overnight delivery. The Claims Administrator shall retain the stamped originals of all Opt-Out Statements and originals of all envelopes accompanying Opt-Out Statements in its files until such time as the Claims Administrator is relieved of its duties and responsibilities under the terms of the Settlement Agreement.

C. Deadline For Class Counsel To File A Petition For An Award Of Attorneys' Fees And Reimbursement Of Expenses.

Class Counsel shall file with this Court their petition for an award of attorneys' fees and reimbursement of expenses no later than 35 days before the Fairness Hearing. Class Counsel may file a reply to any opposition memorandum filed by any objector no later than 14 days before the Fairness Hearing.

D. Deadline For Class Counsel To File A Petition For Approval Of Service Payments To Plaintiffs.

Class Counsel shall file with this Court their petition for an award of service payments to Plaintiffs Thomas Rosenburg, James Baxter, Robert Carlo, Alan Erece, Marcia Howie, Fnu Kennedy, Vincent Letizio, Sherry Mattson, Steve Park, Michelle Peel, Denise Rambsel, Exaldo Topacio, Laurence Tosi III, Robin Daniels, Rebecca Taylor, and Frank Vasterling no later than 35 days before the Fairness Hearing. Class Counsel may file a reply to any opposition memorandum filed by any objector no later than 14 days before the Fairness Hearing.

E. Deadline For Filing Objections To Settlement

Any Class Member who wishes to object to the fairness, reasonableness or adequacy of the Settlement Agreement or the Settlement must do so in writing. To be considered, any such objection must be sent to the Claims Administrator, at the address provided in the Class Notice, *via* First-Class United States mail, postage prepaid. In addition, any such objection must be received by the Claims Administrator no later than

60 days after the date the Class Notice is mailed to such Class Member. An objector who wishes to appear at the Fairness Hearing, either in person or through counsel hired by the objector, must state his or her intention to do so at the time the objector submits his/her written objections.

The Claims Administrator shall stamp the date received on the original and send copies of each objection to the Parties by facsimile and overnight delivery not later than three calendar days after receipt thereof. The Claims Administrator shall also file the date-stamped originals of any objections with the Clerk of Court within three business days after the Opt-Out Period. On or before 14 days before the Fairness Hearing, the Parties may file with the Court written responses to any filed objections.

F. Deadline For Filing Motion For Judgment And Final Approval

*8 No later than 35 days before the Fairness Hearing, Plaintiffs and IBM will submit a joint Motion for Judgment and Final Approval of the Settlement Agreement and Settlement.

G. Deadline For Submitting Claim Forms

A Class Member who does not opt out will be eligible to receive his or her proportionate share of the settlement benefit. To receive this share, such a Class Member must properly and timely complete a Claim Form in accordance with the terms of the Settlement. Completion of the Claim Form includes: (1) an oath that, at some point during the applicable period, he or she worked overtime; (2) an acknowledgement that, by signing the Claim Form, he or she opts in to the case pursuant to 29 U.S.C. § 216(b); and (3) a release of claims consistent with that set forth in the Notice. To be effective, the Claim Form must be sent to the Claims Administrator at the address provided in the Class Notice by First Class United States Mail, postage prepaid, and must be received by the Claim Administrator within 70 days after the mailing of the Class Notice.

H. Plaintiffs' And Class Members' Release

If, at the Fairness Hearing, this Court grants Final Approval to the Settlement Agreement and Settlement, Plaintiffs and each individual Class Member who does not timely opt out will release claims, by operation of this Court's entry of the Judgment and Final Approval, as described in Section 4 of the Settlement Agreement, regardless of whether he or she

submits a Claim Form or receives any share of the Settlement Fund. The Court has reviewed the release in the Settlement Agreement, which is incorporated as well into the Claim Form, and finds it to be fair, reasonable, and enforceable.

I. Releases of Class Representatives

In addition, Plaintiffs Rosenberg, Baxter, Carlo, Erece, Howie, Kennedy, Letizio, Mattson, Park, Peel, Rambsel, Topacio, Tosi, Daniels, Taylor, and Vasterling will execute individual releases in exchange for any court-approved service payments. The Court has reviewed these individual releases and finds them to be fair, reasonable, and enforceable.

J. Opt-In Form Of Daniel Cribb

Class Counsel has filed a Notice of Withdrawal of Opt-In Form of Daniel Cribb. Accordingly, the Court hereby approves such notice and the Opt-In Form of Daniel Cribb is deemed withdrawn.

All Citations

Not Reported in F.Supp.2d, 2007 WL 128232

End of Document

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Exhibit G

2013 WL 12161799

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Susan SABOL, Valerie Done, and Kathleen Klodner on behalf of themselves and all others similarly situated, Plaintiffs,

v.

HYDROXATONE LLC and Atlantic Coast Media Group LLC, Defendants.

Civil Action No. 2:11-cv-04586-KM-MAH

|

Signed 03/28/2013

Attorneys and Law Firms

Exhibit B —Order Granting Preliminary Approval, [Joseph A. Boyle](#), [Michael C. Lynch](#) (pro hac vice), [Lauri A. Mazzuchetti](#), [Michael A. Innes](#), KELLEY DRYE & WARREN LLP, 200 Kimball Drive, Parsippany, New Jersey 07054, Phone (973) 503-5900, Attorneys for Defendants Hydroxatone LLC and Atlantic Coast Media Group LLC

ORDER GRANTING PRELIMINARY APPROVAL OF AMENDED CLASS SETTLEMENT, DIRECTING NOTICE TO THE CLASS AND SCHEDULING FAIRNESS HEARING

Honorable [Kevin McNulty](#), United States District Judge

*1 WHEREAS, this matter has come before the Court pursuant to the Motion for Entry of an Order Granting Preliminary Approval of the Amended Class Settlement and Approving the Forms and Methods of Notice of the Class (the “Motion”) of plaintiffs Susan Sabol, Valerie Done and Kathleen Klodner (collectively, “Plaintiffs”); and

WHEREAS, defendants Hydroxatone LLC and Atlantic Coast Media Group LLC have joined in the Motion;

WHEREAS, the Court finds that it has jurisdiction over this Action and each of the Parties for purposes of settlement; and

WHEREAS, the Court has considered all of the submissions related to the Motion, and is otherwise fully advised;

IT IS HEREBY ORDERED THAT:

I. PRELIMINARY APPROVAL OF AMENDED SETTLEMENT AGREEMENT

1. The terms of the Amended Settlement Agreement, dated March 22, 2013, including all Exhibits thereto (the “Amended Settlement Agreement”), made by and among Plaintiffs, individually and as the representative of a class of similarly situated persons (the “Class”), and Defendants, and their various direct and indirect operating subsidiaries and affiliates (collectively, “Defendants”), are hereby preliminarily approved, subject to further consideration thereof at the Final Approval (Final Fairness) Hearing provided for below. This Order incorporates herein, and makes a part thereof, the Amended Settlement Agreement, including all Exhibits thereto. Unless otherwise provided herein, the terms defined in the Amended Settlement Agreement shall have the same meanings herein. The Amended Settlement Agreement was entered into only after extensive arm's-length negotiation by experienced counsel and in mediation under the guidance of the Honorable Stephen M. Orlofsky (ret.). The Court finds that the Amended Class Settlement embodied in the Amended Settlement Agreement (the “Amended Class Settlement”) is sufficiently within the range of reasonableness so that Notice of the Amended Class Settlement should be given as provided in sections IV, V and VI of this Order. In making this determination, the Court has considered the current posture of this litigation and the risks and benefits to the Parties involved in both settlement of these claims and through continuation of the litigation.

II. THE CLASS, REPRESENTATIVES, AND CLASS COUNSEL

2. The Settlement Class is defined as follows:

All Persons residing in the United States who between January 1, 2005 and March 28, 2013 paid for and/or were charged for Hydroxatone-branded products, and/or were charged shipping and processing fees for such products, in connection with a Risk-Free Trial and/or Auto-Shipment Program.

Excluded from the Settlement Class are Defendants, any entities in which Defendants have or had a controlling interest, any officers or directors of Defendants, the legal representatives, heirs, successors, and assigns of Defendants, any Judge assigned to this action and his or her immediate

family, and anyone who timely requests exclusion from the Class.

3. The Court preliminarily finds that the proposed nationwide Settlement Class meets all the applicable requirements of [Fed. R. Civ. P. 23\(a\), \(b\)\(2\), and \(b\)\(3\)](#), and hereby certifies the Settlement Class for settlement purposes only. The Court hereby preliminarily finds, in the specific context of the Class Settlement, that:

*2 (a) Numerosity. The Settlement Class consists of hundreds of thousands of members located throughout the United States, its territories and possessions, and satisfies the numerosity requirement of [Fed. R. Civ. P. 23\(a\)](#). Joinder of these widely dispersed, numerous Settlement Class Members into one suit would be impracticable.

(b) Commonality. Common questions of law and fact, with regard to the alleged activities of Defendants exist, for each of the Settlement Class Members. These issues are central to this case and are sufficient to establish commonality.

(c) Typicality. Plaintiffs' claims in this litigation are typical of the claims of the Settlement Class Members. Therefore, in the context of this settlement the element of typicality is satisfied.

(d) Adequate Representation. Plaintiffs' interests do not conflict with, and are co-extensive with, those of absent Settlement Class Members. Additionally, this Court recognizes the experience of Class Counsel, Cohen Milstein Sellers & Toll PLLC as defined below, and finds under [Fed. R. Civ. P. 23\(g\)](#) that the requirement of adequate representation of the Settlement Class Members has been fully met.

(e) Predominance of Common Issues. Plaintiffs commonly assert that Defendants misrepresented the cost, terms, and scope of its risk-free and auto-ship programs, charged for unordered and unwanted products, and continued to charge membership and delivery fees despite requests for cancellation, all in alleged violation of pertinent law. In the context of this Class Settlement, these issues predominate over any individual questions, favoring class settlement.

(f) Superiority of the Class Action Mechanism. The class action mechanism is ideally suited for treatment of the settlement of these matters. Class certification promotes efficiency and uniformity in judgment, among other reasons, because the many Settlement Class Members

will not be forced to separately pursue claims or execute settlements in various courts around the country.

4. The Class Representatives are: Susan Sabol, Valerie Done, and Kathleen Klodner. Based upon the Court's familiarity with the claims and Parties, and the negotiation process overseen by Honorable Stephen M. Orlofsky (ret.), the Court preliminarily finds that these designated representatives are appropriate representatives for settlement purposes. The Court finds that each of these representatives were/are subscribers to the risk-free and auto-ship programs, were charged for unordered and unwanted products, and/or continued to be charged membership and delivery fees despite requests for cancellation.

5. The Court further preliminarily finds that the following firms fairly and adequately represent the interests of the Settlement Class and hereby confirms them as Class Counsel pursuant to [Fed. R. Civ. P. 23\(g\)](#):

Class Counsel

Andrew N. Friedman, Esq.
COHEN MILSTEIN SELLERS & TQLULLC
1100 New York Ave NW
Suite 500 West
Washington, DC 20005
(202) 408-4600

Lee S. Shalov, Esq.
McLAUGHLIN & STERN LLP
260 Madison Ave.
New York, NY 10016
(646) 278-4298

Angela Edwards, Esq.
LAW OFFICE OF ANGELA EDWARDS
72 Canterbury Circle
East Longmeadow, MA 01028
(413) 525-3820

6. If the Amended Settlement Agreement is terminated or is not consummated for any reason whatsoever, the certification of the Settlement Class shall be void, and Plaintiffs and Defendants shall be deemed to have reserved all of their rights as set forth in the Amended Settlement Agreement, including but not limited to the issues related to all claims, defenses and issues under [Fed. R. Civ. P. 23](#).

III. COMMON FUND

*3 7. Pursuant to the Amended Agreement, Defendants shall deposit a total of three million dollars (\$3,000,000) into the Escrow Account for the benefit of the Settlement Class, thereby establishing the Common Fund, in accordance with the funding schedule, and terms and conditions set forth in the Escrow Agreement. Any interest generated from the Common Fund shall remain in the Common Fund to be distributed consistent with the terms of the Amended Settlement Agreement and the Escrow Agreement.

8. The Common Fund shall be used to fund the administration of the Amended Settlement Agreement, including certain shipping and processing and to provide monetary relief to Settlement Class Members all set forth in the Amended Settlement Agreement and the Escrow Agreement.

9. The Court finds that the Escrow Account is a “qualified settlement fund” as defined in [Section 1.468B–1\(c\) of the Treasury Regulations](#) in that it satisfies each of the following requirements:

(a) The Escrow Account is established pursuant to an Order of this Court and is subject to the continuing jurisdiction of this Court;

(b) The Escrow Account is established to resolve or satisfy one or more claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting liabilities; and

(c) The assets of the Escrow Account are segregated from other assets of Defendants, the transferors of the payment to the Settlement Fund.

10. Under the “relation back” rule provided under [section 1.468B–1\(j\)\(2\)\(i\) of the Treasury Regulations](#), the Court finds that:

(a) The Escrow Account met the requirements of paragraphs 9(a) and 9(b) of this Order prior to the date of this Order approving the establishment of the Escrow Account subject to the continued jurisdiction of this Court; and

(b) Defendants and the Settlement Administrator may jointly elect to treat the Class Escrow Account as coming into existence as a “qualified settlement fund” on the latter of the date the Class Escrow Account met the requirements of paragraph 9 and 9(c) of this Order or January 1 of the calendar year in which all of the requirements of paragraph 9 of this Order are met. If such a relation-back election is

made, the assets held by the Settlement Fund on such date shall be treated as having been transferred to the Escrow Account on that date.

IV. NOTICE TO SETTLEMENT CLASS MEMBERS

11. The Court has considered the proposed Notices (Email Notice, Long Form Publication Notice and Short Form Postcard Notice) attached as Exhibits D, F and G respectively to the Amended Settlement Agreement, including the proposed forms of notice, as well as the proposal for the Claim Form, attached as Exhibit A to the Amended Settlement Agreement, and finds that the form, content, and manner of notice proposed by the Parties and approved herein meet the requirements of due process and [Fed. R. Civ. P. 23\(c\) and \(e\)](#), are the best notice practicable under the circumstances, constitute sufficient notice to all persons entitled to notice, and satisfy the Constitutional requirements of notice. The Court approves the Notices in all respects (including the proposed forms of notice, and the proposal for the Claim Forms set forth in the Amended Settlement Agreement) and orders that notice be given in substantial conformity therewith. The Short Form Postcard Notice shall be distributed through the wire services of either PR Newswire or Business Wire and such notice will direct members to the Long Form Publication Notice on the dedicated website. The Long Form Publication Notice shall be posted on a website maintained for that purpose by the Settlement Administrator. The Email Notice shall be sent electronically to the last known email address of all Settlement Class Members that Defendants has email addresses for. The Short Form Postcard Notice shall be sent to the last known addresses of all Settlement Class Members for whom Defendants do not have an email address. The Short Form Postcard Notice will also be sent to addresses (where known) of Settlement Class Members whose email notices bounced back.

*4 12. The Court appoints Gilardi & Co. as Settlement Administrator. Responsibilities of the Settlement Administrator shall include the following: (a) disseminating Email Notice to Class Members for whom Defendants have an email address, and Short Form Postcard Notice to the other class members; (b) establishing and maintaining a website for purposes of posting the Long Form Publication Notice, the Claim Form, the Amended Settlement Agreement and related documents; (c) administering the publication of the Short Form Postcard Notice by way of either PR Newswire or Business Wire; (d) accepting and maintaining documents sent from Settlement Class Members, including

Claim Forms, Requests for Exclusion, and other documents relating to claims administration; (e) administering claims for the allocation of the Cash Benefits among Settlement Class Members; (f) responding to Settlement Class Member inquiries; and (g) overseeing the distribution of Product Benefits by Defendants.

V. REQUEST FOR EXCLUSION FROM THE CLASS

13. Settlement Class Members who wish to be excluded from the Settlement Class shall mail a written Request for Exclusion to the Settlement Administrator, so that it is postmarked no later than twenty one (21) days before the Final Approval (Final Fairness) Hearing, and shall clearly state the following: the name, address, email address, telephone number, and the signature of the individual or entity who wishes to be excluded from the Settlement Class, and provide all such information as may be required by the Amended Settlement Agreement or requested by the Settlement Administrator.

14. A person who submits a valid Request for Exclusion shall not be bound by the Amended Settlement Agreement, or the Final Approval Order and Judgment. Not later than ten (10) days before the Final Approval (Final Fairness) Hearing, the Settlement Administrator shall prepare and deliver to Class Counsel, who shall file it with the Court, and Defendants' Counsel, a report stating the total number of Persons who have submitted timely and valid Requests for Exclusion from the Settlement Class and the names of such Persons. Such Persons will not be entitled to receive any relief under the Amended Settlement Agreement.

15. Any Settlement Class Member who does not properly and timely mail a Request for Exclusion as set forth in paragraph 13 above shall be automatically included in the Settlement Class and shall be bound by all the terms and provisions of the Amended Settlement Agreement, the Class Settlement, this Order Granting Preliminary Approval of Amended Class Settlement, and the Final Approval Order and Judgment, whether or not such Settlement Class Member received actual notice or shall have objected to the Amended Class Settlement and whether or not such Settlement Class Member makes a Claim upon or participates in the Amended Class Settlement.

VI. PROOFS OF CLAIM

16. To effectuate the Amended Settlement Agreement and Class Settlement, the Settlement Administrator shall be responsible for the receipt and processing of all Requests for

Exclusion and Claim Forms. The Settlement Administrator shall preserve (on paper or transferred in to electronic format) all Requests for Exclusion, Claim Forms, and any and all other written communications from Settlement Class Members in response to the Notices for a period of five (5) years, or pursuant to further order of the Court. All written communications received by the Settlement Administrator from Settlement Class Members relating to the Amended Settlement Agreement shall be available at all reasonable times for inspection and copying by Class Counsel and Defendants' Counsel, including prior to payments being mailed to each Settlement Class Member.

VII. OBJECTIONS TO THE AMENDED SETTLEMENT

17. Settlement Class Members who do not request exclusion from the Settlement Class may object to the Amended Settlement. Settlement Class Members who choose to object to the Amended Settlement must file written notices of intent to object with the Court and serve copies of any such objection on counsel for the Parties. Any Settlement Class Member may appear at the Final Approval (Final Fairness) Hearing, in person or by counsel, and be heard to the extent permitted under applicable law and allowed by the Court, in opposition to the fairness, reasonableness and adequacy of the settlement, and on Class Counsel's application for any award of attorneys' fees and costs. The right to object to the Class Settlement must be exercised individually by an individual Settlement Class Member and, except in the case of a deceased, minor, or incapacitated Person or where represented by counsel, not be the act of another Person acting or purporting to act in a representative capacity.

*5 18. To be effective, a notice of intent to object to the Amended Class Settlement that is filed with the Court must:

- (a) Contain a caption that includes the name of the case as follows: *Sabol, et al. v. Hydroxatone, LLC and Atlantic Coast Media Group*, Case No. 2:11-cv-04586-KM-MAH;
- (b) Provide the name, address, telephone number and signature of the Settlement Class Member filing the intent to object;
- (c) Provide the approximate date of his/her transaction with Defendants and the total amount paid by him or her for Defendants' Hydroxatone-branded products;

- (d) Be filed with the District of New Jersey Clerk of the Court not later than thirty (30) days prior to the Final Fairness Hearing;
- (e) Be served on Class Counsel and counsel for Defendants so as to be received no later than thirty (30) days prior to the Final Fairness Hearing;
- (f) Contain the name, address, bar number and telephone number of the objecting Settlement Class Member's counsel, if represented by an attorney;
- (g) Contain the number of class action settlements objected to by the Settlement Class Member in the last three years; and
- (h) State whether the objecting Settlement Class Member intends to appear at the Final Approval (Final Fairness) Hearing, either in person or through counsel.

19. In addition to the foregoing, if the Settlement Class Member is represented by counsel and such counsel intends to speak at the Final Approval (Final Fairness) Hearing, a notice of intent to object must contain the following information:

- (a) A detailed statement of the specific legal and factual basis for each and every objection; and
- (b) A detailed description of any and all evidence the objecting Settlement Class Member may offer at the Final Approval (Final Fairness) Hearing, including copies of any and all exhibits that the objecting Settlement Class Member may introduce at the Final Approval (Final Fairness) Hearing.

20. Any Settlement Class Member who does not file a timely and adequate notice of intent to object in accordance with these provisions waives the right to object or to be heard at the Final Approval (Final Fairness) Hearing and shall be forever barred from making any objection to the Amended Settlement. To the extent any Settlement Class Member objects to the Amended Class Settlement, and such objection is overruled in whole or in part, such Settlement Class Member will be forever bound by the Final Approval Order and Judgment of the Court.

21. The filing of an objection allows Class Counsel or counsel for Defendants to notice such objecting Settlement Class Member for and take his, her, or its deposition consistent with the Federal Rules of Civil Procedure at an agreed-upon

location, and to seek any documentary evidence or other tangible things that are relevant to the objection. Failure by an objecting Settlement Class Member to make himself, herself, or itself available for a deposition or to comply with expedited discovery requests may result in the Court striking the Settlement Class Member's objection and otherwise denying that Settlement Class Member the opportunity to make an objection or be further heard. The Court reserves the right to tax the costs of any such discovery to the objecting Settlement Class Member or the objecting Settlement Class Member's separate counsel should the Court determine that the objection is frivolous or is made for an improper purpose.

VIII. CLAIMS PROCESS

*6 22. In addition to all other consideration set forth in the Amended Agreement, Settlement Class Members who file an Approved Claim by the Claims Deadline and provide all required proof or documentation and comply with all other conditions and requirements and Settlement Benefit Rules set forth herein, shall have the right to obtain one of the Settlement Benefits as set forth in the Amended Settlement Agreement.

23. As set forth in the Amended Settlement Agreement, the following shall be paid out of the Common Fund prior to any distribution of the Common Fund to the Settlement Class: (a) attorney's fees and costs; (b) Participation Awards; (c) administrative costs and the costs of Notice, but excluding internal costs to Defendants (except Shipping and Processing Costs (as defined in the Amended Settlement Agreement) shall be paid from the Common Fund) to administer the settlement; and (d) shipping and processing costs ("Shipping and Processing Costs") not to exceed \$7.95 per shipment, in connection with the provision of benefits to all Approved Claimants who select to receive a Product Benefit. The remainder of the Common Fund shall be used to pay Approved Claims for the Cash Benefits, in accordance with the rules set forth herein. Any distribution of monies from the Common Fund to the Settlement Class shall commence only after the Effective Date. In the event that Approved Claims for Cash Benefits and/or the Shipping and Processing Costs exceed the available cash in the Common Fund, all Cash Benefits will be reduced in a pro rata proportion. In the event there remains cash in the Common Fund after all Settlement Benefits have been paid or provided, or from Class Members failing to cash settlement checks, the remaining cash will be allocated by Class Counsel to the Electronic Frontier Foundation through *cy pres* distributions, or as otherwise directed by the Court.

IX. CONFIDENTIALITY

24. Any information received by the Settlement Administrator in connection with the Amended Class Settlement that pertains to a particular Settlement Class Member, or information submitted in conjunction with a Request for Exclusion (other than the identity of the entity requesting exclusion), shall not be disclosed to any other person or entity other than Class Counsel, Defendants' Counsel, and the Court, or as otherwise provided in the Amended Agreement.

X. FINAL APPROVAL (FINAL FAIRNESS) HEARING

25. A hearing on final settlement approval (the "Final Approval (Final Fairness) Hearing") will be held before this Court at the United States Post Office and Courthouse Building, Courtroom No. 3, Federal Square, Newark, New Jersey on July 16, 2013 at 10:00 a.m., to consider, *inter alia*, the following: (a) the adequacy of the Class Representatives and whether the Settlement Class should be finally certified; (b) the fairness, reasonableness and adequacy of the Amended Class Settlement; (c) the dismissal with prejudice of the Action as to Defendants; (d) whether Class Counsel's application for attorneys' fees, expenses, and compensation for the Class Representatives ("the Fee and Cost Application") should be granted; (e) whether to finally approve the Amended Agreement; and (f) whether the Court should enter an order expressly determining that there is no just reason for delay and expressly directing that any judgment by the Court approving the Amended Agreement and the Settlement Class should be deemed as a final judgment under [Fed. R. Civ. P. 54\(b\)](#) with respect to all Claims by Settlement Class Members against Defendants and all Released Parties.

*7 26. No later than fifteen (15) calendar days before the Final Approval (Final Fairness) Hearing, the Settlement Administrator shall provide to Class Counsel the following information: (i) the number of e-mail notices sent to Settlement Class Members; (ii) the approximate number of visits to the settlement website from the date of entry of a Preliminary Approval Order; and (iii) such other similar tracking information reasonably requested by Class Counsel.

27. No later than fifteen (15) calendar days before the Final Approval (Final Fairness) Hearing, the Settlement Administrator shall provide to Class Counsel the names of

Settlement Class Members who have requested exclusion from the Settlement.

28. Counsel for the Parties shall file memoranda, declarations, or other statements and materials in support of final approval of the Amended Settlement Agreement, including an application for an award of attorneys' fees, costs, and Class Representative incentive payments ("Fee Application"), no later than forty-five (45) days prior to the Final Fairness Hearing.

29. Counsel for the Parties shall file any reply papers in support of final approval of the Amended Settlement Agreement and the Fee Application and in response to any objections from Settlement Class Members by seven (7) days prior to the Final Fairness Hearing.

30. The settlement on the terms and conditions of the Amended Settlement Agreement filed concurrently with the Motion for Preliminary Approval is hereby preliminarily approved, but is not to be deemed an admission of liability or fault by Defendants or by any other party or person, or a finding of the validity of any claims asserted in the litigation or of any wrongdoing or of any violation of law by Defendants. The amended settlement is not a concession and shall not be used as an admission of any fault or omission by Defendants or any other party or person.

31. Any Settlement Class Member may enter an appearance in the Action and/or may seek to intervene in the Action, individually or through the counsel of their choice at their expense. Other than (a) Settlement Class Members who enter an appearance and (b) Opt-Outs, the Class will be represented by Class Counsel.

32. Counsel for the Parties are hereby authorized to utilize all reasonable procedures in connection with the administration of the settlement that are not materially inconsistent with either this Order or the terms of the Amended Agreement.

XI. OTHER PROVISIONS

33. Upon Final Approval, each and every term and provision of the Amended Settlement Agreement (except as may be modified by the Final Approval Order) shall be deemed incorporated into the Final Approval Order and Judgment as if expressly set forth and shall have the full force and effect of an Order of the Court.

Sabol v. Hydroxatone LLC, Not Reported in Fed. Supp. (2013)

2013 WL 12161799

34. In the event that the Class Settlement is terminated in accordance with the provisions of the Amended Settlement Agreement, the Class Settlement and all proceedings had in connection therewith shall be null and void, except insofar as expressly provided in the Amended Settlement Agreement, and without prejudice to the status quo ante rights of Plaintiffs and Defendants.

35. Neither this Order nor the Amended Settlement Agreement, nor any documents or statements related thereto, shall constitute any evidence or admission of liability by Defendants and/or any Released Party, nor shall any such document or statement be offered in evidence in this or any other proceeding except to consummate or enforce the Amended Settlement Agreement or the terms of this Order.

***8** 36. Summary of Dates and Deadlines:

Last day to disseminate class notice:	30 days after entry of the Preliminary Approval Order
Last day to file (1) Motion for Final Approval and (2) Fee Application:	45 days prior to Fairness Hearing
Last day for class members to opt-out of the Amended Settlement:	21 days prior to Fairness Hearing
Last day for objections to Amended Settlement or opposition to Motion for Final Approval of Fee Application	30 days prior to Fairness Hearing
Last day for the Parties to file replies to any class member objections to the Motion for Final Approval or Fee Application:	Seven days prior to Fairness Hearing
Fairness Hearing:	at least 100 days after entry of the Preliminary Approval Order

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2013 WL 12161799

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Exhibit H

2007 WL 4105971

Only the Westlaw citation is currently available.

NOT FOR CITATION

United States District Court, N.D. California,
San Jose Division.

Chuck BROWNING, individually
and on behalf of all persons
similarly situated, Plaintiff,

v.

YAHOO! INC.; ConsumerInfo.com, Inc.; and
Experian North America, Inc., Defendants.

No. C04-01463 HRL.

I

Nov. 16, 2007.

Attorneys and Law Firms

Clay Lowe, Lowe & Grammas LLP, [Peter A. Grammas](#),
Lowe, Grammas, Hitson & Dana LLP, Birmingham, AL,
[Gordon John Finwall](#), Finwall Law Offices, San Jose, CA, for
Plaintiff.

[Richard Joseph Grabowski](#), [Marc Kirby Callahan](#), [Marc
Stephen Carlson](#), Jones Day, Irvine, CA, [John W. Edwards](#),
Jones, Day, Reavis & Pogue, Menlo Park, CA, [Jerome R.
Doak](#), [Jones Day](#), Dallas, TX, for Defendants.

**ORDER GRANTING JOINT MOTION FOR FINAL
APPROVAL OF AMENDED SETTLEMENT AND
DISMISSING ACTION WITH PREJUDICE**[HOWARD R. LLOYD](#), United States Magistrate Judge.**I. INTRODUCTION**

*1 Chuck Browning saw on Yahoo!'s website the offering for a service called Yahoo! Credit Manager. The offering allegedly represented that, by subscribing to it, he would be able to "improve" his credit score, to actually "learn how to boost it in seconds." Browning subscribed (for \$79.95 per year). The Credit Manager service was provided by Yahoo!'s purported "co-branded partner," ConsumerInfo.com, Inc. ("CIC"). CIC is owned by Experian, one of the country's major credit reporting organizations.

The Credit Repair Organization Act ("CROA"), [15 U.S.C. § 1679](#), is intended to protect the public from unfair or deceptive advertising and business practices by credit repair organizations. Specifically, CROA focuses on providing consumers of credit repair organization services with information necessary to make informed decisions concerning the purchase of such services. To that end, a company in the "credit repair" business must adhere to a host of specified regulations: e.g., (1) a written contract with the consumer specifying the payment terms, and (2) full disclosure of the consumer's statutory rights-including cancellation options.

No one disputes that neither Yahoo!, CIC, nor Experian complied with the requirements of CROA. The real questions in the litigation that followed were: (1) whether or not Defendants were credit repair organizations subject to CROA; (2) whether the claims Browning ultimately brought were appropriate for class action treatment; and, finally, (3) what was the effect here of an earlier Alabama federal court's denial of class certification against CIC for CROA violations?

As this court intends to approve the settlement discussed at length below, it does not formally reach the first or third question. As to the second, it answers in the affirmative with respect to a settlement class.

II. PRESENT PROCEDURAL POSTURE

In February 2006, the parties jointly moved for certification of the tentative settlement class and preliminary approval of the proposed settlement. After the Preliminary Approval hearing and several interim orders, the parties eventually proffered an Amended Settlement Agreement. The Amended Settlement entirely resolves the claims brought by Browning, on behalf of himself and the settlement class, against CIC, Experian and Yahoo!. Defendants agree to certification of the settlement class and to offer certain relief but deny that they fall within the Credit Repair Organization Act's definition of a "credit repair organization," deny all claims alleged, and deny that the case could be certified as a class action for trial purposes.

On December 27, 2006, this Court certified the tentative settlement class, preliminarily approved the parties' Amended Settlement Agreement, approved and directed a plan for giving notice to class members, appointed Class Counsel, and appointed the Settlement Administrator. ("Prelim. Approval Order"). The Court also set deadlines for objecting to the settlement and for requesting exclusion from the settlement class.

*2 On July 31, 2007, the Court held a Final Fairness Hearing at which the moving parties and certain objectors appeared and were heard. The order that follows addresses Plaintiff's motion for an award of attorney's fees and expenses, the objections made by class members to the Amended Settlement, and the joint motion for Final Approval of the Amended Settlement.

III. BACKGROUND

A. The *Helms* Litigation

The direct antecedent to this case is a proposed class action filed in Alabama federal court captioned, *Helms v. ConsumerInfo.com, Inc.*, No. CV-03-HS-1439-M (N.D. Ala., filed June 17, 2003). The *Helms* suit alleged (1) violations of CROA; (2) unjust enrichment and money had and received; (3) constructive trust; and (4) conspiracy (Complaint ¶¶ 22–42). As with *Browning*, the claims against CIC arose out of statements made on its website which allegedly subjected CIC to CROA regulations.

The *Helms* case was litigated for more than two years, with both parties conducting depositions, answering interrogatories, and responding to document requests. In 2004, the *Helms* parties filed cross motions for summary judgment, and Plaintiff moved for class certification. The *Helms* court granted in part and denied in part both motions for summary judgment. *Helms v. ConsumerInfo.com, Inc.*, 436 F.Supp.2d 1220, 1238–39 (N.D.Ala.2005). That court held that “the representations of defendant imply that its services will help customers improve their credit ratings,” *id.* at 1232, and that CIC was therefore within the statutory definition of a “credit repair organization.” *Id.* at 1229–34. However, because this determination was an issue of first impression, the *Helms* court sua sponte certified its summary judgment order for interlocutory appeal to the Eleventh Circuit. *Id.* at 1224.

The *Helms* court subsequently denied class certification. *Helms v. ConsumerInfo.com, Inc.*, 236 F.R.D. 561, 567–70 (N.D.Ala.2005). Then, the Eleventh Circuit granted CIC's request for interlocutory appeal on the summary judgment. After completion of appellate briefing, the parties reached a tentative agreement on the settlement that is the subject of the instant motion, and the Eleventh Circuit proceedings were stayed.

B. The *Browning* Litigation

In the meantime, in April 2004, Chuck Browning had filed this putative nationwide class action against Yahoo! Inc. alleging the same claims, noted above, that were pled in *Helms*.¹ Then, after the denial of class certification in *Helms*, Browning sought leave to file a Second Amended Complaint to add CIC and the Experian Entities² (“Experian”) as defendants in his case. He alleged that Yahoo! and the prospective new defendants were intertwined business entities: Experian is CIC's parent corporation; CIC provided the Credit Manager product to Yahoo!; and the three parties maintained a “prominent co-branded partnership” in providing the products or services which allegedly violated CROA. Although this Court granted the motion to amend, in doing so it wrote that it was “skeptical about whether plaintiff will be able to satisfy it that he can maintain a class action here against CIC—particularly where he admittedly seeks to revisit the earlier denial of class certification against CIC in Alabama.”

IV. DISCUSSION

A. Jurisdiction

*3 This Court has jurisdiction over the claims the members of the class asserted in this proceeding, personal jurisdiction over the settling parties (including all class members), and subject matter jurisdiction to approve the Amended Settlement.

B. Class Definition and Scope of Release³

1. Class Definition

The parties agreed to the certification of a settlement class generally defined as people in the United States who, between June 17, 1998 and December 27, 2006, entered into an agreement over the Internet with the Defendants to purchase one of certain enumerated credit-monitoring or credit score products. This definition is subject to exclusions based on people with a relationship to the Defendants or this case, and people who validly excluded themselves as set forth below.

Timely Exclusions: The Settlement Administrator received 1,183 timely exclusion requests from class members. See Keough Supp. Aff., (Docket No. 196). These individuals have properly excluded themselves from the settlement class, and neither this Order nor the Final Judgment shall be binding upon them. The Clerk of the

Court is directed to maintain, for five years, the record of class members who have timely excluded themselves and to provide a certified copy of such records to the Defendants, at their expense.

Untimely Exclusions: As of October 5, 2007, nine class members had made untimely requests for exclusion. *Id.* Each of these nine persons are thus settlement class members and bound by this order and the Final Judgment.⁴

2. *Scope of the Release*

The parties agreed to a release of CROA claims and of claims where their stated basis is about improvement of a consumer's credit record, history, or rating. At the insistence of the Court, this release was written to limit its scope to the claims raised in this litigation.

C. Relief Offered in the Settlement

The Court approves of the multifaceted relief offered to the class members in this settlement. Defendants have agreed to remedial relief, in-kind relief and are responsible for payment of certain litigation costs.

1. *Remedial Relief*

CIC and Experian agree to specific deletions to or modifications of language on particular websites. CIC further agrees not to make certain statements in selling credit scores or credit monitoring to Internet consumers. The Yahoo! product at issue is no longer offered.

The changes to language on the website address the unique CROA claims asserted by Plaintiff. Such relief is intended to change or remove language which suggested to consumers that their purchase of Defendants' products or services could result in the improvement of their credit rating or history. For example, language such as, "you get personalized tips and analysis and learn how to boost your credit rating" and "get on the road to good credit" will be changed to "you get information regarding factors that affect a credit score" and "get on the road to credit knowledge," respectively. Statements like "increase your purchasing power" and "find and dispute mistakes that could be hurting your credit rating" will be deleted.

2. *In-Kind Relief*

*4 Defendants are also offering in-kind relief, providing each eligible settlement class member with the choice of either a free Experian credit score (retail value of \$5.00 at the time of settlement) or two months of free credit monitoring (retail value of \$9.95 per month at the time of the settlement). Because the settlement class consists of consumers who previously purchased similar products or services, class members are likely to be interested in such relief.

The credit score will be based on batched process and on the settlement class member's Experian credit report. Each settlement class member electing the credit-monitoring benefit will be enrolled in credit monitoring and thereafter automatically charged the then-applicable rate unless the member affirmatively cancels enrollment (any time after submitting the benefit code) prior to the expiration of the 60-day, settlement-benefit period.

3. *Attorney's Fees, Class Notice, and Settlement Administration*

As explained in Part VII of this order, Defendants will be paying a \$2.55 million award of attorney's fees and expenses. They will also bear the costs of providing class notice and of administering the settlement. Although Defendants have not quantified such costs here, significant resources were expended to notify the 14 million class members.⁵

D. Notice to the Class and Governmental Entities

1. *Notice to Governmental Entities*

At the Court's direction, Defendants sent notice that would satisfy the Class Action Fairness Act of 2005 ("CAFA").⁶ Such notice was directed to the United States Attorney General, to the attorneys general in all 50 states and the District of Columbia, and to 11 other state agencies that specifically monitor the credit industry. 28 U.S.C. § 1715(b). Notice was also provided to the Federal Trade Commission, the agency charged with enforcing CROA.

2. *Notice to the Class*

Defendants and the Settlement Administrator implemented the approved four-part notice program within the Court's deadlines. See Keough Affs., (Docket No. 139, 141, 142). To effect notice, they: (1) established an official settlement website which posted the Long-Form Notice and other settlement documents; (2) emailed notice to more than 14

million tentative class members identified from consumer records; (3) mailed the Long-Form Notice to more than 3.9 million tentative class members whose email notice was undeliverable or where no email address could be located; and (4) published notice in one daily and in one weekend issue of the national edition of USA Today.

Email notice was particularly suitable in this case, where settlement class members' claims arise from their visits to Defendants' Internet websites. *See, e.g. Lundell v. Dell, Inc.*, 2006 WL 3507938, at *1 (N.D.Cal. Dec.5, 2006). The Court reviewed and approved these notices before they were disseminated and found that they were written in plain language.

The Court concludes that the notice was reasonably calculated under the circumstances to apprise the settlement class of the pendency of this action, all material elements of the Amended Settlement, and the opportunity for settlement class members to exclude themselves from, or object to, or comment on the settlement and to appear at the Final Fairness Hearing on their own behalf or through counsel. This notice program satisfied both [Federal Rule of Civil Procedure 23\(c\)\(2\)\(B\)](#) (certification notice requires “best notice practicable under the circumstances”) and [Rule 23\(e\)\(1\)\(B\)](#) (settlement notice must be directed “in a reasonable manner to all members who would be bound”).⁷ It also properly informed class members of the amount of attorney's fees requested by Class Counsel as required by [Federal Rule of Civil Procedure 23\(h\)\(1\)](#). Notice given was due, adequate, and sufficient. It complied with the Federal Rules of Civil Procedure, due process, and any other applicable rules of the court.

V. OBJECTIONS TO SETTLEMENT

*5 There were 139 objectors to the settlement, some of whom appeared through counsel at the Final Fairness Hearing.⁸ Even though some objectors failed to provide certain identifying information about themselves as required by the Preliminary Approval Order, the Court denied Plaintiff's motion to strike those objections and considered them as well at the hearing.

The objections fall into the following six categories: (1) objections to the benefits offered, (2) objections to the notice, (3) objections to the requested amount of attorney's fees, (4) objections to the scope of the release, and (5) irrelevant or incomprehensible objections.

A. Objections to Benefits Offered

1. *Objections to the In-Kind Relief*

Some objectors protest that the in-kind relief has little value. However, the credit score and credit monitoring benefits are likely to have some value to this class, which consists of individuals who previously purchased Defendants' credit score or credit monitoring products. The Court has been informed that the credit score will provide a numerical score that informs a class member where his or her credit standing falls in a range as compared with other consumers. This information is valuable for anyone interested in keeping up with his or her personal finances, not only those planning a major purchase. Finally, and perhaps most importantly, these objections do not sufficiently consider the value of the remedial relief offered or the considerable risks involved with continued litigation.

Some objectors complained that the Amended Settlement is a “coupon settlement”⁹ or that the benefits are not transferable on a secondary market. However, the in-kind relief offered in this case is not a “coupon settlement” because it does not require class members to spend money in order to realize the settlement benefit. Further, the objectors cite no controlling authority requiring an in-kind benefit to be transferable. Transferability is typically offered in order to avoid the criticism that the class members must spend money to obtain a benefit, which is not the case here. The question is not whether a better benefit could theoretically be provided, but whether the settlement is “fair, adequate and free from collusion.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir.1998).

Finally, some objectors complain that they should get a full cash refund. This is tantamount to complaining that the settlement should be “better,” which is not a valid objection. *Id.* at 1027. It also fails to recognize that settlement, as a product of compromise, typically offers less than a full recovery. *See EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir.1985). Such objections fail to consider the limited nature of the class release and the vulnerability and risk of proceeding with the case on the merits.

The Court concludes that the relief afforded to class members, although modest, is appropriate and valuable given the circumstances.

2. *Objections to the Automatic-Renewal Element*

*6 Some settlement class members object to the automatic-renewal element of the credit-monitoring benefit. The Court has already found that this automatic-renewal element, also called a negative option, was fairly and reasonably disclosed.¹⁰ The disclosure of automatic renewal will also be repeated when settlement class members go to the website to choose and obtain their settlement benefit.

The objectors did not address the adequacy of disclosure, but rather speculated that some consumers might forget to cancel or have difficulty in cancelling. Although the Court appreciates this concern, such speculation is not a basis for denying approval of an otherwise fair and reasonable settlement. Weight is given to the fact that settlement class members are not required to accept automatic renewal to receive a settlement benefit. Members may avoid it by choosing the credit score benefit or by cancelling credit-monitoring within the 60-day benefit period. The presence of the negative option has been weighed in the context of the other aspects of the settlement, and in that context, it is fair, reasonable and adequate.

3. *Objections to the Claims Process*

Some objectors complain about the two-step process for obtaining a settlement benefit. First, the class member selects a benefit by completing a registration form that can be submitted online or mailed to the Settlement Administrator (Garden City Group). After completing this step, the Settlement Administrator will email the class member a benefit code. Then, the class member must enter this code on a CIC website. After the code is submitted, the consumer will receive the chosen settlement benefit from CIC.

Objectors complain that the two-step aspect of the process is burdensome, that the claims process requires technical acumen, and that obtaining a benefit requires the class member to provide identifying information. None of these arguments are persuasive. Only the Settlement Administrator has the resources to handle step one. Only the Defendants have the technology (and the sensitive personal information about each class member) to perform step two. Class members have all demonstrated their ability to navigate the Internet through past dealings with Defendants. Finally, if the Defendants did not ask (over a secure site) for personal identifying information about a class member, it could not match up the member with the corresponding credit information. The objections to the claims process thus fail.

B. *Objections to Notice*

A few objectors say that class members may have been reluctant, after receiving the e-mail inviting them to visit the settlement website, to actually click on the site. Such claimed reluctance was due to concern that the email notice was an Internet “phishing” scam.¹¹ The objectors present anecdotal evidence that some class members sought advice from online technical or consumer protection forums to address these concerns. There, many were told it was probably an internet identity theft scam and were advised to delete the e-mail without visiting the website. (*See* Docket No. 184). Supposedly, this may have been so, even though visiting the settlement website did not require an individual to divulge personal identifying data.

*7 Class Counsel respond that the email notice was designed with the intent to maximize the number of notice recipients. The long form of the notice was intentionally not included in the email over concern that it would trigger spam filters. The decision was thus made to place the long form of the notice on a website and to use the email to provide brief notice and to direct interested class members to the website. Counsel also note that the phone number listed on the website as well as the inclusion of identifying information about the case were mechanisms for class members to verify the legitimacy of the notice.

The Court acknowledges evidence indicating that some number of class members may have deleted the email notice out of concern that it was an identity theft scam. However, no objector has presented evidence of how widespread this concern was throughout the class. There are tradeoffs involved in any form of notice, especially with a settlement class of this size. For approval, the notice need not have been perfect. Rather, it needed to be the “best notice practicable under the circumstances” and directed “in a reasonable manner to all members who would be bound.” [Fed.R.Civ.P. 23\(c\) \(2\)\(B\)](#); [Fed.R.Civ.P. 23\(e\)\(1\)\(B\)](#). The email notice program adopted in this case met these requirements.

C. *Objections to the Requested Attorney's Fees*

The objections to the attorney's fees largely consisted of vague objections to the amount sought and to claims that the fees were not sufficiently tied to the benefits. These objections are fully addressed in Part VII of this order and dismissed. That analysis is adopted here.

D. Objections to the Scope of the Release

Some objectors assert that the release is too broad.¹² The Court is satisfied that this is not so. The earlier, more expansive, versions of the release were rejected by this Court. The release language, as approved here, does not purport to release all claims based on class members' purchase of credit monitoring or credit scores. Rather, it is intended to release only the claims raised in this litigation and is approved by the Court in reliance on Defendants' representation that no other putative (or certified) class actions alleging CROA violations are pending against any Defendant. (Docket No. 194). After such considerations, the Court finds the release to be fair and reasonable.

E. Irrelevant or Incomprehensible Objections

1. *Incomprehensible Objections*

Roughly 10% of the objection letters were incomprehensible. The very nature of these objections makes it impossible for the Court to address them, but such objections are to be expected from a settlement class including 14 million people. These objections are overruled.

2. *Irrelevant Objections*

a. Objections About a Class Member's Particular Credit Report

Another 10% of the class members who objected complained, not about the class settlement, but about alleged errors in the class member's own particular credit report. For instance, some class members complained that a lender's tradeline included an incorrect balance, or that a particular line of credit should no longer be reported. Such objections are irrelevant to the determination of whether the settlement should be finally approved.

b. Objections About Original Purchase of Product or Service

*8 Another group of class members objected not to the automatic-renewal element of this settlement, but to the automatic renewal of their original purchases of Defendants' products. In those transactions, consumers who signed up for a trial membership in credit monitoring received it initially at no charge. If the consumer did not cancel the service within the trial period, the service continued and the consumer was thereafter charged. These objections are irrelevant to the allegations of CROA liability in this lawsuit and to the extent

that such objections are relevant, they have been addressed above in Part V, Section A2.

c. Objections about invalid “free credit report” settlements
 Objector Joshua Hazan objected to the provision of a “free credit report” as a settlement benefit, citing *Acosta v. Trans Union, LLC*, 240 F.R.D. 564, 573 (C.D.Cal.2007) [superseded by, 243 F.R.D. 377, 390]. This objection is misplaced because this settlement does not offer a free credit report as a settlement benefit—it offers a credit score or credit monitoring. Although federal law entitles an individual to a free annual credit report from Experian, there is no law requiring free credit scores or monitoring.

These matters are irrelevant to the current proceeding and are, therefore, overruled.

The objections give scant, if any, recognition to the significant hurdles faced by the Plaintiff and the class on the merits of the CROA claim, or on the risk, expense, complexity and likely duration of further litigation. In particular, and despite an express invitation from the Court, no objector ever addressed whether a class could or should be certified here for trial purposes given the failure to obtain certification in *Helms*. The few objections that purport to consider the viability of Plaintiff's claim either do so in a conclusory manner, or paint an unreasonably rosy picture of the prospects of success for this class. Plaintiff would likely face serious difficulty obtaining superior benefits through litigation than those conferred by the Amended Settlement. Accordingly, all objections which have been submitted have been considered by the Court and are OVERRULED.

VI. MOTION FOR FINAL APPROVAL

A. Final Certification of Settlement Class

In order to certify a settlement class, the requirements of [Rule 23](#) must generally be satisfied and each are considered here. See *Hanlon*, 150 F.3d at 1019 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)). In assessing [Rule 23](#) requirements in the settlement context, a “court need not inquire whether the case, if tried, would present intractable management problems ... for the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620.

1. *The Requirements of Rule 23(a)*

For certification of a settlement class, [Rule 23\(a\)](#) requires: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. In granting preliminary approval, this Court held that the requirements of [Rule 23\(a\)](#) were satisfied and that the “tentative settlement class is superior to individual lawsuits.” The *Helms* court, under nearly identical circumstances, also found that they were met. [Helms](#), 236 F.R.D. at 564–67.

***9 Numerosity.** The class of approximately 14 million individuals is so numerous that joinder of all members is impracticable. [Fed.R.Civ.P. 23\(a\)\(1\)](#); see [Hanlon](#), 150 F.3d at 1019.

Commonality. Further, this case involves common issues of fact and law for the class arising out of the construction and application of CROA to the Defendants and their services and products. [Fed.R.Civ.P. 23\(a\)\(2\)](#).

Typicality. The claims of the named Plaintiff are typical of the settlement class, and depend for their resolution on the construction and application of CROA to the Defendants and their services and products. [Fed.R.Civ.P. 23\(a\)\(3\)](#).

Adequacy. And finally, with respect to legal adequacy, two questions must be resolved: (1) do the named plaintiff and his or her counsel have any conflicts of interest with other class members, and (2) will the named plaintiff and plaintiff’s counsel vigorously prosecute the action on behalf of the class? [Hanlon](#), 150 F.3d at 1020. Here, Browning and Class Counsel do not have any conflicts of interest with the class members. Importantly, the settlement makes all class members eligible for the same relief. *Id.* at 1021. Furthermore, Class Counsel vigorously pursued the class claims through extended litigation in *Helms*, followed by successfully obtaining leave of court to add CIC and Experian to this class action after certification was denied in *Helms*. As such, the named Plaintiff and counsel have fairly and adequately protected class interests. [Fed.R.Civ.P. 23\(a\)\(4\)](#).

2. Requirements of [Rule 23\(b\)\(3\)](#)

For certification under [Rule 23\(b\)\(3\)](#), a class action must meet two more requirements: (1) common questions must “predominate over any questions affecting only individual members”; and (2) class resolution must be “superior to other available methods of fair and efficient adjudication of the controversy.” [Amchem](#), 521 U.S. at 615; [Fed.R.Civ.P. 23\(b\)\(3\)](#).

Predominance. In this case (and as the *Helms* court found), questions of law or fact common to members of the settlement class concerning the application and construction of CROA predominate over any questions affecting only individual members.

Superiority. It was this requirement which caused the *Helms* court to deny class certification. That court reasoned that class litigation would not be a superior method of adjudication when damages, if aggregated by the class trial procedure, could be “grossly disproportionate to the conduct at issue.” [Helms](#), 236 F.R.D. at 564–68.¹³ However, this reasoning does not apply here because the appropriate relief is agreed upon by the parties. Moreover, a settlement class need not be “manageable” as a trial class action because no trial will occur. [Amchem](#), 521 U.S. at 619. This Court determined in its Preliminary Approval Order that the requirements of [Rule 23\(b\)\(3\)](#) had been met, and the objectors do not suggest otherwise.

Finding the requirements of [Rule 23\(a\)](#) and [Rule 23\(b\)\(3\)](#) satisfied, the Court confirms and finally approves the settlement class certification.

B. Final Approval of Settlement

***10** This Court may approve the class action settlement after hearing and upon a finding that the settlement is “fair, reasonable, and adequate.” [Fed.R.Civ.P. 23\(e\)\(1\)\(C\)](#). Therefore, the question is “not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion.” [Hanlon](#), 150 F.3d at 1027. It is “the settlement taken as a whole ... that must be examined for overall fairness.” *Id.* at 1026.

A settlement under [Rule 23\(e\)](#) requires that the Court balance a number of factors, including: (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. [Churchill Vill., LLC v. Gen. Elec.](#), 361 F.3d 566, 575 (9th Cir.2004). Courts also consider (9) the absence of collusion in the settlement process. *Id.*

1. The Strength of Plaintiff’s Case

In considering the strength of Plaintiff's case, legal uncertainties at the time of settlement—particularly those which go to fundamental legal issues—favor approval. See *Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at *3 (N.D.Cal.2007). Here, there is uncertainty as to whether Defendants fall within CROA's definition of a "credit repair organization."¹⁴ Because Plaintiff's allegations are based on CROA's provisions regulating "credit repair organizations," the question of whether Defendants are within that definition is crucial to whether CROA's regulations apply to Defendants. Furthermore, Plaintiff's case was weakened by other *Helms* court decisions. The summary judgment order undermined the CROA fraud allegations and the denial of class certification would be a particularly difficult hurdle to moving forward with this litigation. This level of uncertainty weighs heavily in favor of approval.

2. Risk, Expense, Complexity, and Likely Duration of Future Litigation

As previously noted, further litigation carries a risk that the appellate courts will ultimately adopt an interpretation of CROA adverse to the class. See *Hillis*, 237 F.R.D. at 516–17; *Helms v. ConsumerInfo.com, Inc.*, No. 05–13335–W (11th Cir. Jan. 24, 2006). Should this Court (or the Ninth Circuit on appeal) adopt such an interpretation, the class' CROA claims will be extinguished and the class would receive no recovery for those claims.

If this settlement is not approved, further litigation before this Court would be time consuming, complex and expensive. The Court reasonably anticipates a motion for class certification and competing motions for summary judgment centered upon competing interpretations of CROA. Regardless of how this Court might have ruled on the merits of the legal issues, its decisions would almost certainly be met by one party with an appeal, and the parties would have faced the expense, delays and uncertainties inherent in litigating an appeal. While litigating in this Court, counsel would also be dealing with the currently stayed appeal in the Eleventh Circuit. Accordingly, this factor supports approval of the Amended Settlement.

3. Risk to Maintaining Class Action Status Throughout Trial

*11 When Class Counsel were denied class certification on behalf of a similar class in *Helms*, they sought leave of this Court to file a Second Amended Complaint naming CIC and Experian as defendants. In granting that motion, this Court stated it was "skeptical" that a trial class could

be certified. It again noted its skepticism when granting preliminary approval. Developments in the law since the filing of the Second Amended Complaint further underscore the risk that class certification for trial would not have been obtained. Notwithstanding this, Class Counsel was able to negotiate a settlement that provides a benefit to approximately 14 million consumers and, through the remedial relief, to the general public as well.

For the reasons stated, there is a substantial risk that Plaintiff would not be able to obtain and maintain class certification. This factor weighs in favor of approval.

4. Amount Offered

In considering the amount offered in the settlement, the Court may also look at the difficulties Plaintiff would have in proceeding with litigation. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir.2000). The benefits offered were discussed in Part IV, Section C.

The Court finds that the consideration offered here—remedial and in-kind relief plus additional expenses incurred by Defendants—is adequate to support the proposed settlement, given the uncertainty of Plaintiff's legal claims under CROA, coupled with denial of class certification in other, similar district court cases. The amount offered provides the class with a greater recovery than it would likely achieve through litigation, and does so in a more expedient and certain manner. This factor weighs in favor of approving the Amended Settlement.

5. Extent of Discovery Completed and Stage of Proceedings

In assessing this factor, it is appropriate to consider the antecedent to this case, *Helms*, given the agreement of the parties that the discovery from *Helms* applied in *Browning*.

Helms was filed in 2003 and was litigated for more than two years, with both parties conducting depositions, answering interrogatories, and responding to document requests. During discovery, CIC reportedly produced millions of emails, tens of thousands of documents, and more than 100,000 recordings of phone calls. The parties filed competing motions for summary judgment which were resolved by the court. Eventually, the district court denied class certification. On the issue of whether Defendants were subject to CROA, the parties completed appellate briefing before the Eleventh Circuit.

Browning was filed against Yahoo! in 2004. It, too, has involved discovery and motion practice, including a motion to dismiss by Yahoo! and the aforementioned motion to add two additional defendants. Furthermore, this Court has exercised considerable scrutiny over the settlement, issuing several interim orders in response to the parties' initial proposed settlement.

*12 Finally, the parties engaged in multiple rounds of mediation. As a result, the parties and this Court are well positioned to assess the strength of this case and the comparative benefits of the proposed settlement. See *Young v. Polo Retail, LLC*, 2007 WL 951821, at *4 (N.D.Cal. Mar.28, 2007). Accordingly, this factor weighs in favor of approving the Amended Settlement.

6. Experience and Views of Counsel

The settlement is the product of arm's length negotiations that were conducted by counsel who are experienced in class action litigation. Counsel for both sides believe that the Amended Settlement reflects the relative strengths and weaknesses of the parties' respective claims and defenses, as well as the substantial risks presented in continuing the litigation.

Moreover, the settlement was the product of mediation by a qualified and experienced lawyer, Rodney A. Max,¹⁵ who reported that the case was “professionally, ethically, and reasonably mediated, negotiated and resolved.” Max Aff., (Docket No. 132–7). The mediator recommended the settlement to the Court as being “fair, reasonable, and adequate.” *Id.*

The experience and views of counsel weigh in favor of approval.

7. Presence of Governmental Participant

The court, in requiring CAFA notice to be sent to various governmental entities,¹⁶ intended to provide an opportunity for comment or objection by such entities. Defendants provided a thorough case history and kept these entities informed of the developments in the case. However, no governmental entity sought to participate in the settlement proceedings by objection or comment. See *Keough Aff.*, (Docket No. 167).

The fact that the agency responsible for CROA enforcement—the FTC—did not object to the settlement is significant. CIC and the FTC previously entered into a consent decree which required CIC to make certain disclosures in connection with its negative option marketing.¹⁷ Given this history, the Court's preliminary approval order specifically addressed the negative option feature of this settlement. That order noted this Court's belief that offering a choice of settlement benefits—one of which did not have the negative option—avoided the potential problems cited by the FTC in its opposition to a negative option in a class action settlement. See *Chavez v. Netflix, Inc.*, No. CGC–04–434884 (Cal.Super.Ct. October 27, 2005). As evidenced by that case, the FTC has previously objected where it believed a negative option in a settlement was either inadequately disclosed or inappropriately structured.

Because numerous governmental agencies (including the FTC) were given notice of the settlement and have not objected, this factor weighs in favor of the settlement.

8. Reaction of Class Members to Proposed Settlement

The next factor that the court must consider is the reaction of the class to the proposed settlement. *Hanlon*, 150 F.3d at 1026. Of the 14 million settlement class members who were sent notice, 139 objected to the Amended Settlement. See *Keough Aff. and Supp. Aff.*, (Docket Nos. 167, 196). Statistically, this indicates that there was 1 objector for every 100,720 class members. This objection rate is low, even compared to objection rates in other, similar class action settlements.¹⁸ The relatively low percentage of objectors weighs in favor of approval.

9. Absence of Collusion in Settlement Process

*13 Finally, this court should satisfy itself that the settlement was not the product of collusion. See *Young*, 2007 WL 951821, at *3. Here, the original proposed settlement was the product of mediation arising out of *Helms* and settlement negotiations covering both *Helms* and *Browning*. Max Aff., (Docket No. 132–7). This negotiation process spanned more than a year.

The initial mediation was discontinued because the parties could not reach agreement. The Eleventh Circuit ordered the case to a second mediation. The mediator reported that these negotiations were contentious, with the parties staking out aggressive positions. *Id.* After several meetings, the parties

reached an agreement on the substance of the relief to be provided to the settlement class. *Id.* Then, the negotiations broke off for a second time when the parties were unable to agree on attorney's fees. *Id.* The mediator initiated one last effort, submitting a "mediator's proposal" on the attorney's fees which was ultimately accepted. *Id.*

Further, the Amended Settlement was reached in accordance with this Court's interim orders following the initial motion for preliminary approval of the settlement. Accordingly, the Court is satisfied that the settlement procedure was without collusion. This factor weighs in favor of approving the Amended Settlement.

Approval of settlements in class action lawsuits is left to the "sound discretion of the trial court." *Hillis*, 2007 WL 1953464, at * 9. After consideration of the above factors and because public and judicial policies strongly favor settlement of class action law suits, *id.* at * 9, the Court GRANTS the joint motion for final approval of the Amended Settlement. On balance, the settlement is fair, reasonable and adequate, was determined without fraud or collusion, and is in the best interests of the settlement class.

VII. MOTION FOR ATTORNEY'S FEES AND EXPENSES

Also before the Court is Class Counsel's Motion for Award of Attorney's Fees and Reimbursement of Expenses. (Docket No. 176). The motion seeks, and CIC and Experian have agreed to pay, \$2.55 million for Class Counsel's attorney's fees and expenses. This figure was proposed by the mediator. Max Aff., (Docket No. 132-7). Class Counsel contend that their fee request is appropriate under both a lodestar and percentage-of-the-fund analysis.

Lodestar Comparison: The motion for Attorney's Fees is supported with declarations and detailed records showing that 4,798.7 hours were spent on the litigation (*Helms* and *Browning*) and giving a full breakdown of expenses. The lodestar amount during this period for attorney time calculated at prevailing market rates is \$2,688,647.50. The market rates utilized, the hours expended, and the expenses incurred appear reasonable and appropriate. Class Counsel's request of \$2.55 million, which includes expenses of \$47,642.86, is below the lodestar without including the multipliers that typically increase the award of attorney's fees to plaintiffs' attorneys in class action settlements with a risky outcome if litigated to conclusion.

***14 Percentage-of-Recovery Comparison:** The reasonableness of the requested fee and the lodestar analysis are further supported by a percentage-of-recovery analysis.¹⁹ To begin the analysis, the Court concludes that \$35 million²⁰ is one possible estimate of the total monetary benefit created to the class based on the in-kind relief. The \$2.55 million requested in attorney's fees and expenses therefore represents approximately 7.3% of this estimated total benefit, falling within the 25% benchmark applied in the Ninth Circuit. *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1043, 1047 (9th Cir.2002), *cert denied sub nom. Vizcaino v. Waite*, 537 U.S. 1018, 123 S.Ct. 536, 154 L.Ed.2d 425 (2002).

As such, the fee request is reasonable, given the length, novelty and complexity of the litigation, the quality of representation, the risk of nonpayment, the time and labor required, the benefits obtained for the class through the settlement, multipliers applied in similar cases, and the comparisons to a lodestar and percentage-of-recovery analysis. The motion for an award of attorney's fees of \$2.55 million (inclusive of \$47,642.86 in litigation expenses) is GRANTED. The award shall be paid in accordance with the terms of the Amended Settlement.

VIII. CONCLUSION

1. The Court designates Chuck Browning as the class representative, and E. Clayton Lowe, Jr. and Peter A. Grammas as Class Counsel.
2. Plaintiff's motion for attorney's fees and expenses is granted. *See* Part VII.
3. The Amended Settlement Agreement is expressly incorporated herein by this reference, and the Court directs the parties to implement it.
4. The applicable requirements of [Federal Rule of Civil Procedure 23](#) having been satisfied, the settlement class is finally certified as all natural persons in the United States who:

between June 17, 1998 and December 27, 2006, entered into an agreement over the internet with [CIC] or any Experian Entity to purchase any **Credit Check or Credit Monitoring (which were formerly known as CreditCheck® Monitoring Service), Credit Manager (including Yahoo! Credit Manager), Triple Alert, or Triple Advantage credit-monitoring product (and/or**

any credit score sold on a website also selling any of the foregoing credit monitoring products)²¹ and paid [CIC] or any Experian Entity for that credit-monitoring product (and/or such a credit score) but did not later obtain complete refunds from any source of the full amount paid for that credit-monitoring product (and/or credit score).

A full opportunity having been afforded to class members to participate in the Final Fairness Hearing and all objectors having been heard, all settlement class members who have not timely excluded themselves are bound by this Order and the Final Judgment.

Those individuals who timely excluded themselves are not part of the settlement class. Also excluded are Defendants' officers, directors, and employees; Defendants' and Plaintiff's attorneys; Magistrate Judge Lloyd and the members of his immediate family; anyone who enrolled in credit monitoring pursuant to a free trial offer but never became a paying member of the credit-monitoring program; and anyone who was a named plaintiff (as opposed to a putative class member) in a lawsuit pending against any defendant as of December 26, 2006.

*15 5. Upon the Effective Date (i.e., the date when all appellate rights with respect to this order and the Final Judgment are exhausted):

1. the Released Defendants²² shall forever be released and discharged from any and all legal or equitable claims ... that the named Plaintiff and settlement class members ("the *Browning* class") had based on any Released Party's violation of [CROA]; and

2. the Released Defendants shall forever be released and discharged from any and all legal or equitable claims ... that [the *Browning* class] had based on any Released Party's selling, providing or performing (or representing that such person can or will sell, provide, or perform) the service of improving a consumer's credit record, history, or rating (including providing advice or assistance to the consumer with regard to improving the consumer's credit record, history, or rating), where the stated basis of the claim is

about improvement of a consumer's credit record, history, or rating; and

3. the Released Marketing Partners or Marketing Affiliates²³ shall forever be released and discharged from any and all legal or equitable claims ... that [the *Browning* class] had based on any Released Party's violation of [CROA], insofar as and to the extent that [the Released Marketing entities] advertised, promoted, marketed, provided and/or sold [the enumerated products or services]

4. [the Marketing Entities] shall forever be released and discharged from any and all legal or equitable claims ... that [the *Browning* class] had based on any Released Party's selling, providing or performing (or representing that such party can or will sell, provide, or perform) the service of improving a consumer's credit record, history, or rating (including the service of providing advice or assistance to the consumer with regard to improving the consumer's credit record, history, or rating), where the stated basis of the claim is about improvement of a consumer's credit record, history, or rating, insofar as and to the extent that [the Released Marketing Entities] advertised, promoted, marketed, provided, and/or sold [the enumerated products or services].

All released claims refer to those arising on or before the Effective date.

6. All objections having been overruled, and final approval to the Amended Settlement having been granted, the Second Amended Complaint shall be, and is, dismissed with prejudice. No member of the settlement class (including his or her past, present or future agents, legal representatives, trustees, parents, estates, heirs, executors and administrators) may hereafter assert any claim, demand, action, suit or cause of action, whether class or individual, against any Released Party based in whole or in part upon any released claim.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 4105971

Footnotes

¹ Browning is represented in this case by plaintiff's counsel in *Helms*: Lowe & Grammas LLP (formerly Lowe, Grammas, Hitson & Dana LLP).

- 2 The term “Experian Entities” shall mean Experian North America, Inc. and any company that is a subsidiary, parent, corporate affiliate or division of Experian North America, Inc., and shall also include Credit Expert, LLC.
- 3 For full text of the class definition and release, see the Amended Settlement Agreement (Docket No. 132–2) or Part VIII, Nos. 4–5 of this order.
- 4 Class members marked as “late” in Exhibit 1 of Keough Second Supp. Aff., did not file timely exclusions. (See Docket Nos. 196, 197). This list includes:
- | | | | |
|----------|------------------------|----------|---------------------|
| No. 1184 | Sergey Golod (WA) | No. 1189 | Keishana White (IN) |
| No. 1185 | Lisa Mace (NC) | No. 1190 | Sally Barnhill (OH) |
| No. 1186 | Charles Patrick (TN) | No. 1191 | Susan Shelton (TX) |
| No. 1187 | Teresa Crook (GA) | No. 1192 | Matthew Maurer (PA) |
| No. 1188 | Carmelita Vazquez (PA) | | |
- Any additional late exclusions submitted to the Settlement Administrator, who are not identified by name in Exhibit 1, also remain in the class.
- 5 Cost of notice and settlement administration in similar case involving class of 6.6. million—with same settlement administrator—estimated to exceed \$1,000,000. *Hillis v. Equifax Consumer Services, Inc.*, 2007 WL 1953464, at *5 (N.D.Ga.).
- 6 The Court ordered this notice even though at the time there was no clear authority as to whether CAFA retroactively applied to cases filed prior to 2005.
- 7 In class-action settlements, it is common practice to provide a single notice program that satisfies both of these notice standards. See David F. Herr, *Annotated Manual for Complex Litigation* § 21.31 (4th ed.2005).
- 8 See Keough Aff. and Supp. Aff., (Docket Nos. 167, 196); Edward F. Siegel represented objectors Richard Oster, Jeff Heinrich and Norman Palmer. Attorney J. Garrett Kendrick appeared for Joshua Hazan. Objectors Rodney Ashburn and Aron Noelle Griffis appeared through attorney John W. Davis. Attorney Lawrence W. Schonbrun represented Marty Evans and Michael Weiss.
- 9 Raymond Cooper was among the putative class members who primarily objected to this settlement as a “coupon” settlement. (Docket No. 143). However, Cooper also excluded himself from the class. (Docket No. 167). In any event, all of his objections were raised by other class members and accordingly considered.
- 10 The notices explain how a class member who chooses the credit monitoring benefit may cancel membership to avoid automatic renewal. All of the notices included on the first page (in bold, 14–point type) plain language disclosing the automatic-renewal.
- 11 A phishing scam involves Internet “fraudsters” who send spam or pop-up electronic messages to lure personal information from unsuspecting victims. See FTC Consumer Alert, *available at*, www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt127.shtm
- 12 Although, broad releases are sometimes approved in class action settlements. See *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 106 (2d Cir.2005). Note that an even broader release was recently approved in a similar case. *Hillis*, 2007 WL 1953464, at *12.

- 13 It noted that the violation was at most, a technical violation of a complex statutory scheme and that “[t]he damages resulting would be devastating and largely out of proportion with the culpability of defendant’s conduct.” *Helms*, 236 F.R.D. at 569.
- 14 Two district courts in the Eleventh Circuit reached contrary conclusions on this legal issue. *Helms*, 436 F.Supp.2d at 1238 (finding that CIC fell within the definition, but certifying ruling for interlocutory appeal); *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 513–517 (N.D.Ga.2006) (decided after *Helms*, with similar CROA claims against similar defendant; finding as a matter of law that plaintiff failed to show defendant was a credit repair organization; the case then settled).
- 15 Max is an Alabama lawyer and mediator who has practiced law for over 30 years and who has, for the past ten years, focused his practice on the mediation of hundreds of complex civil cases in 26 states and the District of Columbia.
- 16 For details, see Part IV, Section D1.
- 17 See *FTC v. ConsumerInfo.com*, No. CV SACV 05–801 AHS (MLGx), Stip. Final J. (C.D.Cal. Aug. 15, 2005).
- 18 See, e.g., *Glass*, 2007 WL 221862, at *5 (approving a settlement with 8 objectors in a class of 13,176, an objection rate of 1 objector for every 1,647 class members).
- 19 Objectors dispute the application of a percentage-of-recovery analysis because it does not take into account actual redemption rates. Class Counsel maintain that attorney’s fees may be based on the projected total amount of benefit created. *Williams v. MGM–Pathe Communications Co.*, 129 F.3d 1026 (9th Cir.1997); *Young*, 2007 WL 951821, at *8. The objectors correctly distinguish the cases cited by Class Counsel as common fund cases. But, because this analysis is applied for the limited purpose of confirming the reasonableness of the requested fee and lodestar amount, the authority is sufficiently analogous.
- 20 Determined by multiplying the retail value of the credit score (\$5.00) by half of the number of class members (7 million). Some class members would presumably choose the benefit of two months free credit-monitoring (\$9.95 per month). This estimate does not include the additional benefit derived from the remedial relief.
- 21 Bold language hereinafter “the enumerated products and services.”
- 22 i.e., Defendants and their present or former officers, directors, employees, attorneys, agents, administrators, successors, assigns, subsidiaries, partners, corporate affiliates, sister corporations, parents, divisions, and predecessors.
- 23 i.e., any entity which (or individual who) during the class period was a defendant’s marketing partner or affiliate that advertised, promoted, marketed, provided, or sold any [enumerated product or service] on a website also selling any of the foregoing credit-monitoring products (hereinafter, “Marketing Entities”).

Exhibit I

2015 WL 10172760 (N.J.Super.Ch.) (Trial Order)

Superior Court of New Jersey, Chancery Division.

General Equity

Essex County

Christine GURRIERE, et al., on Behalf of themselves and all others Similarly situated, Plaintiff,

v.

BLOOMFIELD CONDOMINIUM ASSOCIATES, LLC, Bloomfield Associates, Alex Bistricher, David Bistricher, Elsa Bistricher, Brookdale Gardens Condominium Association, Inc., Bloomfield Management Company, Defendants.

No. ESX-C-101-15.

August 28, 2015.

Opinion

[Laurence H. Olive](#), Esq., for plaintiffs.

[Philip R. Sellinger](#), Esq. & Aaron Van Nostrand, Esq. (Greenberg Traurig, LLP), for defendants Bloomfield Condominium Associates, LLC, Bloomfield Associates, Alex Bistricher, David Bistricher, Morris Bistricher, Elsa Bistricher and Bloomfield Management Company.

[E. Richard Kennedy](#), Esq. (Kennedy, Wronko, Kennedy), for defendant Brookdale Gardens Condominium Association, Inc.

[Dennis J. Drasco](#), Esq. (Lum, Drasco and Positan), Special Fiscal Agent.

[David B. Katz](#), Judge.

FACTUAL BACKGROUND

*1 The present application in the above matter is intended to resolve a complex litigation that has spanned at least 15 years. Indeed, the underlying case, Docket No. ESX-C-143-00, is the oldest case in Essex County, New Jersey.

In the instant matter, the parties, after years of extensive litigation and negotiation, agreed among themselves to settle the underlying case by way of a class action settlement. As such, the parties filed the present class action complaint under Docket No. ESX-C-141-15 for the purpose of settlement only.

The Court is now being asked to grant final approval of a proposed class action settlement on behalf of themselves and a class of all current and former non-sponsor unit owners (“Class Members”) at Brookdale Gardens Condominium Complex (“Brookdale Gardens”), located at 935 Broad Street in Bloomfield, New Jersey. The putative class, consisting of 75 Class Members, was certified and the proposed settlement agreement was preliminarily approved on May 6, 2015 following a hearing. Of the 75 Class Members, 59 unit owners are class representatives.

The Court conducted a lengthy final approval hearing on July 20, 2015. Two experts testified at the hearing and were available for cross-examination. The objecting Class Members were given an opportunity to verbally place their objections on the record at the hearing, and four objectors elected to do so. They too were subjected to cross-examination.

Briefly, and as will be discussed at length below, the proposed settlement provides that, in consideration for dismissing the lawsuit and releasing Defendants from the claims alleged therein, each Class Member who currently owns a unit or units at Brookdale Gardens may convey its unit(s) to Bloomfield Condominium Associates, LLC, the developer of Brookdale Gardens (the “Sponsor”) in exchange for a specific amount set forth in the agreement. The specified amount is based on the number of rooms in the particular unit.¹ Significantly, and at issue, the proposed settlement also provides that upon final approval, control over the Board and the Association will vest in the Sponsor, and the Sponsor will not be obligated to sell any additional units in Brookdale Gardens.

The terms of the proposed settlement reflect a compromise on various issues in the instant litigation, which has been ongoing for the past 15 years and which is characterized by a complex, contentious and protracted history. The Court has been advised that the instant litigation is the oldest pending case in Essex County. For purposes of context and completeness, the Court will provide a brief overview of the substantive issues of the underlying suit as well as the significant procedural events that led to the instant proposed class action settlement.

On August 28, 1987, a Public Offering Statement (“POS”) was issued for a 400-unit development known as Brookdale Gardens. Originally, an entity known as River Broad Corporation planned to convert the development into a condominium pursuant to *N.J.S.A. 46:8B-1*. The POS contained several terms relating to governance of the condominium. At some point, Brookdale Gardens was sold to Defendant Bloomfield Condominium Associates, LLC, whose members consist of Defendants Alex Bistricher, David Bistricher, Morris Bistricher and Elsa Bistricher.² The conversion of Brookdale Gardens began on January 12, 1989 with the filing of a Master Deed establishing the condominium. Defendant Brookdale Gardens Condominium Association, Inc. (the “Association”), a non-profit corporation, governs Brookdale Gardens and is responsible for the administration, management, and operation of the complex. The Association was to be governed by an elected Board of Trustees (“the Board”).

*2 The POS set forth a detailed plan for the governance of Brookdale Gardens as required by *N.J.S.A. 46:8B-12.1*. Specifically, in the event that 25% of the units are sold, non-sponsor unit owners shall elect no less than 25% of the Board of Trustees. In the event that 50% of the units are sold, no less than 40% of the members of the Board of Trustees shall be elected by non-sponsor unit owners. Finally, in the event that 75% of the units are sold, non-sponsor unit owners may elect the entire Board of Trustees, except that the Sponsor may retain one member on the Board of Trustees as long as any units remain unsold in the regular course of business.

At all relevant times, Bloomfield Condominium Associates has owned 310 out of the 392 units in the condominium, roughly 80%, with the balance being sold to third parties acquiring their units from the Sponsor. Thus, Bloomfield Condominium Associates had complete control of the Board of Trustees since its inception because it did not convey 25% or more of the units. Through its control of the Board, Bloomfield Condominium Associates hired Bloomfield Management Company, a company owned by the Bistrichers, to manage and operate the complex. Bloomfield Management Company was later removed by a Special Fiscal Agent appointed by the Court to oversee the finances and operation of Brookdale Gardens. Bloomfield Management Company is no longer in existence.

In addition to the POS, the New Jersey Condominium Act (“Condominium Act”) or (“the Act”) itself contains provisions requiring turnover of board control to non-sponsor unit owners in certain circumstances. The relevant statute, *N.J.S.A. 46:8B-12.1* sets forth the same governance scheme as provided by the POS, but also provides in pertinent part that “when some units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration.” *N.J.S.A. 46:8B-12.1(a)*.

On April 24, 2000, 34 non-sponsor unit owners filed a Complaint and Order to Show Cause under Docket No. C-143-00, alleging that Bloomfield Condominium Associates violated multiple provisions of the Condominium Act, as well as claims based on negligence, breach of contract and fraud. Specifically, the Plaintiffs alleged that the Association was not being operated in their

best interest and that the property was in a state of disrepair. This case was related to two earlier cases initiated by non-sponsor unit owners against Bloomfield Associates, Bloomfield Condominium Associates, and the Bistricers filed in 1990 and 1995.³

After unsuccessfully attempting mediation on several occasions, the parties continued litigation over several years. On February 16, 2007, the Court appointed Dennis Drasco, Esq., of Lum Drasco and Positan, as Special Fiscal Agent (“SFA”) for the Association. Mr. Drasco was appointed to facilitate litigation to which the Association was a party, as well as to report to the Court any improprieties found in the operations and financial affairs of the Association and to take any other actions deemed appropriate. The SFA recommended the removal of Bloomfield Management Company and the appointment of a professional management firm to operate, manage and maintain the condominium.

*3 After several years of ongoing litigation, on July 6, 2012, the Court granted Plaintiffs' motion for partial summary judgment, thus granting them control of the Board of the Trustees of the Association. The main thrust of Plaintiffs' motion was that after selling units to Plaintiffs, Defendants intentionally failed to offer any additional units for sale to the public in the ordinary course of business for the previous 20 years in order to maintain control over the Board. In support of its allegation that Defendants failed to offer units for sale in the ordinary course of business, Plaintiffs offered evidence that individuals made many offers to purchase units from the sponsor which went ignored. Those individuals alleged that they eventually purchased their units from non-sponsor unit owners.

Plaintiffs asserted that Defendants also executed a blanket mortgage on sponsor-owned units in contravention of the Condominium Act, making it impossible for Plaintiffs to sell their units. Specifically, Plaintiffs claimed that the *N.J.S.A. 46:8B-23* prohibits blanket mortgages unless individual unit owners can obtain releases of their particular units from the mortgage upon payment to the mortgagee of their respective proportionate share of the then outstanding balance of unpaid principal, accrued interest and any other charges then due and unpaid.

Plaintiffs also argued that under Defendants' improper control, the complex had fallen out of compliance with various municipal code requirements and suffered numerous Bureau of Housing Inspection violations. Plaintiffs also alleged that Defendants failed to properly maintain the property and refused to raise the maintenance fees because they would have had to pay 80% of those fees by virtue of their ownership of the units, and that Defendants did not properly reserve funds for maintenance and upkeep.

In resolving Plaintiffs' summary judgment motion, the Court held that after selling some units, Defendants intentionally took action that prevented the sale of additional units in the ordinary course of business, and as such, Plaintiffs were entitled to elect all members of the board pursuant to *N.J.S.A. 46:8B-12.1(a)*. In reaching its decision, the Court set forth many sources that indicated that “the overriding legislative concern was to address problems associated with continued developer control over condominium complexes long after some units were sold.” July 6, 2012 Opinion, at p. 14. The Court found that the blanket mortgage executed on approximately 80% of the units in the complex made it impossible for Defendants to sell sponsor-owned units in the ordinary course of business. Because the Sponsor would not sell its units, the non-sponsor unit owners were deprived of any control over the condominium, contrary to the legislature's intent in enacting the Condominium Act. In order to effectuate the legislative goal to allow non-sponsor unit owners to play a meaningful role in the governance of their condominiums, the Court divested the Sponsor of all voting rights until they conveyed ownership of additional units such that non-sponsor unit owners would own 75% of all units. In other words, Plaintiffs were given full control over the Board of Trustees by the Court's July 6, 2012 decision. The non-Sponsor unit owners were elected to serve as members of the Board in December 2012 for the first time since the creation of the condominium in 1989.⁴

Plaintiffs then filed another summary judgment motion on April 24, 2013. There were several significant aspects to this motion. First, Plaintiffs were concerned that Defendants were still able to technically “control” the Condominium complex, notwithstanding the Court's order of July 6, 2012. Second, Plaintiffs sought to compel Defendants to sell their units so that the complex would returned to Condominium-like development, with more than the 20% private ownership so that Plaintiffs could eventually have a market for the sale of their units. Third, Plaintiffs sought an Order precluding the Sponsor from continual rental of its units.

*4 With respect to the issue that the Sponsor may retain “control” despite the Court’s July 6, 2012 Order, Plaintiffs reasoned that the Condominium’s bylaws set forth a number of actions that require a two-thirds majority vote of all “members” who are voting, which the Master Deed defines as the owner or co-owner of a unit. Plaintiffs feared that Defendants could still frustrate their attempts to pass proposals requiring a two-thirds majority because 51% of the members must be present before a meeting can be held and a vote can be taken. Because the Bylaws define “member” only as owner or co-owner of a unit, arguably, according to Plaintiffs, even a member without voting rights (such as the Sponsor) “counts” for the purposes of the percentage of members needed to hold a meeting. In light of Plaintiffs’ concerns over the potential frustration of the remedy fashioned by the Court in July 2012, the Court held that meetings may be held so long as 51% of the *non-sponsor unit owners* are present. See August 30, 2013 Order.

While the Court did craft a remedy to prevent the Sponsor from frustrating the divestiture of its voting rights, it denied the principal other relief requested by Plaintiffs. Specifically, the Court refused to enter a mandatory injunction compelling the Sponsor to sell the units it owns because such relief would require an inappropriate level of court supervision. Finally, the Court refused to enjoin Defendants from leasing any of its remaining units because the Master Deed contained no restrictions upon the leasing of any Unit and the Condominium Act required those types of restrictions to be specified in the Master Deed. *Id.*

Litigation remained ongoing for several months following the August 30, 2013 Order. On October 29, 2013, the Association filed a motion for leave to amend its Answer to Plaintiffs’ Fourth Amended Complaint and intervene as Plaintiff in the action or file a cross-claim against the Sponsor. The Association argued that its Answer to the first three Complaints denied Plaintiffs’ allegations against the Sponsor, its Co-Defendant, because at that time the Association was controlled by the Sponsor. Because the Sponsor was stripped of that control by virtue of the Court’s July 2012 Order, the Association, then controlled by non-Sponsor unit owners, wished to support Plaintiffs’ allegations against the Sponsor and assert claims of its own against the Sponsor. Thus, the Association alleged violations of the New Jersey Condominium Act, the Planned Real Estate Development Full Disclosure Act, and the Consumer Fraud Act. The Court granted the Association’s request to amend its Answer to the Fourth Amended Complaint and to assert a Cross Claim against the Sponsor on December 19, 2013.

On February 11, 2014, the Sponsor filed a motion to dismiss the Association’s Cross-Claims against the Sponsor, arguing that the Association failed to adequately plead any cause of action under the Consumer Fraud Act, the Condominium Act and the Planned Real Estate Development Full Disclosure Act. The motion hearing took place on March 20, 2014, at which time the Court granted the Association permission to amend the Cross-Claim. The Association filed a Second Amended Cross-Claim on April 5, 2014, and Defendant’s motion to dismiss the Second Amended Cross-Claim was denied on May 2, 2014. Defendants thereafter filed an Answer denying all allegation in the Second Amended Cross-Claim.

The parties then continued in active mediation. The parties agreed amongst themselves that a fair resolution of the lawsuit would be for the non-sponsor unit owners to be bought out at above market rates, with control of the complex returning to the Defendants. The parties agreed amongst themselves that those settlement parameters were obtainable through a class action. As such, the Plaintiffs filed a class action complaint on May 1, 2015 under Docket No. C-101-15. The Court conducted an extensive preliminary approval hearing on May 4, 2015 and entered an Order on May 6, 2015 preliminarily approving the proposed class action settlement and directing that notice of the settlement in the form proposed by the parties be sent to all Class Members as set forth in the Settlement Agreement. In accordance with the Court’s May 6, 2015 Order, the Class Notice was mailed to all 75 Class Members via first class mail. On May 11, 2015 the Class Notice was also placed under the doors of all 41 Class Members currently residing at Brookdale Gardens. On June 13, 2015 through June 16, 2015 the Class Notice was published in the Newark Star Ledger.

TERMS OF THE PROPOSED CLASS ACTION SETTLEMENT

Procedural Terms

*5 The Settlement Agreement provides several options for Class Members regarding their participation in the proposed settlement. In order to avail themselves of the settlement benefits (i.e., be bought out by the Sponsor), Class Members were required to submit a claim form by July 3, 2015. Class Members who leased any of their units to tenants were directed to submit copies of any leases with their claim forms. If the outstanding term of any lease exceeds a year or if the lease is more than 10% below certain monthly rent amounts, the claim may be rejected. The specific threshold rent amounts set forth in the proposed settlement are (1) \$1,430 for 5 rooms; (2) \$1,250 for 4 rooms; (3) \$1,220 for 3.5 rooms; and (4) \$1,010 for 2.5 rooms.

Class Members who submit a claim form will, if the settlement is approved, each receive a notice advising that the Class Member has six months to find alternate housing, and once the Class Member has found alternate housing, the Class Member will have 60 days to close on the sale of their unit in Brookdale Gardens to the Sponsor.

Class Members who wished to “opt-out” so as not to participate in the settlement, and preserve only their right to pursue damage claims based on an alleged diminution of value of their units due to Defendants' conduct, were required to submit an opt-out form by June 11, 2015. Any Class Member who neither submitted a claim nor submitted a formal opt-out letter in accordance with the settlement terms waives his or her right to convey his or her unit to the Sponsor, but will be bound by all other terms of the settlement. The proposed settlement also gave Class Members an opportunity to object to the terms of the settlement by sending a letter to all attorneys and filing that letter with the Clerk of Court by June 11, 2015. Those who submitted an affirmative opt-out letter were not permitted to object because by opting out they were no longer a party to the settlement. In other words, only those who submitted claim forms or did nothing were afforded an opportunity to object.

Substantive Terms

The settlement agreement is 46 pages long and contains 30 provisions, with many provisions containing subparts. The Court will elaborate only on those provisions that are at issue in the final approval hearing.

Pursuant to the proposed settlement, Class Members who timely submit a claim form will be entitled to receive the following amount for each unit owned by that Class Member upon conveyance to the Sponsor: (1) \$127,500 per unit for a 2.5 room unit; (2) \$136,500 per unit for a 3.5 room unit; (3) \$141,500 per unit for a 4 room unit; (4) \$170,000 per unit for a 5 room unit; (5) \$5,000 per unit for each garage unit; and (6) \$105,000 for unit 84A. The settlement agreement provides that the Sponsor will pay the fee for obtaining the certificate of occupancy and the realty transfer fee associated with the conveyance, with the Class Member being responsible for performing all repairs required by the Township for issuance of a certificate of occupancy.

Also at issue are those provisions that change the governance of Brookdale Gardens. Section 1(b)(i) provides that control of Brookdale Gardens, the Association and the Board shall be turned over to the Sponsor, with the governance structure reverting to the structure in place immediately prior to the July 6, 2012 Order, with the Sponsor having the right to appoint each member of the Board of the Association. As such, any remaining non-sponsor unit owners will have no representation on the Board, and all Class Members, as well as those who opt out of the class and remain in the complex, will have no right to object to the Sponsor's control of the Board. Section 1(b)(ii) provides that the Sponsor has no obligation to sell any of their units at Brookdale Gardens. Should the Sponsor decide to sell any of its units, it must comply with the progressive statutory turnover of control to non-sponsor unit owners provided by [N.J.S.A. 46:8B-21](#).

*6 In its many submissions to the Court, the Sponsor represents that while any remaining unit owners may not challenge the Sponsor's control of the Association in and of itself, they may challenge any acts that are contrary to the Condominium Act. The Sponsor asserts that the release in the proposed Settlement Agreement only applies to claims based on acts or omissions of the Sponsor that predate the Settlement Agreement such that Class Members reserve their right to sue the Sponsor for any future improper or unlawful acts. In other words, should the Sponsor fail to properly maintain the community areas of the condominium, the remaining unit owners may sue for those violations. In addition, those who opt-out will be able to maintain an action for any alleged diminution in value of their unit(s) due to Defendant's prior conduct relative to their control of Brookdale Gardens. Significantly, the opt-outs do not preserve their right to sue over the Sponsor's current control over the complex.

CLASS REACTION TO SETTLEMENT

Out of the 75 total Class Members, 41 submitted claims, 18 objected⁵, and two opted out. Of the 18 objections, 11 are “form” objections in that they are identical. Each objection challenges the amount of the settlement benefits and/or the turnover of control to the sponsor. The Court will identify each of those objections and provide a brief overview of the substance of each one.

1. Zef Lulgjuraj

Mr. Lulgjuraj owns Units 38D, 3D and 39C, residing in 38D and renting 3D and 39D to tenants. All three units owned by Mr. Lulgjuraj are five rooms and have been valued at \$170,000 by the settlement agreement. Mr. Lulgjuraj also owns garages 28 and 46 which have been valued at \$5,000 each. Mr. Lulgjuraj asserts that if he sold his units to the Sponsor in accordance with the settlement, he would not receive fair value in exchange. Mr. Lulgjuraj attaches an appraisal report performed in February 2015 by a licensed real estate appraiser which appraises unit 3D at \$178,000.

Mr. Lulgjuraj attaches MLS listings of similar units within a five mile radius of Brookdale Gardens, many of which list for well over the amount offered under the settlement agreement.

Mr. Lulgjuraj argues that the Sponsor should buy the units at a higher price because the Sponsor will be able to rent the units for well over the \$1,800/month Mr. Lulgjuraj currently charges his tenants. Mr. Lulgjuraj also claims that he has spent approximately \$30,000 in renovations for each of the units he owns. As such, Mr. Lulgjuraj proposes an increase of at least \$30,000 for each unit, and an increase of \$2,000 for each garage. That is, Mr. Lulgjuraj would like to receive \$200,000 for each of his units and \$7,000 for each garage.

2. Valentina Gumenyuk and Oleg Korzyukov

Ms. Gumenyuk and Mr. Korzyukov purchased Unit 74A, a four room unit, in October 2014 while the instant lawsuit was ongoing. Their first objection to the settlement agreement is that they would be unable to buy a comparable unit in the same area for the amount of money offered by the settlement agreement. They also object to the Sponsor having total control over the Association and Board as well as the non-Sponsor unit owners having no control despite paying association fees and taxes.

3. Therese Anglin

Ms. Anglin reports that she has owned Unit 87A since February 1989, which comprises of 4 rooms. Ms. Anglin takes issue with the fact that the sale price offered by the settlement is “across the board” for all class members and does not account for improvements that some owners have made to their units. Ms. Anglin claims that she has installed new windows, replaced the entire kitchen, including appliances, installed a new hardwood floor in the living room due to damage from a steam leak, replaced the toilet and sink in the bathroom, renovated two hallway closets into one large closet, installed crown molding in the living room, and planted a garden. Ms. Anglin argues that she should receive a higher price for her Unit based on these improvements because they will save the Sponsor time and money and allow them to obtain a higher rent once it assumes ownership over her unit. In addition to submitting her written objection, Ms. Anglin testified at the fairness hearing about the value of improvements made to certain units.

4. Linda Grotenstein and Jessica Grotenstein

*7 The Grotensteins report that they purchased unit 14D in December 2007 for \$188,000. The Grotensteins allege that the Sponsor will likely sell the property for millions of dollars for development once it regains control. To bolster their theory

regarding the Sponsor's intentions, the Grotensteins attach several judicial decisions involving the Bistricers as defendants in cases where they allegedly acted wrongfully in certain real estate or finance transactions. The Grotenstein's also attach articles portraying David Bistricer as the "worst city landlord" in Brooklyn and noting his presence of then-Public Advocate Bill de Blasio's Worst Landlord Watchlist.

In light of the profit the Sponsor stands to gain through its alleged plans to sell the entire property, the Grotensteins assert that in exchange for the sale of their unit, they should receive fair market value as established in other condominium communities in and around Bloomfield. Like many of the other objectors, the Grotensteins have submitted listings in Bloomfield currently on the market to illustrate the alleged discrepancy between the sale price under the settlement agreement and the fair market value.

In addition to submitting a written objection, Linda Grotenstein testified at the fairness hearing regarding her improvements and her concerns about the Sponsor regaining control over the condominium.

5. Kathleen Karcher

Ms. Karcher disagrees with the settlement offer for two reasons. First, she argues that the prices being offered for the units under the settlement agreement are less than current selling prices of similar units in less desirable locations. Specifically, Ms. Karcher asserts that: a 2.5 room unit, offered for \$127,500 under the settlement agreement sells for between \$135,000 and \$149,000; a 3.5 room unit, offered for \$136,500 under the settlement agreement, sells for between \$149,000 and \$169,000; a 4 room unit, offered for \$141,500 under the settlement agreement, sells for between \$169,000 and \$239,000; and that a 5 room unit, offered for \$170,000 under the settlement agreement, sells for between \$195,000 and \$245,000. Ms. Karcher argues that not only are the comparable units offered for higher sales prices, but such comparable units are in much less desirable locations than Brookdale Gardens. Ms. Karcher also argues that garages should be valued higher than \$5,000, which Ms. Karcher asserts was the original purchase price in 1989, because they are currently in high demand due to limited parking.

In addition to the alleged disparities between the prices offered under the settlement and the asking prices for comparable units, Ms. Karcher also objects to the governance structure proposed under the settlement. Particularly, Ms. Karcher asserts that the Sponsor's main objective is "to maxim[ize] rental income at the expense of proper management and maintenance." As such, Ms. Karcher alleges that all improvements made by the non-Sponsor unit owners when they regained control of the Board will be undone. Specifically, Ms. Karcher claims that "the living conditions will quickly become unhealthy and unsanitary for everyone who lives in this complex" because the Sponsor will fail to pay for maintenance. In light of these concerns, Ms. Karcher proposes that the Board should be equally comprised of both Sponsor and non-Sponsor unit owners, notwithstanding that non-sponsor unit owners will be the smallest minority if the settlement is approved.

The following individuals submitted identical objections to Ms. Karcher's objection, which were submitted together with Ms. Karcher's objections: Malgorzata Jaroszczyk⁶, Joseph Spera, Jr.⁷, Michael Gatton, Shahid Liaqat, Michael Cucolo, Fabian Araujo, Patricia Dunn, Bella Broberg, John Lauvo III, Gloria Rafiq, Gustavo Villafuerte, Yolanta Lubinska, Santiago R. Vinueza and Tim Kelly. These "form" objections echo Ms. Karcher's concerns, namely that the purchase price offered under the settlement is lower than the current multiple listing prices for comparable sized units within a five mile radius of Brookdale Gardens, and that the Sponsor should not have sole control over the Board. These objections parrot Ms. Karcher's fear that the Sponsor will erase the progress and improvements made to the condominium achieved when the non-Sponsor unit owners regained control of the Board.

EXPERT RESPONSES TO THE PROPOSED CLASS ACTION SETTLEMENT

*8 Defendants submitted two expert reports to address the two principal concerns raised by the objections, namely the sale price for the units and the turnover of control over the Board to the Sponsor. These experts testified at the fairness hearing and were available for cross-examination.

Jon P. Brody, President of Appraisal Consultants Corporation, prepared an analysis addressing the reasonableness of the Sponsor's offered purchase price for the units. Mr. Brody is a state certified General Appraiser and is a Senior Residential Appraiser, Counselor of Real Estate and Member of the Appraisal Institute. In his report, Mr. Brody explains that he inspected the exterior of Brookdale Gardens and researched sales of comparable individual units in Bloomfield taking place between 2010 through 2015. Mr. Brody concludes that overall, the settlement agreement values exceed the overall average sales price per square foot.

Mr. Brody specifically addressed the appraisal report submitted by Mr. Lulgjuraj and testified that the report actually further supports that the settlement amounts are more than fair market value. Mr. Lulgjuraj's appraiser's report values one of his units at \$178,000, and the settlement values his unit at \$170,000. Mr. Brody explains that, in a typical transaction, the seller would be responsible for a brokerage fee, traditionally 5%. As such, the seller would net only \$169,100 in a typical sale at a \$178,000 sale price.

As to the assertion by some Class Members that the settlement value did not take into consideration certain improvements made to particular units, Mr. Brody acknowledged that no one unit was perfectly comparable to any Class Member's unit. However, Mr. Brody explained that his pool of sales data included a diverse range of units that included both units that had been improved and upgraded as well as older units with no upgrades. As such, on average, his analysis reflected the breakdown of units at Brookdale Gardens.

As to the multiple listings submitted with many of the objection letters, Mr. Brody asserts that multiple listings are not evidence of a market value transaction.

Defendants' other expert, J. David Ramsey, Esq., addressed the objections regarding the return of control of the governing board of the Association to the appointees of the Sponsor. Mr. Ramsey is an attorney with Becker & Poliakoff, LLP and specializes in condominium law. Mr. Ramsey concludes that Class Members may waive the statutory provision under the Condominium Act which requires the Sponsor to sell units in the ordinary course of business and the right to contest the Sponsor's control, because courts have held that statutory rights, albeit under other legislative acts, may be waived if the waiver is clear and explicit. Mr. Ramsey asserts that no case in New Jersey has addressed a waiver of rights under the New Jersey Condominium Act, but cites *Scully v. Tillery*, 456 Mass. 758 (2010), a case out of the Supreme Court of Massachusetts, for the proposition that provisions of the Condominium Act may be waived.

At the fairness hearing, Mr. Ramsey testified that the Condominium Act is an enabling statute rather than a remedial statute. In other words, the purpose of the Condominium Act is to set forth the parameters for establishing a condominium, but does not contain provisions intended to address wrongdoing or impropriety of the developer with regard to the Act. With this concept of the Condominium Act, Mr. Ramsey explained that the provision turning control over to the non-sponsor unit owners when the Sponsor fails to sell additional units is an optional provision. That is, according to Mr. Ramsey, the statute does not automatically transfer control to non-sponsor unit owners. Instead, the non-sponsor unit owners must choose whether they wish to control the Board or simply leave the Sponsor in control despite its failure to sell additional units. According to Mr. Ramsey, this elective turnover of control distinguishes New Jersey's Condominium Act from the Uniform Act, under which control automatically reverts to the non-sponsor unit owners in the event the Sponsor fails to offer additional units for sale. Mr. Ramsey opined that by accepting the settlement agreement, the Class Members are declining to exercise their statutory "option" to seize control back from the Sponsor. Thus, in Mr. Ramsey's opinion, the Class Members are in reality not "waiving" any statutory provisions, but are instead choosing a course of action permitted under the statute. In either event, according to Mr. Ramsey, voluntarily returning control to the Sponsor is not against the public policy of this state.

*9 Mr. Ramsey also points out that under the settlement agreement, the Sponsor only maintains its control over the condominium unless and until it sells sufficient units to trigger the statutory gradual transfer of control of the governing board.

In other words, while the Sponsor is not *obligated* to sell any additional units, if it chooses to do so, it must comply with the statutory provisions of *N.J.S.A. 46:8B-12.1*.

As noted, Class Members were given the opportunity to cross-examine both experts.

DISCUSSION

I. Laws and Regulations Governing Condominiums

Brookdale Gardens is a condominium complex. In New Jersey, the creation and operation of condominiums are primarily governed by the Condominium Act, *N.J.S.A. 46:8B-1 et seq.*⁸ The term “condominium” is defined under the Condominium Act as a form of ownership of real property under a master deed providing for ownership by one or more owners of units of improvements together with an undivided interest in the common elements appurtenant to each unit. *N.J.S.A. 46:8B-3(h)*. A unit owner therefore “has a fee simple title to and enjoys exclusive ownership of his or her individual unit while retaining an undivided interest as a tenant in common in the facilities used by all of the other unit owners.” *Fox v. Kings Grant Maint. Ass'n*, 167 *N.J.* 208, 219 (1999) (citing *Siller v. Hartz Mountain Assoc.*, 93 *N.J.* 370, 375, *cert. denied*, 464 *U.S.* 961 (1983)).

A. Creation of Condominiums

The Condominium Act provides that a condominium is created and established by “recording in the office of the county recording officer of the county wherein the land is located a master deed”. *N.J.S.A. 46:8B-8*. Among other things, the master deed must include by-laws, the voting rights of unit members, and the name of the association. *N.J.S.A. 46:8B-9*. The master deed must also include “such other provisions, not inconsistent with this act, as may be desired but not limited to restrictions or limitations upon the use, occupancy, transfer, leasing or other disposition of any unit (provided any such restriction or limitation shall be otherwise permitted by law) and limitations upon the use of common elements.” *N.J.S.A. 46:8B-9(m)*. The Act provides that the association may be either a corporation or other business entity recognized in New Jersey, and “shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners.” *N.J.S.A. 46:8B-12*.

The Planned Real Estate Development Full Disclosure Act (“PREDFDA”), *N.J.S.A. 45:22A-21 et seq.*, places additional requirements on a developer who seeks to construct a condominium or convert an existing form of real estate into a planned development, as is expressly made applicable to condominiums. *N.J.S.A. 45:22A-23(h)*. Pursuant to PREDFDA, a developer of a condominium project may not offer or dispose of any interest in the project until the project is registered with the Division of Codes and Standards of the State Department of Community Affairs. *N.J.S.A. 45:22A-26(a)(1)*; *N.J.A.C. 5:26-2.1*; *N.J.S.A. 45:22A-24*.

The PREDFDA also requires that a developer submit for approval along with the registration application a public offering statement or prospectus, describing the characteristics of the development. *N.J.S.A. 45:22A-28*. The purpose of the public offering statement is to disclose fully and accurately exactly what is being sold, and to state to prospective purchasers “all unusual or material circumstances or features” of the development. *N.J.S.A. 45:22A-28(a)*. The statute also directs the developer to clearly and understandably set forth the “totality of rights, privileges, obligations and restrictions, comprehended under the proposed plan of development.” *N.J.S.A. 45:22A-28(d)*. Where a developer seeks to convert property into a condominium, the developer must serve upon all tenants in the building being converted a copy of the proposed public offering statement simultaneously with the filing of an application for registration with the Department of Community Affairs. *N.J.A.C. 5:26-9.3(a)*. Further, the developer may not dispose of any lot, parcel, unit or interest in a planned real estate development without providing the purchaser with a current public offering statement on or before the contract date. *N.J.A.C. 5:26-4.1(a)*.

*10 The Public Offering Statement (“POS”) for Brookdale Gardens was issued in August 1987. At that time, the sponsor was River Broad Corporation. Among other things, the POS advised prospective unit purchasers that control of the condominium would gradually turn over to the Sponsor depending on the amount of units owned and sold by the Sponsor. Specifically, it provided that in the event that 25% of the units are sold, non-sponsor unit owners shall elect no less than 25% of the Board of Trustees. In the event that 50% of the units are sold, no less than 40% of the members of the Board of Trustees shall be elected by non-sponsor unit owners. Finally, in the event that 75% of the units are sold, non-sponsor unit owners may elect the entire Board of Trustees, except that the Sponsor may retain one member on the Board of Trustees as long as any units remain unsold in the regular course of business.

B. Governance of Condominiums

The Condominium Act sets forth a comprehensive governance scheme for condominiums and their associations. The Condominium Act provides for the creation of a condominium association which “shall be responsible for the administration and management of the condominium and condominium property, including but not limited to the conduct of all activities of common interest to the unit owners.” *N.J.S.A. 46:8B-12*.

The association is charged with the maintenance of the common elements and the “assessment and collection of funds for common expenses and the payment thereof,” along with various other duties set forth in *N.J.S.A. 46:8B-14(6)*. The condominium association carries out these functions through its elected officers and governing board. *N.J.S.A. 46:8B-12.1* sets forth a comprehensive system for the composition of the Board, designed to “prevent a developer from having lingering control over an association.” *Fox, 167 N.J. at 221*. The control of the association's governing body is initially vested in the Sponsor, but the Condominium Act mandates a gradual relinquishment of this control at a rate based on sales of the units. Under *N.J.S.A. 46:8B-12.1(a)*:

[w]hen unit owners other than the developer own 25% or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect not less than 25% of the members of the governing board or other form of administration of the association. Unit owners other than the developer shall be entitled to elect not less than 40% of the members of the governing board or other form of administration upon the conveyance of 50% of the units in a condominium. Unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration upon the conveyance of 75% of the units in a condominium. *However, when some of the units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be entitled to elect all of the members of the governing board or other form of administration.*

Notwithstanding any of the provisions of subsection a of this section, the developer shall be entitled to elect at least one member of the governing board or other form of administration of an association *as long as the developer holds for sale in the ordinary course of business one or more units in a condominium operated by the association.*

N.J.S.A. 46:8B-12.1(a) (emphasis added). By way of this provision, “the [Condominium Act] phases out the developer's representation on the association's governing board”. *Fox, 167 N.J. at 221*. The Condominium Act also prohibits developers from entering into long-term employment, service or maintenance contracts before unit owners take control of the association's board. *N.J.S.A. 46:8B-12.1*. These provisions demonstrate the Legislature's intent to “ensure that the *unit owners*—not the developer—exercise control over their condominium boards, and by extension their common elements.” *Fox, 167 N.J. at 225* (emphasis in original). As stated by the Supreme Court of New Jersey, “in a condominium unit, the unit owners' interests take precedence over any outside interest, [and] any governance scheme that conflicts with the recognition of that interest is inconsistent with and in violation of the [Condominium] Act.” *Id. at 227*. As discussed above, the Court therefore ordered that non-sponsor unit owners were entitled to elect all members of the governing board in accordance with *N.J.S.A. 46:8B-12.1(a)* due to the fact that the Sponsor prevented the sale of additional units. *See July 6, 2012 Opinion.*

***11** Under the proposed settlement agreement, the Sponsor must buy out any unit owner who wishes to sell its unit(s), as many owners claimed they were “stuck” in Brookdale Gardens because the Sponsor's control diminished the value of their units and because no banks would provide financing for a purchase in Brookdale Gardens due to the fact that 80% of the units were owned by the Sponsor. However, as a *quid-pro-quo* for the right to be bought out, the Class Members agree to essentially vacate the Court's July 6, 2012 Order by allowing the Sponsor to maintain full control over the Board, despite its failure to offer any additional units for sale in contravention of *N.J.S.A. 46:8B-12.1*. Thus, the Court is faced with the significant legal questions of whether the Condominium Act's progressive governance scheme is waivable such that Class Members and future owners may lawfully agree to subject themselves to the full control of the Sponsor despite the Sponsor's failure to sell units.

Neither the Appellate Division nor the Supreme Court of this state have ruled on the threshold issue of whether the provisions of the Condominium Act are waivable. However, in *Amir v. D'Agostino*, 328 N.J. Super. 141 (Law Div. 1998), the court suggested that a waiver of the statutory provisions of the Condominium Act was possible. In *Amir*, the court held that where a condominium developer elected to impose certain use restrictions, it was mandatory to include those restrictions in the master deed in accordance with *N.J.S.A. 46:8B-09. Id. at 151*. Because the master deed failed to set forth the restrictions, the court held they were unenforceable against the other units. *Id.*

After deciding that the restrictions were not enforceable, the court analyzed whether the defendants, by enjoying the benefits extended by the deeds, nevertheless waived the statutory protection to have the restrictions placed in the master deed and were thus estopped from resisting the effort to enforce them. *Id. at 159-60*. The court explained that for waiver to apply, the “plaintiff would have to show that the [defendants] knew that there was a statutory protection available and then elected to waive it.” *Id. at 160*. In other words, a waiver of the Condominium Act, like that of other statutory provisions, would have to be knowing and voluntary. *See e.g., Knorr v. Smeal*, 178 N.J. 169, 177 (2003) (“An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights.”) While the court in *Amir* ultimately found that the plaintiff made no such showing, it suggested that such a waiver was at least possible.

Here, based on the notice distributed to the class, the Court finds that the Class Members knew there was a statutory protection available and elected to waive it. Further, the statutory provision relating to the Sponsor's control of the complex was the basis of several motions and court decisions in the earlier stages of this case. For example, the Court's July 6, 2012 and August 30, 2013 Opinions were decided on the basis of *N.J.S.A. 46:8B-12.1(a)*, which entitles non-Sponsor unit owners to maintain control of the complex under certain circumstances. Thus, the parties to this case are familiar with the statutory protection ensuring them representation on the Board in the event the Sponsor sells units, and have voluntarily given up that protection by agreeing to be part of the settlement.

As to those Class Members that were not parties to the litigation before it became a class action, they received notice upon preliminary approval of the settlement advising them that by accepting the settlement, they are giving up their legal right to challenge the changes to the governance structure at Brookdale. *See Notice*, p. 5.

As to future owners, the Court is satisfied that they may be bound by the control provisions of the settlement, so long as the Master Deed is amended to clearly advise prospective purchasers that per the instant settlement agreement, the Sponsor maintains full control of the complex. However, at the same time, if the Sponsor elects to sell at least 25% of the Units, then the progressive control provision of *N.J.S.A. 46:8B-12.1(a)* is triggered. In *Amir*, the court held that where a condominium developer elected to impose certain use restrictions, it was mandatory to include those restrictions in the master deed in accordance with *N.J.S.A. 46:8B-09. Amir*, 328 N.J. Super. at 151. Because the master deed failed to set forth the restrictions in that case, the court held they were unenforceable against the other units. *Id.*

***12** The Court finds the concepts illustrated and alluded to in *Amir* are applicable to this case. That is, a master deed must refer to any limitation or alteration of the rights and obligations of a unit owner. So long as the master deed provides notice of the provision, any party purchasing that unit is bound by it. The Court finds no reasoned basis to treat a restriction on use and occupancy of a unit differently than a restriction on a unit owner's participation in governance of the complex. Moreover,

N.J.S.A. 46:8B-9(m) appears to be a “catch all” by providing that the master deed must include “such other provisions, not inconsistent with this act, *as may be desired*”. *Id.* (emphasis added). The statute does not limit the types of “provisions” that “may be desired” by a Sponsor except for requiring that they not be inconsistent with the Condominium Act.⁹ Presumably then, the Sponsor may modify the governance of the complex as long as it places a provision to that effect in the master deed, and such a provision is not inconsistent with the Condominium Act. Under *N.J.S.A. 46:8B-11*, “[t]he master deed may be amended or supplemented in the manner set forth therein.”

The Court finds that, based on an analysis of the precise language used in *N.J.S.A. 46:8B-12.1(a)*, it is not inconsistent with the Condominium Act in and of itself, without challenge by the unit owners, to vest control of the Association in the Sponsor notwithstanding its failure to offer for sale any of its units in the complex. That is, while the Court previously held in its July 6, 2012 Opinion that control of the Association should equitably be turned over to the Plaintiffs based on their challenge to the Sponsor's failure to offer units for sale, it does not necessarily follow that the Sponsor's failure to offer units *automatically* results in a violation of the statute unless challenged by the non-Sponsor unit owners. *N.J.S.A. 46:8B-12.1(a)* provides, in relevant part, that “when some units of a condominium have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business, the unit owners other than the developer shall be *entitled* to elect all of the members of the governing board or other form of administration.” *Id.* (emphasis added). Significantly, *N.J.S.A. 46:8B-12.1(a)* does *not* provide that the unit owners *shall* elect all the members of the Board when the Sponsor fails to offer units for sale in the ordinary course of business. The Legislature's placement of “be entitled to” after “shall” suggests that the transfer of control to non-sponsor unit owners does not happen automatically, and that the non-sponsor unit owners must voluntarily elect to exercise their entitlement to elect the members of the Board. Thus, the class members who accept the modified deed detailing the Sponsor's exclusive control over the complex are in essence exercising their right not to elect members of the Board consistent with the Condominium Act.

Further supporting this interpretation is the [Uniform Condominium Act](#).¹⁰ Section 3-103 of the Uniform Condominium Act relates to the Association's control of a condominium complex and the manner in which the Board members are elected. Subsection (d) of that provision relates to the phasing out of Sponsor control and provides in relevant part that “a period of [Sponsor] control terminates no later than the earlier of: (i) [60] days after conveyance of [75] percent of the units which may be created to unit owners other than a [Sponsor]; (ii) [2] years after all [Sponsors] have ceased to offer units for sale in the ordinary course of business; or (iii) [2] years after any development right to add new units was last exercised.” [Uniform Condominium Act § 3-103](#). Notably absent from this provision is the “shall be *entitled*” language found in *N.J.S.A. 46:8B-12.1*, which suggests that the shift of control from the Sponsor to the unit owners occurs automatically under the Uniform Condominium Act. New Jersey has not adopted the Condominium Act, suggesting that the Legislature prefers to retain the “shall be entitled” language enacted in its Condominium Act. Thus, because it is not inconsistent with the Condominium Act to allow the Sponsor to control to Board, the Court finds that as long as the Sponsor amends the Master Deed of Brookdale Gardens to reflect the changes to its governance structure, Class Members who currently own a unit in Brookdale and future purchasers of a unit may be bound by those changes.

***13** The Court must also resolve whether unit owners who affirmatively opt out of the proposed settlement agreement, and thus elect to remain in Brookdale Gardens and not submit a claim under the settlement, may nevertheless be bound to the governance provisions of the settlement agreement. The Court has undertaken extensive research on this issue and has found that, under certain unique circumstances, courts have found it appropriate to bind opt-outs to limited provisions of the settlement agreement. For example, the Third Circuit has approved a settlement where class members were given an opportunity to opt-out after the initial opt-out period expired based on factors such as, by way of example, a concern that there would be no funds left in the settlement trust to pay their claims.¹¹ See *In re Diet Drugs Prods. Liab. Litig.*, 275 F.3d 34 (3d Cir. 2001); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 293, 317 (3d Cir. 2004). Those who exercised this “back-end” opt-out right were not given the same unlimited right to sue the defendant in the tort system as were the initial opt-outs. Instead, those who exercised the back-end opt-out right were restricted from seeking certain types of relief, such as punitive, exemplary, or multiple damages. See *Diet Drugs II*, 369 F.3d at 296. The Third Circuit characterized the treatment of the back-end opt-outs as follows:

The settlement approved and supervised by the District Court in this case is a landmark effort to reconcile the rights of millions of individual plaintiffs with the efficiencies and fairness of a class-based settlement. Critical to this effort was the allowance of downstream opt-outs, so that potential class members were not faced with an all-or-nothing decision at the threshold. To make this allowance meaningful, the settlement had to protect Wyeth against its largest fear, potentially ruinous punitive damage awards. At the same time, it had to allow intermediate opt-out plaintiffs to have a fair chance to litigate their claims and obtain those damages that were expressly preserved.

Id. at 318. Professor Rhonda Wasserman, who published a scholarly article particularly on the restrictions placed upon opt-outs in the series of cases generated from the above diet drug litigation, explained that “it is fair to say that the entire settlement was predicated on the class action court’s ability to bind those who declined to opt out initially by the restrictions built into the Settlement Agreement.” Wasserman, 49 *Wm. & Mary L. Rev.*, at 410 (2007).

The Court finds that the instant matter presents similarly unique circumstances that justify and warrant limiting those who opt-out from asserting claims against the Sponsor regarding its exclusive control over the Board after the effective date of the settlement. In other words, the opt-outs in this case, while permitted to pursue their initial claims for diminution of value against the Sponsor, are not given the same unlimited ability to sue that an opt-out typically has. Specifically, opt-outs will be limitedly bound to only those provisions regarding control of the complex returning to the Sponsor. The instant settlement agreement can be characterized as a herculean effort to reconcile a case that has been pending in the Superior Court for *at least* 15 years with barely any progress as to a settlement agreement, until now. Crucial and integral to this settlement agreement was the Sponsor’s ability to maintain exclusive control over the Board in exchange for its obligation to buy out any unit owners who wished to leave Brookdale Gardens.

Without this provision and the concomitant assurance its control would not be challenged, the Sponsor would be unwilling to make such a commitment. In other words, obtaining full control over the Board is the foundation and lynchpin of the settlement agreement. If the two opt-outs were given free rein to challenge this provision, which is the product of extensive and lengthy negotiation, the Sponsor would not receive the benefit of the bargain in agreeing to the settlement. Thus, like the defendant in the diet drugs litigation, in providing the opt-outs with the ability to litigate their initial claims and receive damages, the Sponsor seeks to protect itself against “its largest fear,” which is the loss of control over the Board of the complex. In order to strike this balance, the settlement agreement removes only one type of claim the opt-outs may bring against the Sponsor, while allowing them to preserve any and all other claims.

***14** In addition, the opt-outs are receiving a benefit which justifies the limited restriction on the right to challenge control of the complex. By concluding the instant litigation, which otherwise does not have an end in sight, the Association, and thus the unit owners, will no longer have to devote funds to the litigation. Thus, in light of the unique, complex, and long-contested circumstances and issues in this case, the Court finds it fair and reasonable to place certain restrictions on the claims the opt-outs may pursue against the Sponsor.

Finally, an additional rationale exists for the limited restrictions on the opt-outs to challenge the control provision. Specifically, the settlement agreement, as a whole, based on the various competing interests and the inherent difficulties in otherwise achieving justice for the Class Members, is fair and equitable. The Court’s equitable powers are warranted to limitedly bind the opt-outs to the control provisions, as the Court has “broad discretionary power to adapt equitable remedies to the particular circumstances of a given case.” *Marioni v. Roxy Garments Delivery Co.*, 417 *N.J. Super.* 269, 275 (App. Div. 2010). Indeed: Equitable remedies ‘are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules, which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex regulations of all the parties.’

Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 411-12 (1938) (quoting Pomeroy's Equity Jurisprudence, sec. 109). In light of the unique circumstances of the instant matter and the Court's broad equitable powers to shape an appropriate remedy tailored to such circumstances, the Court finds it fair, reasonable and equitable to limit those who opt-out from contesting the Sponsor's control over the Board granted by the settlement agreement.

Class Action Law

In addition to the Condominium Act and the PREDFDA, the Court must also consider class action jurisprudence, as the matter has been converted into a class action. A class action is a litigation device that “permits one or more individuals to act as plaintiff or plaintiffs in representing the interests of a larger group of persons with similar claims.” *Lee v. Carter-Reed Co., LLC*, 203 N.J. 496, 517 (2010). Class actions are a means through which many litigants with similar claims who otherwise would not have the resources to seek legal redress through the judicial system can band together against a “corporate entity that wields enormous economic power.” *Id.* at 518. For this and other reasons, class actions are looked upon favorably by courts in New Jersey. “Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants.” *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 104 (2007). The end result of a class action is that “[m]embers of the represented class are bound by the results of the litigation, for better or worse, unless they opt out of the class-action lawsuit.” *Lee*, 203 N.J. at 518 n.9.

The class action device in New Jersey is authorized by *New Jersey Court Rule 4:32-1* and *-2*, which set forth the requirements for maintaining a class action. While courts in New Jersey have held that the class action rule should be liberally construed in favor of certifying a class action, parties seeking to proceed as a class must nevertheless meet certain requirements. Specifically, plaintiffs requesting to proceed as a class action must establish the threshold requirements of numerosity, commonality, typicality and adequacy of representation set forth in *R. 4:32-1(a)*. Once the threshold requirements have been met, plaintiffs also must satisfy one of the three alternative requirements set forth in *R. 4:32-1(b)*. Before approving a class action settlement, a court must first determine whether the requirements of *R. 4:32-1(a)* and *(b)* have been satisfied. *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010).¹² When deciding certification, the court must not make a preliminary decision on the merits of the claim. *Delgozzo v. Kenny*, 266 N.J. Super. 169, 180-81 (App. Div. 1993).

I. Requirements of 4:32-1 (a) and (b)

A. R. 4:32-1(a)

1. Numerosity

*15 *Rule 4:32-1(a)(1)* requires that the class be “so numerous that joinder of all members is impracticable.” In the instant matter, there are 75 putative class members. “There is no precise number that distinguishes between a class that satisfies the condition of numerosity and one that does not.” *Fink v. Ricoh Corp.*, 365 N.J. Super. 520, 557 (Law Div. 2003). In *Saldana v. City of Camden*, 252 N.J. Super. 188, 193 (App. Div. 1991), the court found that a class comprised of 81 property owners seeking relief against a city for property damage caused by failure to implement a policy regarding City-owned abandoned buildings was “sufficiently large” to meet the numerosity requirement. The Court finds that the putative class of 75 members meets the numerosity requirement.

2. Commonality

Rule 4:32-1(a)(2) requires that there be “questions of law or fact common to the class.” New Jersey has followed the approach under the Federal Rule which holds that “ ‘a single common question is sufficient.’ ” *Delgozzo*, 266 N.J. Super. at 185 (quoting

In re Asbestos School Litigation, 104 F.R.D. 422, 429 (E.D.Pa.1984), *aff'd in part and vacated in part sub nom, In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. den.*, 479 U.S. 852 (1986)).

Plaintiffs have put forth questions of both law and fact that are common to all proposed class members. That is, Plaintiffs present the legitimate factual question of whether the actions of the Sponsor caused a diminution of value in condominium units in Brookdale Gardens and whether the Sponsor's ownership of 80% of the units in Brookdale Gardens prohibits non-sponsor unit owners from selling their units. Plaintiffs also present the legal question of whether the Sponsor is required to sell units in the ordinary course of business under the Condominium Act. Both of these questions are common to all proposed class members and thus the Court is satisfied that Plaintiffs have met the commonality requirement.

3. Typicality

The claims of a putative class representative are typical if they “have the essential characteristics common to the claims of the class.” *In re Cadillac V8-6-4 Class Action*, 93 N.J. 412, 425 (1983) (quoting 3B James W. Moore et al., *Moore's Federal Practice* § 23.06-2 (2d ed. 1982)). The purpose behind the typicality requirement is “to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals.” *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir. 1998); *see also Goasdone v. Am. Cyanamid Corp.*, 354 N.J. Super. 519, 530 (Law Div. 2002) (“The expectation is a harmony of interest between the class action representatives and the class members, so that the class representatives by furthering their own goals are also furthering the goals of the class.”) At the same time, “‘typical’ is not identical.” *Osgood v. Harrah's Entm't, Inc.*, 202 F.R.D. 115, 124 (D.N.J. 2001) (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985), *cert. denied sub nom.*, *Weinstein v. Eisenberg*, 474 U.S. 946 (1985)). Thus, “factual differences ... ‘will not render a claim atypical if the claims arises from the same event or practice or course of conduct that gives rise to the claims of the class members’”. *Id.* (quoting *Baby Neal For and By Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994)).

The Court finds that the Plaintiffs' claims are typical and aligned with the interests of the rest of the class. Specifically, the claims of the Plaintiffs and of the class arise from the same alleged wrongful course of conduct by the Sponsor, i.e., failing to sell additional units in the complex and improperly managing and maintaining the complex while in control thereof. While Plaintiffs and Class Members may have bought their respective units at different times, and for different prices, and with different conditions, they all seek to challenge the legality of the Sponsor's decision not to sell any additional units in the complex on the grounds that such conduct violated the Condominium Act, prevented unit owners from selling their units, and caused units to decrease in value. Thus, Plaintiffs' claims “have the essential characteristics common to the claims of the class” and thus satisfy the typicality requirement. *In re Cadillac, supra*, 93 N.J. at 425.

4. Adequacy of Representation

*16 *Rule 4:32-1(a)(4)* mandates that “the representative parties will fairly and adequately protect the interests of the class.” *R. 4:32-1(a)(4)*. New Jersey has followed the Federal approach to determining adequacy in representation by requiring two factors be established: “(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.” *Delgozzo*, 266 N.J. Super. at 188 (quoting *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 430 (E.D. Pa. 1984)).

As to the adequacy of counsel, the Plaintiffs are represented by Laurence H. Olive, Esq. Mr. Olive has represented Plaintiffs for the past 15 years in this matter and is therefore highly familiar and experienced regarding the particular facts of the case, including its strengths and weaknesses, and is also familiar with Plaintiffs' complaints, concerns and desired outcomes. Mr. Olive is being assisted by Arthur C. Hopkins, Jr., Esq. It is clear that Mr. Olive is fully able and competent in conducting the proposed litigation, as he has obtained favorable outcomes for Plaintiffs in the past, namely the July 6, 2012 Order. The Association, which is aligned with Plaintiffs, is represented by E. Richard Kennedy, Esq., an attorney with Kennedy Wronko and Kennedy and who has approximately 40 years' experience in all aspects of condominium management and control.

As to the alignment of interests between the Plaintiffs and the proposed class members, the Court finds that Plaintiffs' interests are identical, not antagonistic, to those of the proposed class members. Plaintiffs are similarly situated to the proposed class members in that they seek to prove that their units diminished in value as a direct result of the Sponsor's alleged wrongful conduct. The Court has not been made aware of any reason why the proposed class members could possibly be disadvantaged by Plaintiffs attempt to show that their units have decreased in value as a result of the Sponsor's conduct and that they have been unable to sell their units for the same reason. For example, there is no reason why the proposed class members would have a more difficult time showing that the value of their units diminished by reason of Plaintiffs' attempt to prove same.

The Court acknowledges that the objectors' argument that the settlement price per unit fails to take into account improvements made to the unit could possibly be viewed as a weakness in the adequacy of representation. In other words, because some of the Plaintiffs may not have made improvements to their units, they do not have the incentive to advocate for a higher sale price per unit. However, the Court does not, on balance and considering the entirety of the settlement, find it problematic that some of the Plaintiffs may have made improvements to their units, while others may not have, because the interests of the class representative and the absentee class members need not be identical. *Moore's Federal Practice* § 23.25[2][b][i] (Matthew Bender 3d Ed.). Instead, "the named plaintiff need only be an 'adequate' representative." *Id.*

Because there is no foreseeable conflict of interest and Plaintiffs and proposed class members share the same goal, the Court finds that the Plaintiffs' interests are not antagonistic to those of the proposed class members.

B. R. 4:32-1(b)

A class action is maintainable only if it falls within at least one of the following three categories authorized by *R. 4:32-1(b)*:

*17 (1) the prosecution of separate actions by or against individual members of the class would create a risk either of:

(A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.

The parties have relied on (b)(3) to certify the class. That is, the parties assert that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior

to other available methods for the fair and efficient adjudication of the controversy. Members of a class certified under (b)(3) are afforded the opportunity to “opt-out” of the class. Members of a (b)(3) class “are automatically included and remain so unless they make a timely election to opt-out.” *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463, 470 (3d Cir. 1994). Thus, a class member who does not come forward to opt-out is bound by any final judgment or settlement, even if that class member did nothing affirmative to “opt in.” See *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250 (3d Cir. 1975) (explaining that all members of a (b)(3) class who have not opted out, as well as all members of a (b)(2) class, are “bound by the res judicata effect of the judgment.”).

Plaintiffs seeking to certify a class under (b)(3) must show that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” R. 4:32-1(b)(3). Thus, under (b)(3), plaintiffs must demonstrate two separate requirements: (1) “predominance” of the common issues and (2) the “superiority” of a class action over other available trial techniques.

*18 In analyzing the predominance requirement, the court must “weigh the common issues against the individual issues.” *Goasdone*, 354 N.J.Super. at 539. The court must also conduct a “close analysis of the facts and law.” *In re Cadillac*, 93 N.J. at 434. The predominance prong does not require that all class members have identical issues, but instead requires a “common nucleus of facts.” *Id.* (citing *Saldana v. City of Camden*, 252 N.J. Super. 188, 197 (App.Div.1991)). The presence of individual issues does not preclude certification under (b)(3), and class members need not be affected “in precisely the same manner.” *Iliadis*, 191 N.J. at 108-09.

In *Iliadis*, the Court found that the plaintiffs satisfied the predominance requirement. The proposed class in *Iliadis*, current and former employees of defendant Wal-Mart, alleged that defendant regularly denied its employees earned rest and meal breaks in contravention of its corporate policies. Based on this alleged conduct, the plaintiffs asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violations of the Wage and Hour Law. The trial court found that the plaintiffs did not satisfy the predominance requirement based on the individual issues raised by Wal-Mart, and the appellate court affirmed.

In reversing the judgment of the appellate court, the Court explained that “[t]he core of the present dispute is whether Wal-Mart engaged in a systematic and widespread practice of disregarding its contractual, statutory, and regulatory obligations.” *Id.* at 111. The Court found that the presence of some individual issues, such as whether particular employees voluntarily missed rest and meal breaks, how much time was worked off-the-clock, and whether and the amount of damages suffered, did not preclude class certification. *Id.* at 112.

As in *Iliadis*, Defendants in this class action are alleged to have disregarded a statutory obligation to the detriment of the class. Specifically, the common factual and legal thread is whether the Sponsor acted wrongfully in failing to sell its units and in its management and governance of the complex. The class members also have in common the alleged detriment arising from this course of conduct, which is that they have been unable to sell their units and the units have diminished in value. It has been held that “in cases where it is alleged that the defendant... engaged in a common course of conduct, courts have found that conduct to satisfy the commonality and predominance requirements.” *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 231 (D.N.J. 2005). The Court acknowledges that the units owned by each class member may vary in price, which affects the potential amount of damages suffered by each class member. However, “[t]he need to make individual determinations on the question of damages will not necessarily defeat (b)(3) certification.” *Goasdone*, 354 N.J.Super. at 539 (citing *Delgozzo*, 266 N.J.Super. at 190). Further, courts are far more inclined to find that common issues predominate over individual issues in the context of a proposed settlement. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 304 (3d Cir. 2011).

Indeed, “[e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement” despite the generally wide variation in damages. *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). The proposed class in this case is far more cohesive than that in *Amchem*, where the Court found that the class did not satisfy the

predominance requirement. In that case, the U. S. Supreme Court held that the proposed settlement class consisting of asbestos victims failed to meet the predominance requirement because the proposed class members were exposed to the different asbestos products of over twenty companies during a variety of different activities. *Id.* at 597. In contrast, the proposed class in this case does not involve such wide variation in each class member's particular circumstances, as the alleged harm stems from specific prolonged conduct of a particular actor, the Sponsor. Thus, the Court finds that Plaintiffs have established that common questions of law and fact predominate over individual questions.

*19 In order to certify the class under (b)(3), the court must also find that the class-action vehicle is superior to other methods of adjudication. The court rule identifies the following factors to consider in deciding whether a class action is the superior method: (A)the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B)the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C)the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and

(D)the difficulties likely to be encountered in the management of a class action.

R. 4:32-2(b)(3)(A)-(D).

However, “[i]n settlement situations, the superiority requirement arguably translates into the question whether the settlement is a more desirable outcome for the class than individualized litigation, and may assure that the settlement has not grossly undervalued plaintiffs' interests.” *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995). Further, “a [] court need not inquire whether the case, if tried, would present intractable management problems, see *Fed. Rule Civ. Proc. 23(b)(3)(D)*, for the proposal is that there be no trial.” *Amchem*, 521 U.S. at 620.

The proposed settlement allows unit owners to sell their units to the Sponsor for an amount set forth by the settlement agreement. Specifically, the settlement offers the following: (1) \$127,500 per unit for a 2.5 room unit; (2) \$136,500 per unit for a 3.5 room unit; (3) \$141,500 per unit for a 4 room unit; (4) \$170,000 per unit for a 5 room unit; (5) \$5,000 per unit for each garage unit; and (6) \$105,000 for unit 84A. The Association's expert, Jon Brody, submitted a report and testified at the fairness hearing that not only are the settlement offers reasonable, but they are in fact above fair market value. The Court deems him credible. He was not impeached. Mr. Brody testified in a straightforward and understandable manner. Mr. Brody reached his conclusion by researching sales of other individual condominium units in the same municipality between 2012 through 2015 and finding that, on average, the settlement values proposed by the Sponsor are “significantly higher than the average price per square foot for condominium sales in Bloomfield.” Brody Report, p. 7.

Several class members raised concerns that the settlement values are unfairly low in light of certain improvements and renovations made in particular units. Mr. Brody specifically addressed this issue in his report:

[L]ike the sales within the subject development, the sales considered in the other developments ranged, from a physical standpoint in the same manner as the settlement group that is, some had been improved/upgraded while others were older with no upgrades. By employing the large population of sales data we included all types of sales, upgraded and not upgraded, and on average, the settlement prices still exceeded the highest comparable square foot values, which included upgraded units.

Brody Report, p. 19. In addition to his report, Mr. Brody testified at the fairness hearing that the settlement values for *unimproved* units still exceeded the sale price of a comparable unit with upgrades. As noted, the Court credits the expert opinion of Mr. Brody, an active licensed real estate appraiser with decades of experience, and finds that the settlement does not grossly undervalue Plaintiffs' interests. Thus, the plaintiffs have satisfied both the predominance and superiority requirements for class certification under (b)(3).

II. Settlement Approval Factors

*20 Settlements of class actions are treated differently than traditional settlements. While an individual action can typically be settled without involvement of the court, *Pascarella v. Bruck*, 190 N.J. Super. 118, 124 (App. Div. 1983), Rule 4:32-4 provides that “[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.” Rule 4:32-4.

The approval of a class action settlement occurs in five stages. First, the proposed settlement is presented to the court so that it can make a preliminary determination whether the proposed agreement has merit to justify further consideration. *Morris Cnty. Fair Hous. Council v. Boonton Twp.*, 197 N.J. Super. 359, 369 (Law Div. 1984). This Court completed the preliminary approval proceeding and entered an Order preliminarily approving the proposed class action settlement on May 4, 2015.

Second, assuming the court preliminarily approves the proposed class action settlement, a court-approved settlement notice must be distributed to class members advising them of the general terms of the settlement, their right to object and the date and location of the final approval hearing. *Id.* Mr. Van Nostrand has certified that the Court-approved notice was properly disseminated to all class members describing the settlement terms and advising Class Members of their options vis-a-vis the settlement. Thus, step two has been completed.

Third, a sufficient period of time is provided to allow Class Members and other interested parties to prepare and submit objections and other materials related to the proposed settlement. *Id.* The Class Members were given over two months to submit their objections and comments, and the Court has received 18 objections.

Fourth, after receiving objections, the Court conducts a “fairness hearing.” *Id.* The fairness hearing in this matter was held on July 20, 2015. Finally, the court must determine whether the settlement is “fair and reasonable” to the members of the class as a whole. *Id.* “A settlement of a class action may be approved even in the face of a majority vote by members of the class to disapprove the settlement.” *Chattin v. Cape May Greene*, 216 N.J. Super. 618, 627 (App. Div. 1987). In analyzing whether a proposed class settlement is “fair and reasonable,” New Jersey courts have adopted a list of factors set forth by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). See *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 406 N.J. Super. 86 (App. Div. 2009). Those factors are:

- (1) the complexity, expense and likely duration of the litigation;
- (2) the reaction of the class to the settlement;
- (3) the stage of the proceedings and the amount of discovery completed;
- (4) the risks of establishing liability;
- (5) the risks of establishing damages;
- (6) the risks of maintaining the class action through the trial;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and
- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 157. The *Girsh* factors “are a guide and the absence of one or more does not automatically render the settlement unfair.” *In re American Family Enters.*, 256 B.R. 377, 418 (D.N.J. 2000).

*21 The proponents of the settlement bear the burden of proving that the factors weigh in favor of approval. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). While a fairness hearing is not a plenary trial, a court has discretion to determine the nature and extent of the hearing required to determine whether a proposed settlement is “fair and reasonable.” *Morris Cnty. Fair Hous. Council*, 197 N.J. Super. at 370. When the parties offer an independent evaluation of a settlement proposal, “[t]he Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.” *Id.* (quoting *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 315 (7th Cir. 1980)). In *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, 406 N.J. Super. 86 (App. Div. 2009), the court held that the trial court erred by denying certain objectors' requests to cross-examine the plaintiffs' economic expert who provided valuation of the settlement. *Id.* at 102. The court explained that the court would be better able to examine whether the settlement was fair and reasonable if the expert's report were tested by cross-examination. As such, the court remanded for a “testimonial fairness hearing.” *Id.* Here, all witnesses were subjected to cross-examination.

The Court will examine each of the “fair and reasonable” factors separately and determine whether the proposed settlement agreement satisfies each factor.

1. Complexity, Expense and Likely Duration of the Litigation

As stated throughout this Opinion, this litigation has been ongoing for 15 years without any final resolution. As such, Plaintiffs have been in a state of uncertainty with regard to their legal rights for well over a decade and have not yet been able to obtain full relief for the alleged wrongful conduct of Defendants. Obviously, proceeding with further litigation would prolong the already protracted period Plaintiffs have had to wait to resolve their claims and would further delay any potential relief to which they are entitled. At trial, Plaintiffs would have the difficult task of proving that the value of their units in Brookdale Gardens decreased as a direct result of the Sponsor's allegedly wrongful control over the complex and failure to sell additional units, and not as a result of some other factor or factors. Plaintiffs would also have to show that the Sponsor's conduct was the direct cause of their inability to sell their units to third parties. In order to prove this, Plaintiffs would likely have to introduce experts and Defendants would likely do the same to rebut Plaintiffs' assertion. The retention of experts by both sides and the extensive and exhaustive discovery would make the trial extremely costly and both sides have presumably already expended large sums throughout the 15 years of this litigation separate and apart from trial. Aside from the likely expense, proving these points would be difficult given the number of Plaintiffs involved and the varying circumstances of each Plaintiff. In addition, it is significant to note that the parties have not even commenced discovery as to damages. At a minimum, in addition to the expense, the parties are facing significant delays due to the inevitable motion practice that would be involved with damages discovery.

Plaintiffs would also have to show that Defendants had a statutory obligation under the Condominium Act to sell units. While the Court previously ruled that Defendants violated the Condominium Act by remaining in control of the complex while not selling any additional units, it did not necessarily hold that Defendants have an affirmative obligation to sell units. That is, Defendants could conceivably not sell units without violating the statute so long as the Sponsor did not attempt to maintain control. However, this legal issue has not yet been decided by any appellate court in New Jersey and thus the Plaintiffs would have to persuade the Court to adopt their interpretation of the statute. Given the complexity of the legal and factual issues in the case, the Court is satisfied that the trial would neither be a short nor inexpensive one. As such, the Court finds that this *Girsh* factor weighs strongly in favor of approving the settlement.

2. Reaction of the Class to the Settlement

*22 “This factor attempts to gauge whether members of the class support the settlement.” *Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 F.3d 283, 318 (3d Cir. 1998). Only two out of the total 75 class members opted not to convey their units to the Sponsor and to remain in the complex. Out of the 41 class members who submitted claims, 18 objected. In other words, the number of non-objecting claimants exceeds the number of objectors. Of the 18 objections, 11 appear to be “form” or boilerplate objections in that they are wholly identical and do not contain any individualized concerns.¹³ The form objections put forth two concerns: (1) inadequacy of the purchase prices offered for the units and (2) the Sponsor's control over the complex. “[A]n apparently high number of objections may reflect an organized campaign, rather than the sentiments of the class at large.” *Manual for Complex Litig.* § 21.631, p. 318 (4th ed.). The relatively low number of objections, combined with the fact that more than half of the objections were not written personally by class members, suggests that the Class Members generally support the terms of the proposed settlement. Further, in light of the fact that the class members have been given an opportunity to hear the testimony of the experts and pose questions to the experts, it is possible that there may even be less objections after the 30 day period following approval of the settlement should the Court approve it. Thus, this *Girsh* factor weighs in favor of approving the settlement.

3. Stage of the Proceedings and Amount of Discovery Completed

The third *Girsh* factor “ ‘captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.’ ” *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995)). The instant case has been pending in Essex County for a decade and a half and the parties have engaged in numerous motions, some dispositive. As such, “this is most certainly not a case that is settling in the early stages of litigation.” *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 238 (D.N.J. 2005). Through the various motions filed throughout the years this case has been pending, the Court is satisfied that counsel has most certainly gained an adequate understanding of the merits of the case such that they were able to fairly decide to settle the matter.

4. Risks of Establishing Liability

A court considers this factor in order to “examine what the potential rewards (or downside) of litigation might have been had class counsel decided to litigate the claims rather than settle them.” *GM Trucks*, 55 F.3d at 814. Where there is a high risk of establishing liability, this factor cuts in favor of settlement. In this case, in order to establish liability of the Sponsor, the Plaintiffs will have to prove that their alleged inability to sell their units and alleged diminution in value of their units were caused by the Sponsor's conduct and not some other factor, such as general market fluctuations or decline in the housing market as a whole. In other words, Plaintiffs must prove by more than mere speculation that the Sponsor's conduct caused them tangible harm.

Plaintiffs must also establish that if the Sponsor acted in violation of applicable statutes and regulations governing the complex, the proper remedy is to force the Sponsor to purchase the non-Sponsor-owned units. However, in its August 30, 2013 Order, the Court denied Plaintiffs' request for an Order forcing the Sponsor to sell its units, holding that ordering a sale of the units “would require an unwieldy level of court supervision.” August 30, 2013 Order, p. 10. In light of that decision and the lack of clarity or precedent on the proper remedy for a violation of the Condominium Act and related statutes and regulations, the Court finds that Plaintiffs would encounter a significant risk in achieving its desired outcome. As such, this *Girsh* factor weighs in favor of settlement.

5. Risks of Establishing Damages

“Like the previous factor, this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.” *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 816 (3d Cir. 1995). In this case, the class would be required to prove not only that the conduct of the Sponsor diminished the value of the units in the complex, but would have to ascertain the dollar amount by which the units on average decreased in value. This would require expert evaluation and

testimony and would involve experts from both Plaintiffs and Defendants. As such, the Court finds that the risks and burden of establishing damages in this particular case is significant.

6. Risks of Maintaining the Class Action Through the Trial

*23 *New Jersey Court Rule 4:32-2* has been construed to give trial courts discretion to decertify a class after entering a certification order. The court can decertify a class if it finds that “the criteria for and goals of class certification are no longer being met.” *Muise v. GPU, Inc.*, 371 N.J. Super. 13, 34 (App. Div. 2004). A high risk of decertification supports approval of a settlement agreement. The Court has not been made aware of any reason why it would potentially decertify or modify the class. However, in *Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 F.3d 283, 321 (3d Cir. 1998), the Third Circuit held that this factor adds little to the consideration of the fairness of the settlement in light of the U.S. Supreme Court’s holding in *Amchem* that courts need not inquire into manageability where request for certification is for settlement-only purposes. *Id.* at 321. Thus, in a case such as this, where a class is approved for settlement purposes only, this factor is of “negligible importance” in deciding whether to approve a class action settlement. *Weber v. Gov’t Emples. Ins. Co.*, 262 F.R.D. 431, 446 (D.N.J. 2009). Thus, although there is no apparent risk of decertification, the court assigns this factor little weight based on the Third Circuit’s holding in *Prudential*. See *Erie Cnty. Retirees Ass’n v. Cnty. of Erie*, 192 F. Supp. 2d 369, 375-76 (W.D. Pa. 2002).

7. Ability of Defendants to Withstand Greater Judgment

This factor examines whether the defendants could withstand a judgment for an amount significantly greater than the Settlement *In re Cendant Corp. Litig.*, 264 F.3d 201, 240 (3d Cir. 2001). The Court has not been presented with any of Defendants’ financial information, and thus it is unable to make an informed determination of whether Defendants could withstand greater judgment. For example, in *In re Safety Components Int’l*, 166 F. Supp. 2d 72, 91 (D.N.J. 2001), the Court was made aware that Defendants previously filed for Chapter 11 Bankruptcy and that the D&O policy which would fund the settlement may refuse to pay under the policy. *Id.* at 91. Because of this lack of information, this factor weighs neither for nor against settlement. See *In re Cendant Corp. Litig.*, 264 F.3d at 240.

8. Range of Reasonableness of the Settlement in Light of Best Possible Recovery

After 15 years of contentious litigation, the parties have finally reached an agreement that benefits both the Class Members and the Sponsor. The settlement agreement allows class members to convey their units to the Sponsor for a fixed sum upon submitting a claim under the settlement agreement. In exchange for the Sponsor’s obligation to purchase those units, the settlement agreement transfers exclusive and total control over the Board to the Sponsor, notwithstanding the Court’s July 6, 2012 Order awarding control over the Board to the non-Sponsor unit owners. Class members who remain in the complex and opt not to sell their units to the Sponsor are barred from contesting the fact of the Sponsor’s complete control over the Board, but are permitted to contest specific actions taken by the Sponsor in exercising that control. If, however, the Sponsor sells at least 25% of the units, then the Condominium Act’s (and Public Offering Statement’s) gradual turnover of control provisions are triggered, and the non-Sponsor unit owners may elect some members of the Board.

The Court finds that the remedy offered under the settlement agreement is appropriate, fair and reasonable in light of the specific issues in the case. Specifically, the crux of this case is that the non-Sponsor unit owners at Brookdale Gardens have been unable to sell their units because banks will not offer financing due to the blanket mortgage and the fact that the Sponsor owns 80% of the complex, and therefore they claim that, for lack of a better term, they are “stuck” in Brookdale Gardens. Moreover, the non-Sponsor unit owners claim that the value of their units has diminished due to the Sponsor’s alleged mismanagement of the complex over the years. Thus, the settlement agreement allows non-Sponsor unit owners to finally sell their units and leave the complex, as well as receive fair market value for their units.

*24 Many objectors contested on the grounds that all units of the same size were given a universal offer despite any improvements or upgrades. Mr. Brody concluded that the settlement values are above market value, even for those units with improvements, based on his comparison of purchase prices of comparable units in the same locality. As explained in detail above, Mr. Brody's analysis took into account units without any upgrades and improvements, as well as units that have been upgraded and improved such that the average purchase price for comparable units consisted of a population of both upgraded and non-upgraded units, similar to the population at Brookdale Gardens. In other words, while units of the same size are purchased at a fixed price, that price reflects any improvements or upgrades because it was derived by comparing units with such upgrades.

At the fairness hearing, some objectors suggested that the Sponsor make individualized offers for each unit to take into account renovations and improvements. While this may be the *ideal* solution, it is neither efficient nor practical. One of the main advantages of a class action is that there is one universal recovery that is dispersed to class members, eliminating the need for individual trials on each claim. Were the sponsor to individually appraise each unit, the process would be cumbersome, as the unit owners would likely obtain their own independent appraisal of their unit which conflicts with that of the Sponsor. This process would further prolong the already 15-year-long lawsuit and further postpone relief to Plaintiffs.

Many objectors also took issue with the Sponsor's exclusive control over the Board under the settlement agreement, arguing that when the Sponsor was previously in control before the Court's July 5, 2012 Order, the complex fell into disrepair and was grievously mismanaged. It took the parties over 15 years to reach a settlement which they both deemed beneficial to their respective positions. The turnover of control to the Sponsor operates as a *quid pro quo* and an incentive for the Sponsor's agreement to buy out any unit owners who wish to leave the complex. Even assuming the Sponsor poorly runs the Board and manages the complex, nothing precludes the class members remaining in the complex from instituting a lawsuit to address any alleged improper or inadequate actions by the Sponsor. The class members are only precluded from bringing their *past* claims for damages under the existing lawsuit, and from claiming that the Sponsor's control over the Board is itself wrongful.

Moreover, the Sponsor loses its exclusive control over the Board if it decides to convey at least 25% of its units to non-Sponsors. In other words, the Sponsor's total and exclusive control over the Board is not indefinite and is still limited by the Condominium Act and the Public Offering Statement. The only provision of the Condominium Act/POS that is being "waived" is that the Sponsor must relinquish control over the Board if it fails to sell its units. In light of the fact that non-Sponsor unit owners can still contest the Sponsor's actions on the Board and may still regain control over the Board, the Court finds this provision of the settlement a reasonable *quid-pro-quo* for the Sponsor's obligation to buy out non-Sponsor unit owners.

This provision is also fair to *future* purchasers of the units in the complex because the Master Deed will be amended to specify that the Sponsor has exclusive control over the Board even if it does not sell any additional units. Thus, future purchasers will be on notice to this governance scheme prior to purchasing a unit, and as to future owners, the Sponsor will be bound by *N.J.S.A. 46:8B-12.1* when at least 25% of the units are sold.

9. Range of Reasonableness in Light of Attendant Risks of Litigation

As discussed above, damages will be difficult to establish which is evidenced by the fact that the litigation has been ongoing for 15 years due to the hotly contested issues involved. Continuing with the litigation would require the parties to expend a tremendous amount of resources above and beyond what has already been invested, all without any guarantee of success for either party. For the class members especially, the settlement agreement allows them to convey their unit without selling it on the open market, which often involves a broker and other additional frustrations and contingencies. If the class members instead went to trial, they would not only have to prove that the Sponsor's conduct directly caused a diminution in value to their units, but also prove the *amount* of that diminution. By way of the settlement, the class members can receive above fair market value for their unit without having to present expert testimony or the like.

*25 Another aspect of the settlement which demonstrates its reasonableness is the fact that class members are not precluded from bringing a subsequent action contesting action taken by the Board as controlled by the Sponsor. That is, while class

members are precluded from challenging the Sponsor's control of the Board in and of itself, nothing in the proposed settlement prevents class members from alleging that certain actions taken by the Board are improper or unlawful.

The Court finds that the settlement is therefore reasonable in light of the attendant risks of litigation.

CONCLUSION

In light of the above analysis, the Court finds that the Condominium Act allows the Class Members to waive the gradual governance provisions of the Condominium Act and submit to the Sponsor's full control over the Board despite not selling any additional units. The Court also finds that the settlement is fair and reasonable in all aspects considering the equities of the litigation, and thus approves of the final settlement pursuant to *Rule* 4:32-4.

SO ORDERED.

Dated: August 28, 2015

Hon. David B. Katz, P.J.F.P.¹⁴

Footnotes

- 1 Units at Brookdale Gardens consist of 2.5 rooms, 3.5 rooms, 4 rooms or 5 rooms. The settlement monies are as follows: \$127,500; \$136,500; \$141,500 and \$170,000, respectively. Any unit that has a garage will receive an extra \$5,000.
- 2 The partnership previously operated under the name Bloomfield Associates. Bloomfield Associates stopped doing business and was replaced by Defendant Bloomfield Condominium Associates, LLC.
- 3 The Docket Numbers of those cases were C-200-90 and C-21-95, respectively. Those complaints, however, were not made available to the Court, and the parties at times have argued that the matters were consolidated and that the instant case is related to the earlier filings. As such, the parties have represented that the issues at Brookdale Gardens date back to 1990, some 25 years ago.
- 4 The July 6, 2012 Order was a significant partial and temporary victory for the Plaintiffs. Because the Plaintiffs had asserted causes of action against the Defendant Association, the Association subsequently amended its pleadings to assert direct claims against the Defendants.
- 5 As explained below, the Court originally received 19 objections but it was later determined that one of those objections was received in error.
- 6 The Court is unable to ascertain the correct spelling of this class member's name, as her name is handwritten on the objection form and is somewhat illegible.
- 7 On July 17, 2015, the Court was advised of an e-mail exchange between Mr. Van Nostrand, attorney for the Sponsor, and Martha M. Spera, Mr. Spera's wife, in which Martha Spera denied that she or her husband never intended to object to the settlement, and confirmed that they had in fact submitted a signed claim form agreeing to sell their unit.
- 8 The Condominium Act became effective January 7, 1970. The predecessor to the Condominium Act was the Horizontal Property Act, *N.J.S.A. 46:8A-1*.
- 9 Similarly, *N.J.S.A. 46:2B-7* provides that “[a]ny agreement contrary to the provisions of this act shall be void.”
- 10 As of 2003, the Uniform Condominium Act had been adopted by Alabama, Arizona, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, Texas, Virginia and Washington. The District of Columbia,

Louisiana, Michigan and Wisconsin have enacted fragmented portions of the Uniform Condominium Act. *Powell on Real Property* § 54A.02

- 11 This unique type of opt-out was referred to by the district court and Third Circuit as a “downstream” or “back-end” opt-out right, which connotes a delayed or second opportunity to opt-out. See Rhonda Wasserman, *The Curious Complications with Back-end Opt-out Rights*, 49 *Wm. & Mary L. Rev.*, 373, 377 (2007).
- 12 Because New Jersey's class action rule is modeled after [Federal Rule of Civil Procedure 23](#), New Jersey courts often use federal precedent as guidance for class action issues. See *Delgozzo v. Kenny*, 266 *N.J. Super.* 169, 189 (App. Div. 1993). However, New Jersey courts have interpreted [R. 4:32-1](#) more liberally than the federal rule, often holding that a class *must* be certified unless there is a “clear showing that it is improper or inappropriate.” *Gross v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 303 *N.J. Super.* 336, 341 (Law Div. 1997).
- 13 An additional three objectors submitted form objections as well as a separate individual objection.
- 14 The undersigned has continued to preside over this matter subsequent to appointment as Presiding Judge of the Family Part.

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Exhibit J

2023 WL 7545067

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Georgios DROSOS and GGLM
LLC, Plaintiffs-Respondents,

v.

GMM GLOBAL MONEY MANAGERS
LTD., [Bukleia Holdings Ltd.](#), Bukleia
USA Inc., Dreamfood USA LLC and
Christos Savva, Defendants-Appellants,
and
Ioannis Ninios, MEA-G LLC and P&C
Development NY LLC, Defendants.

DOCKET NO. A-3674-21

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Submitted January 19, 2023

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Decided November 14, 2023

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Docket No. L-1053-22.**Attorneys and Law Firms**Matsikoudis & Fanciullo, LLC, attorneys for appellants
([William C. Matsikoudis](#) and [Derek S. Fanciullo](#), on the
briefs).[Jeffrey A. Bronster](#), attorney for respondents.Before Judges [Accurso](#), [Vernoia](#) and [Firko](#).**Opinion**

The opinion of the court was delivered by

[ACCURSO](#), P.J.A.D.

***1** In this complicated business dispute among related companies, their principals and agents, defendants GMM Global Money Managers Ltd., Bukleia Holdings Ltd., Bukleia USA Inc., Dreamfood USA LLC, and Christos Savva

appeal from orders denying their [Rule 4:6-2\(e\)](#) motions to dismiss the complaint of plaintiff GGLM LLC and its sole member Georgios Drosos and to compel arbitration. Because we conclude GGLM agreed to arbitrate its dispute with defendants in Dreamfood's "9th Amendment Amended and Restated Operating Agreement," we reverse the trial court's denial of defendants' motions to dismiss DGGLM's complaint and compel arbitration of its claims.

As to Drosos's individual claims, we conclude his claims for indemnification for actions he took on behalf of Dreamfood and its members must be arbitrated, as well as his claims for misappropriation, conversion and conspiracy against defendants GMM, Bukleia Holdings, Bukleia USA, Dreamfood, Savva and Ionnis Ninios, an employee and director of GM, brought on behalf of himself and GGLM. We lack enough information, however, about Drosos's alleged \$89,502.65 personal loan to Dreamfood to determine whether defendants Dreamfood and Bukleia USA, against whom that claim is pled, could, under principles of agency or otherwise, enforce the operating agreement's arbitration provision against Drosos, and thus remand that claim to the trial court for additional discovery.

Because this appeal arises from the denial of defendants' motions to dismiss, we recount the facts as alleged in plaintiffs' February 2022 complaint. [Kernahan v. Home Warranty Adm'r of Florida, Inc.](#), 236 N.J. 301, 309 (2019). Drosos, an individual residing in Greece, is the owner and sole member of GGLM, a New Jersey limited liability company. Drosos is also the founder of defendant Dreamfood, another New Jersey limited liability company, intended as the operating company for Drosos's GFG, "Greek from Greece" brand, developed to operate "a chain of stores that combined a Greek bakery with a café, serving light food throughout the day." During 2016, Dreamfood's first year of operation, Drosos brought in two partners, Georgios Theodoris, through his company, Moldini, LLC, and Ionnis Chitos, through his company, Elatis USA, LLC. "Through their respective companies, Drosos, Theodoris, and Chitos each became a one-third owner in Dreamfood."

In 2017, Drosos opened the first two GFG stores, GFG Hoboken, owned eighty-five percent by Dreamfood and five percent each by three individual investors, and GFG William in Manhattan, eighty percent of which was owned by a New York limited liability company formed by Dreamfood. The success of those first two stores, "laid the groundwork for

significant expansion,” requiring infusions of more capital into Dreamfood to finance the expansion.

Drosos claimed that at about that time, a man named Nikos Paschalakis approached him about being GFG's first franchisee, and “Dreamfood allowed Paschalakis to study the GFG business operation over a long period of time, giving him broad access to the company and its trade secrets, including access to vendors, renderings, and other forms of Dreamfood's confidential GFG business information.” In their complaint, however, plaintiffs allege it was all a front, and Paschalakis was actually “a corporate spy planted by a Greek businessman, George Korres, to learn the details of Dreamfood's operation so that Korres could open his own chain of competing cafes, modeled on Dreamfood's business plan.”

*2 Drosos claims he discovered this ruse in 2018 when Paschalakis and Korres opened a competing store called Fournos Theophilos in Manhattan. Drosos alleged they modeled this store “directly on the GFG business model, exploiting trade secrets that Paschalakis [had] stolen and using branding and publicity materials so similar to that of GFG as to constitute actionable infringement.” By that time, Dreamfood had agreed to buy out Moldoni's interest, leaving GGLM and Elati as equal owners of the company. A few months later, “Drosos and Chitos took on a new partner, Christos Pangiotopoulos,” who paid \$2,000,000 for a one-third interest through his company, P&C Development NY, LLC, “such that Drosos, Chitos, and Pangiotopoulos, through their respective companies,” each owned one-third of Dreamfood.

After Fournos Theophilos opened a second store, Dreamfood decided to sue. Dreamfood's efforts to negotiate a pre-litigation settlement, however, were not met by Korres or Paschalakis, but by defendant GMM, “a Cypriot investment firm handling approximately two hundred million dollars in investor funds,” acting through one or more of its wholly-owned companies, namely defendant Bukleia Holdings, a Cypriot company incorporated in Cyprus in 2017, which plaintiffs allege, on “information and belief, was formed for the exclusive purpose of participating in the Korres venture that evolved into Fournos Theophilos.” Plaintiffs claim Bukleia Holdings was incorporated while Paschalakis was “engaged in his corporate spying activities,” that it “was aware of these acts of corporate spying,” and was conspiring “with Korres and Paschalakis in stealing Dreamfood trade secrets relating to the GFG Brand.”

Plaintiffs further allege either GMM or Bukleia Holdings formed wholly owned Estia Holdings USA Ltd. in 2017 to further the scheme. They claim Estia “controlled and was an owner of” Fournos Theophilos's management company. Plaintiffs allege GMM/Bukleia Holdings responded to Dreamfood's requests for settlement negotiations with Estia and proposed a merger of GFG and Fournos Theophilos, wherein “the Theophilos name would be retired, and the existing stores would come under the umbrella of the far more successful GFG name.”

Plaintiffs claim that to effectuate the proposed settlement, either GMM or Bukleia Holdings formed a new, wholly owned Delaware corporation, defendant Bukleia USA. In December 2019, a merger of the two brands [Fournos Theophilos and GFG] took place, “with Dreamfood acquiring and essentially retiring Estia Holdings,” and Bukleia USA paying \$2,000,000 for an ownership interest in Dreamfood. Dreamfood took on another investor at the same time, MEA-G, LLC, owned by Anastasia Giannopoulos, which paid \$1,000,000 for its interest. Thus, after the merger, GGLM, Elati, P&C, and MEA-G each owned twenty-one percent of Dreamfood, and Bukleia USA owned sixteen percent.

In December 2019, the five Dreamfood owners became signatories to the “9th Amendment Amended and Restated Operating Agreement,” appointing Drosos the sole manager of Dreamfood with “the right and power individually to manage and operate the Company and to do all things necessary to carry on the purpose, business and objectives of the Company” in accordance with a September 2019 business plan. GMM director, Ninios, signed the agreement on behalf of Bukleia USA and Drosos signed on behalf of GGLM.

After COVID-19-related closures in the Spring of 2020, Drosos, who had been living in Greece, returned to the United States in June 2020 to reopen the GFG stores. In early 2021, Elati left Dreamfood as part of a negotiated settlement for a \$2,300,000 payout over several years, leaving GGLM, P&C, MEA-G LLC, and Bukleia USA each with an approximately twenty-five percent interest in Dreamfood.

Notwithstanding the setbacks caused by the pandemic, plaintiffs claim that “Dreamfood and the GFG brand continued their expansion,” opening two stores in Pennsylvania, with planned locations in Newark, Boston, Rye, New York, and Milwaukee.¹ Drosos was also in discussions for a nationwide chain of GFG franchises.

Plaintiffs allege “GFG thereafter entered into an agreement to take over the leases for 25 Dairy Barn locations, one in Connecticut and 24 throughout Long Island,” ten of which had opened as of the date of the complaint. They claim that “[a]s of the summer of 2021, primarily through the efforts of Drosos, Dreamfood had not only survived the pandemic, it had managed to continue its expansion and increase the GFG brand recognition, and to revive the prospect of nationwide franchising.”

***3** By the beginning of 2021, Dreamfood had hired defendant Savva as its chief financial officer. Drosos alleged Savva was “Bukleia's designated representative,” and had been set to be the manager of Fournos Theophilos in 2019, had the Dreamfood merger fallen through. Plaintiffs allege Savva was the former CEO of a pension fund in Cyprus, where he “developed relationships with persons in positions of power within GMM.”

In July 2021, Drosos, exhausted from the year spent traveling in the United States building the GFG brand, stepped down as Dreamfood's manager and CEO with the understanding he would stay “active in the company's affairs.” Over Drosos's objection, Savva took his place. Plaintiffs allege Savva subsequently “shared less and less information with Drosos and isolated him more and more from any involvement with decision-making.” Plaintiffs claim Savva told Drosos “he did not take direction from Drosos” and “the only person from whom he took orders on the operation of the company was defendant Ioannis Ninios, an employee and Director of GMM.”

In August 2021, Drosos, on behalf of GGLM, supported a \$2 million Dreamfood capital call, with the first payment due six months later, not knowing GMM and Bukleia Holdings had earlier conspired with Korres to steal GFG information and Dreamfood trade secrets to open a competing chain, and “that GMM, Bukleia Holdings, Bukleia USA, Ninios, Savva, and others presently unknown were involved in a conspiracy to remove Drosos from Dreamfood entirely, to appropriate his brand, to deprive GGLM of its ownership interest in Dreamfood, and to otherwise convert to itself the benefits of Drosos's years of hard work developing the GFG Brand.”

Plaintiffs allege that “[b]y the end of 2021, Savva had cut Drosos out of the operations and activities of the company virtually completely.” And in January 2022, suddenly and “without any public announcement or any notice to Drosos or GGLM,” Savva essentially shut down the GFG brand,

“closing virtually every GFG restaurant except for a single one, GFG William.” Plaintiffs allege Drosos was not advised Dreamfood was considering closing even a single store, much less nearly all of them, a month before the first payment on the capital call was due. They claim Drosos didn't learn of the mass closing “until after it had already been completed,” and “his subsequent efforts to obtain an explanation from Dreamfood have been ignored.”

Plaintiffs allege that since closing the stores, “Savva, under the direction of, and with the knowledge and approval of other members of the conspiracy, has taken additional steps to damage the GFG brand” and “to destroy the reputation of Drosos, who is so personally associated with that brand in the eyes of the public and of the business community.” Plaintiffs claim Savva stopped making lease payments on GFG locations, including on some Drosos personally guaranteed “so as to enable the company to obtain the leases,” making “it inevitable that Drosos will now be sued on those guarantees of obligations that belong to Dreamfood.” They also claim Savva and Dreamfood have failed to pay invoices to GFG vendors as well as taxes “for which Drosos may become personally liable.”

Plaintiffs allege on information and belief that “Savva, with the full knowledge, consent, and approval of his co-conspirators, has been forging, and continues to forge Drosos's signatures on company checks” to further “the scheme of the co-conspirators to eliminate Drosos from the company, in that Dreamfood is making payments to new vendors with which [it] has established relationships for the future, while refusing to pay those vendors with whom Drosos had done business.” Plaintiffs contend Savva is defaulting on the payments due Elati under Dreamfood's settlement agreement, as well as personal loans Drosos and GGLM made to Dreamfood.

***4** Plaintiffs further claim, “as Dreamfood knows full well, Drosos will not pay hundreds of thousands of dollars on the upcoming capital call in view of the deliberate destruction of his brand, the closing of all stores, and the destruction of his reputation that the conspirators have caused, both negligently and intentionally.” They claim that although Drosos asked Dreamfood to “extend the deadline for the capital call so that the shareholders can meet to discuss the shut-down of the stores and the future of the company[,] ... Bukleia, which has been conspiring to push Drosos out of Dreamfood,” has refused to allow “any such extension, knowing that it will use the capital call to dilute GGLM's interest in the company.”

Plaintiffs claim that “[a]s a result of all of the foregoing, GMM, Bukleia, and the remaining conspirators have succeeded in stealing the dream that Georgios Drosos created,” as they “stand ready to use his business plan, his knowledge, his experience, and his reputation, all of which it has misappropriated, to build a new company that will lead to a nationwide franchise empire.”

In their five count complaint, plaintiffs sought the appointment of a receiver for Dreamfood (count 1); Dreamfood's repayment of a \$176,891 loan GGLM made to Dreamfood in September 2019, and an \$89,502.65 loan Drosos made to Dreamfood “thereafter” (count 3); damages for misappropriation, conversion, and conspiracy against defendants GMM, Bukleia Holdings, Bukleia USA, Ninios, Dreamfood, and Savva, as well as an injunction prohibiting them from using the name or likeness of Drosos in any promotional literature, contending those “defendants have converted, and continue to convert property of ... plaintiffs, including the ownership interest of GGLM that Bukleia has now positioned itself to appropriate through the coming dilution of GGLM's shares,” with “the deliberate devaluation of the GFG brand,” and Dreamfood's continued misappropriation of Drosos's name and image, “featuring them prominently on the internet in promotional literature, all without Drosos's knowledge or consent” (count 4).

The remaining two counts of the complaint are not brought on behalf of both plaintiffs. Count 2 of plaintiffs’ complaint is a claim brought solely on behalf of Drosos against defendants Dreamfood, Bukleia USA, MEA-G, and P&C for indemnification “from Dreamfood and its Members,” on whose behalf he personally guaranteed leases for certain GFG locations, as well as any personal liability he might incur for certain taxes Dreamfood has failed and refused to pay for which the Internal Revenue Service may have recourse against Drosos personally. Count 5 of the complaint is a claim brought solely on behalf of GGLM against defendants Savva and Bukleia USA for breach of their fiduciary duties, alleging “Savva acted as the point man for the conspiracy by GMM, Bukleia and other defendants to force Drosos personally out of the company, and to dilute and ultimately destroy any ownership interest of GGLM.”

Defendants² filed motions under [Rule 4:6-2](#) to compel arbitration invoking the arbitration clause in Dreamfood's Operating Agreement:

All members agree that any controversy or claim arising out of or relating to this Agreement, or any dispute arising out of the interpretation of this Agreement, which the parties are unable to resolve, shall be finally resolved and settled exclusively by binding arbitration by a single arbitrator acting under the Rules of the American Arbitration Association (“AAA”) then in effect rather than the parties going into litigation in the Judicial Court system. If the parties cannot agree upon an arbitrator from the panel provided by the AAA, then each party shall choose its own independent representative and such representatives shall choose the arbitrator within thirty days of the date of the selection of the first independent representative. Each Party shall bear the costs of its participation in the arbitration procedure. The parties hereby recognize and consent to the jurisdiction of the courts of the state of New Jersey as the sole jurisdiction for enforcement of the arbitration award.

*5 In opposition to the motions, Drosos certified that “[n]o one on behalf of Dreamfood, including its attorney, ever explained the contents of the Operating Agreement to [him].” He claimed that “[w]hen [he] signed the Operating Agreement [he] did not understand that GGLM was giving up any right to sue in an American court,” and “also did not have an understanding of the precise nature of GGLM's right to a jury trial, and [he] certainly did not understand that GGLM was giving up any such right.”³

The trial court denied defendants’ motions, finding the arbitration clause “falls short of the arbitrability criteria” set forth in [Atalese v. U.S. Legal Services Group, LLP](#), 219 N.J. 430 (2014), and [Flanzman v. Jenny Craig, Inc.](#), 244 N.J. 119 (2020), because, “[w]hile referencing a proceeding before an arbitrator, it makes no mention of the fact that the signatory is waiving the critical right to a trial by jury” and “does not explain either the fact that, or the manner in which ‘arbitration and civil litigation are distinct proceedings.’ ” (quoting [Flanzman](#), 244 N.J. at 137). The court concluded the language of the arbitration clause “presumes a level of understanding of the arbitration process that few laymen have” and thus “lacks a clear and knowing waiver by the parties of the right to trial and right to a jury.”

On defendants’ motion for reconsideration, the court rejected the argument that the [Atalese](#) standard does not apply to arbitration agreements between sophisticated entities. The court found it did not need to reach the issue because the arbitration clause “lacks clarity as to [the] essential

requirements of the arbitration clause,” making it unnecessary “to engage in any ‘sophistication’ analysis.”

Defendants appeal, reprising their arguments that “the Dreamfood arbitration clause is sufficiently clear because it plainly states that the parties are waiving their right to sue in court”; that the parties, as “sophisticated businesses,” are not subject to “the heightened clarity requirement for arbitration clauses with consumers”; that Dreamfood is entitled to invoke the arbitration clause in its own operating agreement; that Savva may invoke the arbitration clause under agency principles; and that GMM and Bukleia Holdings, as either a parent company to a signatory of the operating agreement or a company with a controlling interest in a signatory, are both entitled to invoke the arbitration clause; and that Drosos's personal claims are also subject to arbitration under the agreement.

Our review of a trial court's decision on a motion to dismiss a complaint and compel arbitration is de novo. See [Flanzman](#), 244 N.J. at 131. We owe no special deference to the trial court's interpretation of an arbitration provision, which we view “with fresh eyes.” [Morgan v. Sanford Brown Inst.](#), 225 N.J. 289, 303 (2016).

The parties do not dispute that the arbitration clause in Dreamfood's operating agreement comes within the broad reach of the Federal Arbitration Act, 9 U.S.C.A. §§ 1-16. See [Citizens Bank v. Alafabco, Inc.](#), 539 U.S. 52, 55-56 (2003). As our Supreme Court has noted on a number of occasions, Congress's intent in enacting the FAA was “to abrogate the then-existing common law rule disfavoring arbitration agreements ‘and to place arbitration agreements upon the same footing as other contracts.’ ” [Martindale v. Sandvik, Inc.](#), 173 N.J. 76, 84 (2002) (quoting [Gilmer v. Interstate/Johnson Lane Corp.](#), 500 U.S. 20, 24 (1991)).

*6 The Court in [Atalese](#) explained “[a]n arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously.” 219 N.J. at 435. The Court was also clear, however, that an arbitration clause need not contain a “prescribed set of words ... to accomplish a waiver of rights.” [Id.](#) at 447. “Whatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law.” [Ibid.](#) Explaining its holding in [Atalese](#), the Court in [Flanzman](#), declared an enforceable arbitration clause “required language that explains that a party

who agrees to arbitration waives the right to sue in court and makes clear that arbitration and civil litigation are distinct proceedings.” [Flanzman](#), 244 N.J. at 137.

Considering the Dreamfood arbitration clause in light of the Court's holdings in [Atalese](#) and [Flanzman](#), we are convinced the trial court erred in deeming the clause unenforceable because it doesn't state “the signatory is waiving the critical right to a trial by jury” and fails to explain the distinction between arbitration and civil litigation. As the Court has repeatedly held, “[n]o magical language is required to accomplish a waiver of rights in an arbitration agreement. Our courts have upheld arbitration clauses that have explained in various simple ways ‘that arbitration is a waiver of the right to bring suit in a judicial forum.’ ” [Morgan](#), 225 N.J. at 309 (quoting [Atalese](#) 219 N.J. at 444).

The Dreamfood arbitration clause makes the point clearly that the members agree “that any controversy or claim arising out of or relating to [the] Agreement” would be “finally resolved and settled exclusively by binding arbitration by a single arbitrator acting under the Rules of the American Arbitration Association ... rather than the parties going into litigation in the Judicial Court system,” language meeting the standard of [Atalese](#). See 219 N.J. at 445 (endorsing our holding in [Griffin v. Burlington Volkswagen, Inc.](#), 411 N.J. Super. 515 (App. Div. 2010), affirming the enforceability of an arbitration clause providing that “[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes”).

That the Dreamfood clause does not mention specifically that the signatories were waiving a jury trial does not preclude its enforcement. As defendants rightly note, neither [Atalese](#) nor [Flanzman](#) requires specific “jury trial” language to accomplish a waiver of rights. See [Atalese](#), 219 N.J. at 447; [Flanzman](#), 244 N.J. at 137. See also [Kernahan](#), 236 N.J. at 320 (reiterating that [Atalese](#) “imposes no talismanic recitations, acknowledging that a meeting of the minds can be accomplished by any explanatory comment that achieves the goal of apprising the consumer of her rights”).

The Dreamfood arbitration provision is “sufficiently clear, unambiguously worded, satisfactorily distinguished from the other Agreement terms, and drawn in suitably broad language to provide a [signatory] with reasonable notice of the requirement to arbitrate all possible claims arising under the contract.” See [Curtis v. Celco P'ship](#), 413 N.J.

[Super. 26, 33 \(App. Div. 2010\)](#). Because we are satisfied the arbitration provision meets the Atalese standard, we need not consider the parties' arguments as to whether Atalese extends to commercial arbitration agreements between sophisticated parties. But see Cnty. of Passaic v. Horizon Healthcare Servs., Inc., 474 N.J. Super. 498, 504 (App. Div.) (holding "an express waiver of the right to seek relief in a court of law to the degree required by Atalese is unnecessary when parties to a commercial contract are sophisticated and possess comparatively equal bargaining power") certif. granted 254 N.J. 69 (2023).

*7 We also agree with defendants that Dreamfood can invoke the arbitration clause in its own operating agreement. Although Dreamfood is not a signatory to its operating agreement, [N.J.S.A. 42:2C-12](#) expressly provides "[a] limited liability company is bound by and may enforce [its] operating agreement, whether or not the company has itself manifested assent to the operating agreement." This plain statutory language entitles Dreamfood to arbitrate plaintiffs' claims against it to the same extent as any Dreamfood member could. See Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 293 (Del. Sup. Ct. 1999) (finding a limited liability company bound by its operating agreement, although signed only by the members and not by the limited liability company itself); see also Comments to the Uniform Limited Liability Company Act (2006) (amended 2013) (Nat'l Conf. of Commr's on Unif. State Ls., Draft Aug. 19, 2015) (ULLCA) at [section 102](#), paragraph 13 (noting the definition of operating agreement "must be read in conjunction with [Sections 105 through 107](#), which further describe the operating agreement. In particular, although this definition refers to 'the agreement ... of all the members,' the limited liability company itself is bound by and may enforce the agreement").

We reject plaintiffs' argument that non-member defendants GMM, Bukleia Holdings and Dreamfood managing member Savva may not invoke the arbitration clause in the Dreamfood operating agreement against plaintiff GGLM. The law is well settled that "arbitration may be compelled by a non-signatory against a signatory to a contract on the basis of agency principles." [Hirsch v. Amper Fin. Servs., LLC](#), 215 N.J. 174, 192 (2013).

We held in [Alfano v. BDO Seidman, LLP](#), 393 N.J. Super. 560, 568-69 (App. Div. 2007), that agency principles permitted a non-signatory parent company, Deutsche Bank, to enforce the arbitration clause in the account agreement signed by its "separately incorporated indirect subsidiary,"

Deutsche Bank Securities Inc. We reasoned that Deutsche Bank Securities, in brokering the purchase and sale of the bank's securities when the bank itself could not, had "assumed the role of [Deutsche Bank's] agent," and that the Deutsche Bank Securities transaction was integral to the plaintiff's claims against Deutsche Bank, that is, the plaintiff relied on the transaction "to assert his claims against [the bank]." [Id.](#) at 569.

In [EPIX Holdings Corp. v. Marsh & McLennan Cos.](#), 410 N.J. Super. 453 (App Div. 2009), we held a non-signatory parent corporation could enforce the arbitration clause in the payment agreement signed by its corporate subsidiary based on equitable estoppel. We reasoned that plaintiff's complaint alleged an "integral relationship" between the corporations, that is, they conspired with each other to manipulate the insurance market to raise premiums; that plaintiff's claims against the parent were "identical to" its claims against the subsidiary; and that the plaintiff's claims against the parent were "inextricably intertwined" with the payment agreement, such that "no cause of action against the [parent] would have arisen" had the plaintiff not entered into the agreement with the subsidiary. [Id.](#) at 467-68.

The Supreme Court in [Hirsch](#) agreed the non-signatory corporate parent in [EPIX](#) had standing to enforce the arbitration clause, but disagreed with our estoppel theory, finding we had mistakenly concluded "the intertwining of claims and parties in the litigation — in and of itself — was sufficient to give a non-signatory corporation standing to compel arbitration." 215 N.J. at 193. "The appropriate analysis," the Court explained, "would have focused on the agency relationship between the parent and subsidiary corporations in relation to their intertwining with the plaintiff's claims and the relevant contractual language." [Ibid.](#)

Plaintiffs allege in their complaint that Bukleia USA, a signatory to the operating agreement, is wholly "owned and controlled either by GMM directly, or through Bukleia Holdings," which plaintiffs allege "is a Cypriot company wholly owned" by GMM and "formed for the exclusive purpose of participating in the Korres venture that evolved into Fornos Theophilos." The complaint states that "GMM and Bukleia Holding worked with George Korres to have a corporate spy infiltrate the GFG companies so as to learn its trade secrets, including its business plan, its vendors, and other proprietary information upon which they then based the Fornos Theophilos brand."

*8 Plaintiffs allege that GGM, Bukleia Holdings, and Bukleia USA subsequently continued the scheme begun by GGM, Bukleia Holdings and Korres “to steal Drosos's business plan for a novel and potentially hugely successful food business for their own profit,” by installing Savva, “who by his own admission took his instructions from defendant Ninios, an employee and Director of GMM,” as their “frontman” to “isolate and eventually eliminate Drosos” and dilute GGLM and Drosos's economic stake in Dreamfood.

Plaintiffs' complaint plainly alleges that GMM and Bukleia Holdings, acting through their agents, Dreamfood member Bukleia USA and Dreamfood manager Savva, have conspired “to remove Drosos from Dreamfood entirely, to appropriate his brand, to deprive GGLM of its ownership interest in Dreamfood, and to otherwise convert to [themselves] the benefits of Drosos's years of hard work developing the GFG Brand.” The relationship between GMM and Bukleia Holdings and Bukleia USA, Dreamfood and Savva is the through line of plaintiffs' complaint and the focus of all their claims. Those relationships and their intertwinement with plaintiffs' claims and the Dreamfood operating agreement allow GMM, Bukleia Holdings and Savva to enforce the arbitration agreement against GGLM under the test in [Hirsch](#).⁴ See [Hirsch](#) 215 N.J. at 193.

That leaves Drosos's personal claims for indemnification “from Dreamfood and its Members” for any personal liabilities he might incur for acts he took on their behalf; his claim for damages for misappropriation, conversion, and conspiracy against defendants GMM, Bukleia Holdings, Bukleia USA, Dreamfood, and Savva; and repayment of an \$89,502.65 loan he made to Dreamfood.

Drosos's claims for indemnification from Dreamfood and its members arise out of actions he took as Dreamfood's manager and CEO, and thus must be arbitrated under the operating agreement. See [Wasserstein v. Kovatch](#), 261 N.J. Super. 277, 286 (App. Div. 1993). We are also satisfied Drosos must arbitrate his claim for damages for misappropriation, conversion, and conspiracy against GMM, Bukleia Holdings, Bukleia USA, Dreamfood, and Savva.

“ [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” [Angrisani v. Fin. Techs. Ventures, L.P.](#), 402 N.J. Super. 138, 148 (App. Div. 2008) (quoting [AT&T Techs., Inc. v. Commc'ns Workers of Am.](#), 475 U.S.

643, 648 (1986)). Thus “a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute.” [United Steelworkers of Am. v. Am. Mfg. Co.](#), 363 U.S. 564, 570-71 (1960) (Brennan, J., concurring).

Drosos has not separated his claims for misappropriation, conversion, and conspiracy from those of GGLM, and a review of the complaint strongly suggests they cannot be untangled from one another. Even Drosos's claims for misappropriation of his name and likeness are bound up with GGLM and Dreamfood. In their complaint, plaintiffs allege Drosos is publicly identified “as essentially being the personification of GFG,” the “Greek from Greece” brand “as is reflected ... in [Dreamfood's] publicity materials posted on the internet.” Although it appears undisputed that Dreamfood owns the GFG and “Greek from Greece” brands, plaintiffs allege “Dreamfood continues to misappropriate his name and his image, featuring them prominently on the internet in promotional literature.”

*9 GGLM, as a member of Dreamfood, is, of course, obligated to arbitrate all claims arising out of the operating agreement, which Drosos, as GGLM's sole member, signed on its behalf. And although plaintiffs' claims for misappropriation, conversion, and conspiracy sound in tort, “[a]s a general rule, courts have construed broadly worded arbitration clauses to ‘encompass[] tort, as well as contract claims.’” [Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.](#), 168 N.J. 124, 137 (2001) (alteration in original) (quoting [Bleumer v. Parkway Ins. Co.](#), 277 N.J. Super. 378, 405 (Law Div. 1994)).

We've long recognized that “[a]rbitrability of a particular claim ‘depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause.’” [Jansen v. Salomon Smith Barney, Inc.](#), 342 N.J. Super. 254, 258 (App. Div. 2001) (quoting [Wasserstein](#), 261 N.J. at 286). Here, we're satisfied Drosos's claims are so clearly intertwined with those of his company, GGLM, all of which arise out of and relate to the Dreamfood operating agreement and its alleged breach, as to make Drosos's claims arbitrable along with those of DGLLM, of which Drosos is the sole member. See [Jansen](#), 342 N.J. Super. at 258.

The circumstances may be different, however, with respect to the \$89,502.65 loan Drosos allegedly made to Dreamfood.

The complaint provides no information about this loan other than the amount; not even a date is provided. Because we lack sufficient information about Drosos's loan to Dreamfood to determine the nature or arbitrability of Drosos's claim for repayment of his loan, we remand the issue to the trial court for additional discovery and resolution.

In sum, we reverse the trial court's denial of defendants' motions to compel arbitration of the claims by DGGLM, as well as Drosos's individual claims for indemnification and for damages for misappropriation, conversion and conspiracy and remand for entry of an order compelling plaintiffs to arbitrate those claims. We vacate the order denying arbitration of Drosos's \$89,502.65 personal loan to Dreamfood and

remand the claim to the trial court to determine whether defendants Dreamfood and Bukleia USA, against whom that claim is pled, could, under principles of agency or otherwise, enforce the arbitration provision against Drosos. Should that claim remain in the Law Division, it must be stayed pending arbitration. See [Perez v. Sky Zone LLC](#), 472 N.J. Super. 240, 251 (App. Div. 2022). We do not retain jurisdiction.

Reversed and remanded.

All Citations

Not Reported in Atl. Rptr., 2023 WL 7545067

Footnotes

- 1 Plaintiffs allege Drosos struck a deal with Milwaukee Bucks player, Giannis Antetokounmpo, to make him a representative of the GFG brand.
- 2 Plaintiffs were apparently unable to serve MEA-G, P&C, and Ninios, and all were dismissed without prejudice. They are not parties to this appeal.
- 3 Drosos further certified he had "little or no knowledge of the American justice system" and didn't know civil cases to have jury trials, as "in Greece, there is no such thing as a jury trial in civil cases."
- 4 As plaintiffs' claims against Savva arise solely out of his role as manager of Dreamfood, he may also demand they arbitrate those claims under Dreamfood's operating agreement. See [Wasserstein v. Kovatch](#), 261 N.J. Super. 277, 285-86 (App. Div. 1993).

Exhibit K

261 N.J. 30

Supreme Court of New Jersey.

JERSEY CITY UNITED AGAINST THE NEW WARD MAP, Downtown Coalition of Neighborhood Associations, Greenville Neighborhood Alliance, Friends of Berry Lane Park, Riverview Neighborhood Association, Pershing Field Neighborhood Association, Sgt. Anthony Neighborhood Assoc., Gardner Avenue Block Association, Lincoln Park Neighborhood Watch, Morris Canal Redevelopment CDC, Harmon Street Block Association, Crescent Avenue Block Association, Democratic Political Alliance, and Frank E. Gilmore, in his individual and official capacity as Ward F Councilman, Plaintiffs-Appellants,

v.

JERSEY CITY WARD COMMISSION and John Minella, in his official capacity as Chair of the Commission, Defendants-Respondents.

James Calderon, Plaintiff-Appellant,

v.

City of Jersey City Ward Commission, John Minella, Chairman, Sean J. Gallagher, Secretary, and Commissioners Daniel E. Beckelman, Paul Castelli, Janet Larwa, and Daniel Miqueli, Defendants-Respondents.

A-10/11 September Term 2024

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089292

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Argued January 6, 2025

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Decided June 18, 2025

Synopsis

Synopsis

Background: Individual, city councilman, and community organizations that objected to newly drawn city wards brought actions in lieu of prerogative writs against city ward commission, alleging that the newly drawn wards violated the Municipal Ward Law (MWL), the New Jersey Civil Rights Act (NJ CRA), the Open Public Meetings Act (OPMA), and equal protection and other rights under the New Jersey Constitution. The Superior Court, Law Division, Hudson County, dismissed both complaints with prejudice for failure to state a claim. Plaintiffs appealed. Among other relief, plaintiffs sought a declaration avoiding the new ward map and an order that the commission redraw the map. The Superior Court, Appellate Division, [478 N.J.Super. 132, 311 A.3d 989](#), affirmed in part, reversed in part, and remanded. Plaintiffs petitioned for certification, which the Supreme Court granted as to the claims based on the MWL, equal-protection principles, and the NJ CRA.

Holdings: The Supreme Court, [Patterson, J.](#), held that:

as a matter of apparent first impression, commission was not required under the Municipal Ward Law (MWL) to utilize the Polsby-Popper Measure or the Reock Score to quantitatively assess the compactness of proposed wards, although it could have elected to use them;

as a matter of apparent first impression, three of the newly drawn wards were not “bizarrely shaped” and thus did not violate MWL’s compactness requirement;

reinstating trial court’s dismissal of claim that newly drawn wards violated MWL’s compactness requirement was proper remedy;

commission met MWL’s procedural requirements when finding that its newly drawn wards fulfilled MWL’s compactness requirement;

wards’ compliance with MWL’s compactness requirement meant that the wards were sufficiently compact so as not to violate equal protection under the New Jersey Constitution; and

wards' compliance with MWL's compactness requirement meant that wards did not violate New Jersey Civil Rights Act (NJCRA) as claimed.

Judgment of Appellate Division affirmed in part and reversed in part; trial court's judgment dismissing plaintiffs' complaints with prejudice reinstated.

[Wainer Apter](#), J., filed separate opinion concurring in part and dissenting in part, which [Noriega](#) and [Hoffman](#), JJ., joined.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment; Motion to Dismiss for Failure to State a Claim.

On certification to the Superior Court, Appellate Division, whose opinion is reported at [478 N.J. Super. 132, 311 A.3d 989 \(App. Div. 2024\)](#).

Attorneys and Law Firms

Renée Steinhagen and [Yael Bromberg](#), Glen Rock, argued the cause for appellants Jersey City United Against the New Ward Map, et al. (NJ Appleseed Public Interest Law Center, Bromberg Law, and Matsikoudis & Fanciullo, attorneys; Renée Steinhagen, [Yael Bromberg](#), and [William C. Matsikoudis](#), on the briefs).

James Calderon, appellant, Roseland, argued the cause on appellant's behalf.

[Jason F. Orlando](#) argued the cause for respondents Jersey City Ward Commission, et al. (Murphy Orlando, attorneys; [Jason F. Orlando](#), [John W. Bartlett](#), Tyler Newman, and Mallory B. Olwig, on the briefs).

[Peter Slocum](#), Roseland, argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Lowenstein Sandler, attorneys; [Alexander Shalom](#), of counsel, and [Peter Slocum](#) and Mikayla Berliner, on the brief).

[Bruce D. Greenberg](#), Newark, argued the cause for amici curiae City of Jersey City and Councilman at Large Daniel Rivera (Lite DePalma Greenberg & Afanador, attorneys; [Bruce D. Greenberg](#), on the brief).

[Andrew Gimigliano](#), Roseland, submitted a brief on behalf of amicus curiae Electoral Innovation Lab (Mandelbaum Barrett, attorneys; [Andrew Gimigliano](#) and [Brian Block](#), on the brief).

[Edward D. Rogers](#) submitted a brief on behalf of amicus curiae League of Women Voters of New Jersey (Ballard Spahr, attorneys; [Edward D. Rogers](#) and Elizabeth V. Wingfield, of counsel and on the brief).

[Scott D. Salmon](#) submitted a brief on behalf of amicus curiae New Jersey Association of Election Officials (Jardim Meisner Salmon Sprague & Susser, attorneys; [Scott D. Salmon](#) and Julia Burzynski, of counsel and on the brief).

[Richard J. Allen, Jr.](#) submitted a brief on behalf of amici curiae New Jersey League of Municipalities, New Jersey Association of Counties, and New Jersey Institute of Local Government Attorneys (Kipp & Allen, attorneys; [Richard J. Allen, Jr.](#), on the brief).

Opinion

JUSTICE [PATTERSON](#) delivered the opinion of the Court.

****223 *38** In the Municipal Ward Law (MWL), the Legislature prescribed the method by which municipalities that have adopted a ward system for municipal elections establish the boundaries of their wards. [N.J.S.A. 40:44-9](#) to -18. Following each federal decennial census, ward commissioners “fix and determine the ward boundaries so that each ward is formed of compact and contiguous territory” and the population of the most populous ward does not diverge from the population of the least populous ward by more than ten percent of the mean population of the wards. [N.J.S.A. 40:44-14](#).

In this appeal, we consider statutory and constitutional challenges to the ward map adopted by defendant Jersey City Ward Commission following the 2020 federal census. Plaintiffs, who are individuals and community organizations opposed to the Commission's map, sued the Commission and some of its members. They asserted, among other allegations, a statutory claim premised on the MWL's mandate that ****224** wards be “compact”; an equal protection claim under the New Jersey Constitution; and a claim pursuant to the New Jersey Civil Rights Act (NJCRA), [N.J.S.A. 10:6-1](#) to -2.

The trial court concluded that the Commission's ward map created wards that were sufficiently compact under [N.J.S.A. 40:44-14](#) and granted the Commission's motion to dismiss plaintiffs' statutory and constitutional claims pursuant to [Rule 4:6-2](#). Plaintiffs appealed, and the Appellate Division affirmed in part and reversed in part the trial court's judgment.

***39** [Jersey City United Against the New Ward Map v.](#)

[Jersey City Ward Comm'n](#), 478 N.J. Super. 132, 144-56, 311 A.3d 989 (App. Div. 2024). It reversed the trial court's dismissal of plaintiffs' MWL claims and remanded the matter to the trial court for factfinding as to whether there was a rational basis for the Commission's determination that the wards defined by its map were sufficiently compact to satisfy the MWL's requirements. [Id.](#) at 147-50, 311 A.3d 989. We granted plaintiffs' petition for certification, limited to plaintiffs' claims based on the MWL, equal protection principles, and the NJCRA.

We view the Commission's map to represent a proper exercise of the substantial discretion the MWL grants to ward commissions to set the boundaries of municipal wards. We do not concur with the Appellate Division's ruling that additional factfinding is necessary to determine whether the Commission's map meets [N.J.S.A. 40:44-14](#)'s compactness requirement. Accordingly, we reverse the Appellate Division's determination with respect to the MWL. We affirm the Appellate Division's determination that the trial court properly dismissed plaintiffs' equal protection and NJCRA claims.

I.

A.

Jersey City is divided into wards "for the purpose of the election or appointment of any municipal officers." [N.J.S.A. 40:44-10](#). In accordance with [N.J.S.A. 40:44-11](#), the members of the Hudson County Board of Elections and the Jersey City municipal clerk were appointed as ward commissioners.

On September 16, 2021, Governor Philip D. Murphy announced the results of the 2020 census for New Jersey. At its initial meeting, the Ward Commission determined that there was a fifty-nine percent population deviation between the most populous ward, Ward E, and the least populous ward, Ward D. That deviation far exceeded the maximum population deviation authorized by [N.J.S.A. 40:44-14](#).

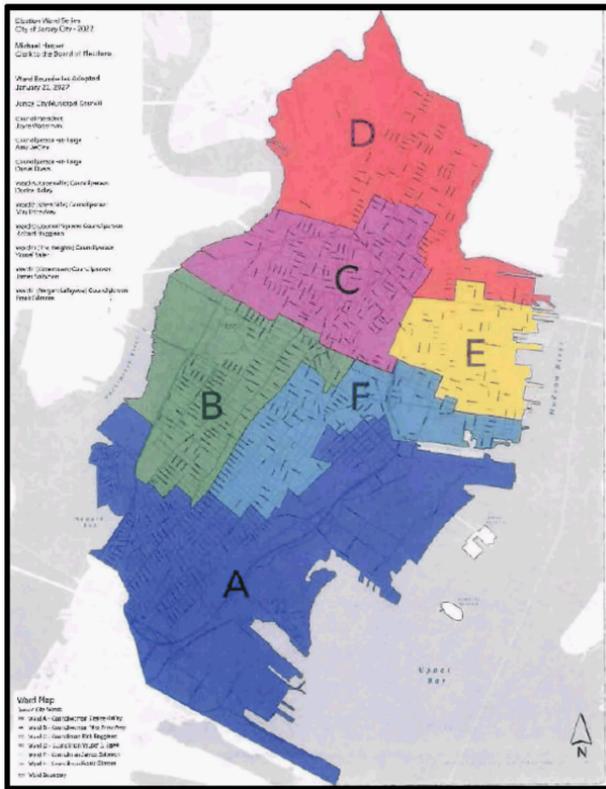
***40** The Commission stated that it "sought to craft a map that would (1) impose the least amount of demographic change to each ward while (2) lowering the deviation between the most populous ward and the least populous to the lowest possible percentage." According to the Commission, it "utilized a proprietary mapping software which depicted the existing

ward map featuring the census tracts provided by the [f]ederal government superimposed upon it."

The Commission disseminated a proposed new map and a comparison of the demographic breakdown of the 2012 ward map based on the 2012 census data and the 2022 proposed ward map based on the 2020 census data. It noted that in contrast to the fifty-nine percent population deviation between the most and least populous wards that would exist if the 2012 ward boundaries were retained following a decade of significant change, the population deviation between the most and least populous wards in its proposed map was only ****225** 1.8 percent. In the Commission's proposed new map, the boundaries of all six wards were revised.

At a public hearing, residents, public officials, and representatives of groups opposed to the new ward map presented comments. The Commission then adopted the map by a six-to-zero vote, with one commissioner abstaining. It published a report explaining its decision and identifying the new ward boundaries. The Commission found that the map conformed to [N.J.S.A. 40:44-14](#)'s requirement that the ward boundaries be compact and contiguous, and that the population of the most and least populous wards not differ by more than ten percent. The map adopted by the Commission is depicted below.

***41**



B.

1.

This appeal arose from two actions in lieu of prerogative writs challenging the Commission's map. The first was filed by pro se plaintiff James Calderon (Calderon), and the second was filed by thirteen community organizations and Ward F Councilman Frank E. Gilmore (collectively, Community Organizations).

*42 Three of the claims asserted in the plaintiffs' complaints are before us in this **226 appeal.¹

First, plaintiffs in both actions asserted in their complaints that the Commission violated the MWL because the new wards were not sufficiently compact. The Community Organizations alleged that the new map should be rejected because its wards earned low scores on two mathematical measures of compactness, the Polsby-Popper Measure and the Reock Score.² They proposed an alternative map, contending that it offered more compact wards as assessed by those measures.

Second, the Community Organizations alleged in their complaint that the Commission's map violated principles of

equal protection guaranteed by [Article I, Paragraph 1 of the New Jersey Constitution](#). The Community Organizations did not assert that the Commission engaged in invidious discrimination when it devised the new map. Instead, they premised their equal protection claim on the contention that the wards were not sufficiently compact and that the Commission unlawfully divided historic districts and established neighborhoods, thus diminishing the capacity of communities *43 of interest to achieve effective representation for issues such as affordable housing and high-rise development.

Third, the Community Organizations alleged in their complaint that the Commission violated the NJCRA by violating the MWL and equal protection principles and therefore deprived them of their right to live in compact wards that preserved communities of interest.

Plaintiffs sought, among other relief, a declaration voiding the Commission's map and an order that the Commission redraw the map.

Pursuant to [Rule 4:6-2\(e\)](#), the Commission moved in both actions to dismiss the complaints for failure to state a claim. Plaintiffs opposed the motions.

The trial court dismissed both complaints with prejudice. Citing this Court's opinion in [Davenport v. Apportionment Commission](#), 65 N.J. 125, 133-35, 319 A.2d 718 (1974), the court noted that judicial review of a plan such as the ward map is limited, that compactness is an elusive concept, and that a map should not be struck down simply because a judge concludes that a better map could be devised. The trial court acknowledged that a plan that created bizarrely shaped districts for partisan advantage would not be tolerated, but it found no such flaw in the Commission's map. The court accordingly rejected plaintiffs' MWL claims. It also dismissed the Community Organizations' equal protection claim, rejecting the notion that such a claim can be premised on the rights **227 of citizens who share a common interest in a particular issue. Finally, the trial court dismissed the Community Organizations' NJCRA claim on the ground that they failed to allege a claim that the Commission violated their substantive rights.³

*44 2.

Plaintiffs appealed the trial court's judgments. The Appellate Division affirmed in part, reversed in part and remanded for limited factfinding. [Jersey City United](#), 478 N.J. Super. at 155-56, 311 A.3d 989.

The Appellate Division observed that redistricting plans such as the ward map in dispute “are not subject to the normal arbitrary, capricious, and unreasonable standard generally used to evaluate agency actions.” [Id.](#) at 149, 311 A.3d 989. It explained that “[i]nstead, courts are limited to determining whether the redistricting plan is ‘unlawful or reflects invidious discrimination.’ ” [Ibid.](#) (quoting [In re Establishment of Cong. Dists. by N.J. Redistricting Comm'n](#), 249 N.J. 561, 574, 268 A.3d 299 (2022)).

In the absence of any claim of invidious discrimination or partisan gerrymandering in this appeal, the Appellate Division held that the boundaries and map can be challenged only on the basis of [N.J.S.A. 40:44-14](#)'s requirements of compactness, contiguousness, and population deviation, not on grounds of “general, but undefined, concepts of ‘communities of interest’ or ‘historic neighborhoods.’ ” [Ibid.](#)

As to the sole statutory factor at issue in plaintiffs’ appeal, compactness, the appellate court reasoned that “[a] ward need not be as tight as possible, and the realities of geography will require some amount of elongation and jagged boundaries.” [Ibid.](#) It held that “[a] ward need only have a rational basis for its shape, considered within the context of the shape of the overall municipality, the other wards, and the population deviation between the most populous and least populous wards.” [Id.](#) at 149-50, 311 A.3d 989. The Appellate Division cautioned that courts “should not consider whether there is a better or more compact configuration.” [Id.](#) at 150, 311 A.3d 989.

The Appellate Division remanded for a determination whether “the Commissioners had a rational basis for their configuration,” so that the trial court could “then determine whether the wards *45 are compact, given the flexibility afforded by the [MWL].” [Ibid.](#) The appellate court granted the trial court “discretion to allow focused cross-examination of one or more Commissioners ... limited to the rational basis for the compactness of the wards.” [Ibid.](#) It barred any challenge based on assertions that the Commission's “wards do not comply with other models of compactness” or that the Commission's map “breaks up communities of interest or neighborhoods,” and specifically rejected the Community

Organizations’ “attempt to use the Polsby-Popper Measure or the Reock Measure.” [Ibid.](#)

The appellate court affirmed the trial court's dismissal of the Community Organizations’ equal protection claim, noting the lack of any claim of invidious discrimination on account of race or any other basis, and the absence of any allegation identifying “how any class of people was treated differently by the Commission as compared to another class of people.” [Id.](#) at 151, 311 A.3d 989. It also affirmed the trial court's dismissal of the Community Organizations’ **228 NJCRA claim because there was no viable claim of deprivation of a substantive right. [Id.](#) at 154-55, 311 A.3d 989 (citing [N.J.S.A. 10:6-2\(c\)](#)). The appellate court affirmed the dismissal of plaintiffs’ remaining claims. [Id.](#) at 155, 311 A.3d 989.

C.

We granted plaintiffs’ petitions for certification, “limited to the issues concerning the interpretation of the ‘compactness’ requirement of the [MWL]; the challenge under the Equal Protection Clause of the New Jersey Constitution; and the dismissal of the claim brought under the [NJCRA].” 258 N.J. 482, 322 A.3d 98 (2024). We granted the applications of the following organizations to appear as amici curiae: the American Civil Liberties Union of New Jersey (ACLU); the City of Jersey City and Councilman at Large Daniel Rivera, jointly represented (City); the Electoral Innovation Lab (EIL); the League of Women Voters of New Jersey (LWV); the New Jersey Association of Election Officials (NJAE0); and the New Jersey League of Municipalities, New *46 Jersey Association of Counties, and New Jersey Institute of Local Government Attorneys, jointly represented (NJLM).

II.

The Community Organizations state that the Commission's map created bizarrely shaped wards that are not compact as [N.J.S.A. 40:44-14](#) requires, and that the map fails to preserve communities of interest, splits up historic neighborhoods, and ignores natural boundaries. They argue that the Appellate Division's limited remand is improper because it effectively eliminates the MWL's compactness requirement. The Community Organizations assert that the Commission violated the New Jersey Constitution's equal protection guarantee because it unnecessarily fractured established neighborhoods and communities of interest, thus

diminishing residents' voting rights. They contend that they have a viable NJCRA claim based on substantive rights conferred by the MWL. Calderon asserts a statutory claim under the MWL, arguing that the Commission's map includes bizarrely shaped wards that are not compact and should not be tolerated.

The Commission argues that its map is entitled to a presumption of legality, that compactness is a vague concept less important than population equality in designing a ward map, and that a map should not be invalidated because it splits a community of interest into different wards. According to the Commission, the Appellate Division properly affirmed the dismissal of the Community Organizations' equal protection claims in the absence of a violation of the MWL, a claim of racial discrimination, or evidence of voter dilution by virtue of the new map, and the Community Organizations' NJCRA claim fails because they demonstrated no deprivation of a substantive right.

The ACLU urges the Court to incorporate the preservation of communities of interest into the MWL's definition of "compact," and to reject the Appellate Division's "rational basis" test. The LWV argues that the Court should vacate the Appellate Division's limited remand and instead order full discovery and expert testimony *47 regarding "the statistical measurements and evidence regarding communities of interest." The EIL takes no position on the outcome of this appeal but argues that we should require the Polsby-Popper Measure and the Reock Score as measures of compactness under the MWL.

The City argues that any requirement that the ward map preserve communities of interest not only contravenes **229 N.J.S.A. 40:44-14, but could weaken the voting power of members of those communities. The NJAEO urges the Court to reject plaintiffs' contention that ward commissioners, who do not have access to detailed information about residents' demographic qualities or views on particular issues, should be required to preserve communities of interest when they redraw a ward map. The NJLM asserts that the Court should apply the plain meaning of the word "compact" in the MWL without reference to the concept of communities of interest and leave policy determinations on that concept to the Legislature.

III.

As we observed in the legislative redistricting setting of [Davenport](#), "[r]eapportionment is essentially a political and legislative process." 65 N.J. at 135, 319 A.2d 718. We held that a redistricting plan "must be accorded a presumption of legality with judicial intervention warranted only if some positive showing of invidious discrimination or other constitutional deficiency is made." [Ibid.](#) Invoking the United States Supreme Court's observation that "[p]olitics and political considerations are inseparable from districting and apportionment," we observed that "[t]he judiciary is not justified in striking down a plan, otherwise valid, because a 'better' one, in its opinion, could be drawn." [Id.](#) at 134-35, 319 A.2d 718 (citing [Gaffney v. Cummings](#), 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973)); accord [Gonzalez v. N.J. Apportionment Comm'n](#), 428 N.J. Super. 333, 368, 53 A.3d 1230 (App. Div. 2012). As we recently noted, "[t]hat stringent standard still applies." *48 [Establishment of Cong. Dists.](#), 249 N.J. at 569, 268 A.3d 299. It is not our task to decide whether there is another map that would be fairer or better than the map at issue, but to determine whether "the map selected is 'unlawful.'" [Ibid.](#) (citing [N.J. Const. art II, § 2, ¶ 9.](#))

Here, we determine only whether the map adopted by the Commission complies with the MWL's requirement of a "compact" map, whether it contravenes the New Jersey Constitution's equal protection guarantee, and whether it gives rise to a claim under the NJCRA. Absent a violation of the MWL, the equal protection guarantee, or the NJCRA, we must uphold the Commission's map. [Ibid.](#)

A.

We begin with plaintiffs' claim that the Commission's map violates the MWL because it created wards that were not "compact," contrary to [N.J.S.A. 40:44-14](#).

1.

The Legislature enacted the MWL to provide "a uniform method for the fixing and determination of municipal ward boundaries by ward commissioners." [S. 3157](#) (1981).⁴ Effective on January 12, 1982, the MWL governs "any municipality having adopted a charter or form of government, or ordinance, providing that the municipality shall be divided into wards, or **230 other similar representation *49

districts, for the purpose of the election or appointment of any municipal officers.” [N.J.S.A. 40:44-10](#).

The Legislature provided that a ward commission shall consist of “[t]he members of the county board of elections of the county in which the municipality is located, together with the municipal clerk.” [N.J.S.A. 40:44-11](#).

Within three months of the Governor's promulgation of the results of a federal decennial census, the ward commission must hold a meeting to “make such adjustments in ward boundaries, as shall be necessary to conform them to the requirements” of the MWL. [N.J.S.A. 40:44-13\(c\)](#). Those requirements are set forth in [N.J.S.A. 40:44-14](#), which charges a commission to “fix and determine the ward boundaries so that each ward is formed of compact and contiguous territory.” The statute also mandates that “[t]he population of the most populous ward so created shall not differ from the population of the least populous ward so created by more than [ten percent] of the mean population of the wards,” using the census as “the population determinant.” [N.J.S.A. 40:44-14](#). Within thirty days of its first meeting, the commission must file a report “setting forth and properly describing the ward boundaries fixed and determined,” and must annex to that report “a map of the municipality with the ward boundaries clearly marked thereon.” [N.J.S.A. 40:44-15](#).

The Legislature did not define a “compact” territory for purposes of the MWL. See [N.J.S.A. 40:44-14](#). Accordingly, we give that term its “generally accepted meaning, according to the approved usage of the language.” [N.J.S.A. 1:1-1](#). As dictionary definitions suggest, the term “compact” modifying the word “territory” in [N.J.S.A. 40:44-14](#) denotes the geographic contours of a given ward. See [Webster's Third International Dictionary](#) 461 (unabridged) (2002) (defining “compact” to denote “[m]arked by concentration in a limited area”); [Merriam-Webster's Collegiate Dictionary](#) 252 (11th ed. 2020) (defining “compact” to denote “a dense structure or parts of units closely packed or joined” and “occupying a small volume by reason of efficient use of space”).

***50** Absent from the MWL is any legislative direction that ward commissions use a mathematical measure of compactness such as the Polsby-Popper Measure or the Reock Score in the determination of ward boundaries. See [N.J.S.A. 40:44-14](#). That is particularly significant because mathematical measures of compactness were available when the MWL was enacted; indeed, Dr. Ernest C. Reock, inventor of the Reock Score, was one of the two representatives of the

Bureau of Government Research and Services who prepared the Musto Commission Report. Nor did the Legislature identify factors that a commission should consider in assessing a ward's compactness. See [ibid.](#) In short, the Legislature directed a ward commission to design wards that are compact, but did not prescribe a methodology for that determination or otherwise constrain a ward commission's discretion. See [ibid.](#)

Although we have not previously addressed the MWL's compactness requirement, we have twice addressed the New Jersey Constitution's legislative district compactness requirement.⁵ In [**231 Jackman v. Bodine](#), plaintiffs challenging a legislative redistricting map relied heavily on a claim of excessive population discrepancies among the proposed districts as a ground to strike down the plan. [49 N.J. 406, 418, 231 A.2d 193 \(1967\)](#). The defendants asserted that although the districts envisioned in alternative maps proposed by the plaintiffs “would come somewhat closer to the optimum population size,” redistricting officials had “selected arrangements which are more ‘compact,’ ” and in some situations may have considered “other matters” such as “so-called community interests, partisan history, and residence of incumbents.” [Ibid.](#)

***51** Observing that those other matters “are wholly irrelevant” and could not be invoked to support population deviations “of any kind,” the Court held that the constitutional mandate limiting population deviations is in some settings a more important consideration than compactness:

Compactness usually appears in discussions of districting, and of course the constitutional amendments cited above refer to it. We incline to believe that the concept is substantially significant only when wholly new district lines are being created without reference to existing political subdivisions. Where the districts are being created on the basis of existing political subdivisions, it seems to us that compactness, although not irrelevant, becomes a much reduced factor. We do not think it possible to state the precise impact of compactness, but we believe it helpful for future guidance to suggest that population equality must be distinctly paramount. Compactness no doubt would be a material factor if the choice were between a configuration of existing political entities which would yield such bizarre designs as a “shoe lace” or “horse shoe.” Absent such extremes, compactness may not be relied upon to justify an appreciable deviation.

[[Id.](#) at 419, 231 A.2d 193.]

Although the Court did not define a “compact” district in [Jackman](#), it suggested that redistricting officials’ visual review of the physical shape or density of a district is an appropriate method of determining whether the constitutional mandate is met. See [ibid.](#)⁶

In [Davenport](#), plaintiffs challenging a legislative apportionment plan contended that some of the districts created by the plan were “of the ‘shoestring’ or ‘horseshoe’ type” that fail the constitutional requirement of compactness, and “that these odd-shaped districts were created solely for the purpose of protecting incumbent legislators.” 65 N.J. at 133, 319 A.2d 718. We observed that *52 “[c]ompactness is an elusive concept” that “may be of limited utility in creating legislative districts in the light of the odd configurations of our State and its municipalities.” [Ibid.](#) Citing [Jackman](#), we reiterated “that population equality **232 is distinctly paramount” to compactness, and that “where districts are created on the basis of existing political subdivisions, compactness becomes a much reduced factor.” [Id.](#) at 133-34, 319 A.2d 718. We stated that “[w]hile the carving out of bizarrely shaped districts for partisan advantage will not be tolerated, the creation of balanced political districts serves a valid apportionment purpose.” [Id.](#) at 134, 319 A.2d 718.

Our decisions in [Jackman](#) and [Davenport](#) thus approve a commission's assessment of a legislative district's compactness by visual inspection of a map. [Davenport](#), 65 N.J. at 133-34, 319 A.2d 718; [Jackman](#), 49 N.J. at 418-19, 231 A.2d 193. We stated that a district that is “bizarrely shaped,” resembling, for example, a horseshoe or a shoelace, may not meet the constitutional mandate of compactness. [Davenport](#), 65 N.J. at 133-34, 319 A.2d 718. We also recognized that in legislative redistricting, achieving approximate population equality among wards is a critical consideration. [Ibid.](#); [Jackman](#), 49 N.J. at 418-19, 231 A.2d 193.

2.

Against that backdrop, we address plaintiffs’ claims that the Commission's map fails to satisfy the MWL's requirement that each ward be “formed of compact ... territory.” N.J.S.A. 40:44-14.

Plaintiffs premise their compactness argument on three primary contentions: (1) that the Commission did not properly assess the compactness of its proposed wards because it did

not apply a mathematical measure such as the Polsby-Popper Measure or the Reock Score to those wards; (2) that the Commission improperly excluded from its consideration of compactness the impact of its map on communities of interest; and (3) that Wards A, D, and F, like the “horseshoe”- and “shoelace”-shaped wards discussed in *53 [Jackman](#) and [Davenport](#), are bizarrely shaped and therefore not “compact” under N.J.S.A. 40:44-14.

We concur with the Appellate Division that the Commission was not required to utilize the Polsby-Popper Measure or the Reock Score to quantitatively assess the compactness of proposed wards. See [Jersey City United](#), 478 N.J. Super. at 150, 311 A.3d 989. The Legislature did not define a “compact” ward as one earning a particular score on the Polsby-Popper Measure or the Reock Score, or otherwise tether the compactness requirement to a mathematical benchmark. See N.J.S.A. 40:44-14.⁷ We do not add to a statute requirements **233 that the Legislature clearly has chosen not to include. See [Keim v. Above All Termite & Pest Control](#), 256 N.J. 47, 62, 304 A.3d 685 (2023) (“We cannot ‘write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment ...’ ” (omission in original) (quoting [Craster v. Bd. of Comm'rs of Newark](#), 9 N.J. 225, 230, 87 A.2d 721 (1952))); [State v. Fleischman](#), 189 N.J. 539, 545, 917 A.2d 722 (2007) (“[W]e do not ‘rewrite a plainly-written enactment of the Legislature [or] *54 presume that the Legislature intended something other than that expressed by way of the plain language.’ ” (second alteration in original) (quoting [O'Connell v. State](#), 171 N.J. 484, 488, 795 A.2d 857 (2002))); [Lippman v. Ethicon, Inc.](#), 222 N.J. 362, 388, 119 A.3d 215 (2015) (noting that “courts should not rewrite plainly worded statutes” or “engraft requirements” that the Legislature did not include).

Therefore, we consider the determination whether to use mathematical measures to assess compactness to be within the broad discretion that the Legislature granted to ward commissions in the MWL. If a ward commission decides that such measures may assist it in a determination of ward boundaries, it may elect to use them, but it is not required to do so. In this case, it was within the Commission's discretion to decline to utilize the Polsby-Popper Measure and the Reock Score.

The Commission also acted within its discretion when it did not consider the map's impact on communities of interest as part of its inquiry about compactness. To be sure, the

preservation of communities of interest is a traditional factor in redistricting. See [Rucho v. Common Cause](#), 588 U.S. 684, 706, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019) (identifying “keeping communities of interest together” among “‘traditional’ districting criteria”); [Gonzalez](#), 428 N.J. Super. at 342-43, 369, 53 A.3d 1230 (noting a redistricting commission's focus on “valid redistricting factors” that included “social, cultural, ethnic, and economic communities of interest”). During the 2022 deliberations of the New Jersey Legislative Apportionment Commission, the Honorable Philip Carchman (Ret.), the Commission's tiebreaking member, listed communities of interest as a factor distinct from the constitutional mandate of compactness in legislative redistricting. See [Commission Meeting 2-8](#) (Jan. 8, 2022), <https://www.apportionmentcommission.org/schedule.asp> (last visited May 12, 2025).⁸ Judge Carchman viewed *55 communities of interest, along with other standards “not constitutionally mandated” in legislative redistricting, to “allow for some discretion in their application.” [Ibid.](#)

Although the preservation of communities of interest may be relevant to the work of ward commissions, it is not a requirement for determining compactness under the MWL. See N.J.S.A. 44:40-14. There is no authority in the MWL, its legislative history, or our case law for plaintiffs’ argument that when it required wards to be “compact,” the Legislature mandated that the members of a community **234 of interest must vote in the same ward.⁹ Ward commissions have the discretion to consider the impact of a ward's boundaries on communities of interest, but if they do so, the preservation of those communities should be weighed as a separate factor, not as a component of compactness. Accordingly, the Commission did not violate N.J.S.A. 40:44-14 by not analyzing the impact of its map on communities of interest.

Nor do we concur with plaintiffs’ contention that Wards A, D, and F are “bizarrely shaped” and thus violate the MWL. The contours of Wards A and D are principally determined not by the Commission, but by Jersey City's uneven borders with adjoining municipalities and natural features such as the Hudson and *56 Hackensack Rivers. The boundaries that separate Ward A from Wards B and F are not linear, but neither are they “bizarre.” The same is true of the boundaries that separate Ward D from Wards C and E. Ward F was significantly altered when the Commission reduced Ward E's population by nearly thirty percent to meet the MWL's population deviation requirement. It now extends east from Jersey City's center to encompass a portion of the City's

Hudson River waterfront. Ward F has uneven borders, but it is not comparable to “bizarrely shaped” districts such as the “horseshoe” and “shoelace” configurations addressed in [Jackman](#) and [Davenport](#).

It is, no doubt, possible to envision a ward map in which any of Jersey City's wards would be more compact than they appear in the Commission's redistricting plan. Our inquiry, however, is not whether a court could design a better map than the map that the Commission devised. [Establishment of Cong. Dists.](#), 249 N.J. at 569, 268 A.3d 299; [Davenport](#), 65 N.J. at 135, 319 A.2d 718. It is instead whether the wards created by the Commission consist of “compact ... territory” as the MWL requires, taking into account the mandate that the Commission eliminate the serious population deviation that had developed over the past decade and other relevant considerations. See N.J.S.A. 40:44-14; [Davenport](#), 65 N.J. at 134-35, 319 A.2d 718; [Jackman](#), 49 N.J. at 418-19, 231 A.2d 193.

Applying the deferential standard of review that governs appeals of redistricting plans in which there is no claim of invidious discrimination, we conclude that the Commission's plan meets N.J.S.A. 40:44-14's mandate of compactness. We respectfully disagree with the Appellate Division's ruling that the matter should be remanded to the trial court for factfinding as to whether the ward commissioners had a rational basis for their determination of compactness. See [Jersey City United](#), 478 N.J. Super. at 150, 311 A.3d 989. We view the record to be adequate for appellate review without inquiry into the commissioners’ individual views on the question of compactness.

*57 The dissent agrees with our holding that the MWL's compactness requirement is not “a mandate to keep together ‘communities of interest,’ ” **235 [post](#) at —, — A.2d at —, and that the MWL does not require the Commission to achieve compactness as measured by a particular numerical cutoff, or to prioritize compactness over other MWL requirements, but does require the Commission to consider and incorporate compactness in its determination, [post](#) at — — —, — — —, — A.2d at — — —, — — —.

The dissent identifies two primary points of disagreement with our decision. First, the dissent contends that we must remand this matter to the trial court, rather than reinstate the dismissal of the MWL claim, because the Commission did not challenge the Appellate Division's remand in a cross-petition.

Post at ———, ——— A.2d at ———. Second, the dissent states that the Commission's determination is inadequate because it did not indicate “whether or how” it considered compactness, and that the Commission should be required on remand to explain in detail the basis for its determination on that issue. Post at ———, ——— A.2d at ———. We briefly address each argument.

With respect to the MWL, the Appellate Division reversed the trial court's decision granting the Commission's motion to dismiss pursuant to [Rule 4:6-2\(e\)](#). The Appellate Division imposed a new standard not set forth in the MWL: whether the Commission “had a rational basis for the ward boundaries and map it adopted.” See [Jersey City United](#), 478 N.J. Super. at 155, 311 A.3d 989. Because the Appellate Division found the record insufficient to decide whether the Commission had such a rational basis for its compactness determination, it ordered a limited remand for the trial court to apply that test. Although we do not concur with the Appellate Division that a rational basis test should govern the Commission's determination of compactness under [N.J.S.A. 40:44-14](#), we find nothing procedurally improper about the Appellate Division's imposition of a remedy not requested by any party. See [ibid](#).

***58** In plaintiffs’ petitions for certification, they asked this Court to review and reverse the Appellate Division's judgment on the MWL claim; indeed, in their reply brief in support of their petition for certification, plaintiffs not only challenged the Appellate Division's judgment on the MWL issue, but specifically asserted that “the Appellate Division's limited remand must be reversed.”

This Court's grant of certification placed the Appellate Division's judgment on the MWL's compactness requirement squarely in issue. See [Township of West Orange v. 769 Associates](#), 198 N.J. 529, 546, 969 A.2d 1080 (2009) (noting that “if an issue is squarely presented, relief need not be withheld simply because it would inure to the benefit of a non-appelling party”); [Hayes v. Delamotte](#), 231 N.J. 373, 386-87, 175 A.3d 953 (2018) (“[I]t is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion.” (quoting [Do-Wop Corp. v. City of Rahway](#), 168 N.J. 191, 199, 773 A.2d 706 (2001))).

Here, the Court determines whether the Appellate Division properly reversed the trial court's determination and ordered a limited remand for rational basis review. As explained [supra](#)

at ———, ——— A.2d at ———, we find the wards devised by the Commission to be compact, we decline to adopt the Appellate Division's rational basis test, and we reverse the Appellate Division's judgment with respect to the MWL claim.

The fact that the Commission did not file a cross-petition does not constrain us to impose a remedy at odds with our decision on the merits; to the contrary, the Court's remedy must be consistent with its ****236** application of [N.J.S.A. 40:44-14](#) to the Commission's map. Accordingly, the appropriate remedy is not to remand the matter for a determination under the Appellate Division's rational basis test, but to reinstate the trial court's dismissal of the MWL claim.

Indeed, the dissent itself rejects the Appellate Division's remand for a rational basis review, which it views to lack any basis in the MWL or prior case law. Post at ———, ——— A.2d at ———. The dissent would instead order a remand “to determine whether the ***59** new wards are compact within the meaning of the MWL.” Post at ———, ——— A.2d at ———. Although we do not view any remand to be warranted on the merits, it is clear that the Commission's failure to file a cross-petition would not preclude imposition of the remedy that the dissent advocates: a remand, but one that diverges from the remand that the Appellate Division directed.

Accordingly, we respectfully disagree with the dissent's suggestion that the Court is constrained to remand this matter, rather than reinstate the trial court's judgment dismissing the MWL claim, because the Commission did not file a cross-petition. See post at ———, ——— A.2d at ———.

With respect to the adequacy of the Commission's compactness finding, it is clear that the Commission met the MWL's procedural requirements. It timely filed a report “setting forth and properly describing the ward boundaries fixed and determined,” and made findings on all of [N.J.S.A. 40:44-14](#)'s factors, including a finding that the ward boundaries were compact. The MWL requires nothing more. See [N.J.S.A. 44:40-1 to -18](#). Nonetheless, the Commission's report also identified the statutory factor that drove the analysis: the urgent need to eliminate the fifty-nine percent population deviation between Ward E and Ward D, and reduce that deviation to the extent possible -- indeed, to a remarkably low 1.5 percent. That factor provides context for the significant changes to the wards between the 2012 and 2022 maps.

We share the dissent's view that a detailed explanation of a ward commission's compactness determination would better inform the public and facilitate judicial review. The Legislature, however, has not mandated such an explanation in a process undertaken on a stringent timetable. See *N.J.S.A. 44:4-13*, -15, -16. We decline to impose such a requirement in this appeal.

Accordingly, we reinstate the trial court's judgment as to the Commission's compliance with *N.J.S.A. 40:44-14* without further proceedings.

***60 B.**

We next consider the Community Organizations' equal protection claim, based on the New Jersey Constitution.

Equal protection principles are "implicit in *Art. I, par. 1 of the 1947 New Jersey Constitution*." *McKenney v. Byrne*, 82 N.J. 304, 316, 412 A.2d 1041 (1980). That provision states that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." *N.J. Const. art. I, ¶ 1*. Like the Fourteenth Amendment of the Federal Constitution, the State Constitution's equal protection guarantee protects "against the unequal treatment of those who should be treated alike." *Greenberg v. Kimmelman*, 99 N.J. 552, 568, 494 A.2d 294 (1985); accord *Lewis v. Harris*, 188 N.J. 415, 442, 908 A.2d 196 (2006); ****237** *Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 472, 842 A.2d 125 (2004).

As this Court noted in *Brady v. New Jersey Redistricting Commission*, in which the plaintiffs claimed that they had been deprived of a voice in the redistricting process, the equal protection guarantee "protects against discriminatory governmental classifications of persons not related to some appropriate state interest." 131 N.J. 594, 610-11, 622 A.2d 843 (1992). There, because the plaintiffs "failed to point to any classification at all that excluded them from participation," their equal protection challenge failed. *Ibid.* And in *Gonzalez*, the Appellate Division similarly rejected a federal equal protection claim to state legislative redistricting premised on alleged dilution of the voting rights of South Jersey voters. 428 N.J. Super. at 366, 53 A.3d 1230. The appellate court found the trial court's consideration of the issue persuasive, including the holding that "no

constitutional infirmity arose from 'the mere fact that a particular apportionment scheme makes it more difficult for a particular group ... to elect the representatives of its choice.'" *Id.* at 368, 53 A.3d 1230 (omission in original) (quoting ***61** *Davis v. Bandemer*, 478 U.S. 109, 131, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986)). It concurred with the trial court's observation that the South Jersey districts included urban, suburban and rural areas, as well as "Democrats, Republicans, third-party voters, ... unaffiliated voters," and "a variety of socioeconomic classes and races." *Id.* at 366, 53 A.3d 1230. Like the trial court, the Appellate Division determined that the plaintiffs had not "alleged sufficient facts to demonstrate there is any type of invidious discrimination to disadvantage" South Jersey communities "that would offend Equal Protection principles." *Ibid.*

Here, the Community Organizations assert no claim of invidious discrimination on racial or other grounds. As the Appellate Division observed, the Community Organizations failed to allege that the Commission unconstitutionally treated one class of people differently from the manner in which it treated another class of people. See *Jersey City United*, 478 N.J. at 151-52, 311 A.3d 989. Instead, they contend that the Commission improperly divided certain established neighborhoods and communities of interest into wards that were not compact. Accordingly, our conclusion that the Commission complied with the MWL's compactness standard compels rejection of the Community Organizations' equal protection claim.

We therefore affirm the Appellate Division's judgment with respect to the Community Organizations' equal protection claim.

C.

Finally, we address the Community Organizations' NJCRA claim.

Pursuant to the NJCRA, "[a]ny person who has been deprived of any substantive ... rights, privileges or immunities secured by the Constitution or laws of this State ... by a person acting under color of law" may bring an action for damages. *N.J.S.A. 10:6-2(c)*; see also *Winberry Realty P'ship v. Borough of Rutherford*, 247 N.J. 165, 183-84, 253 A.3d 636 (2021) (reviewing ***62** the elements of an NJCRA claim). When an NJCRA claim is premised on a violation of a statute such as the MWL, we first determine whether the statute was violated

and then decide whether the right at issue is a substantive right under the NJCRA. See [N.J.S.A. 10:6-2\(c\)](#); [Tumpson v. Farina](#), 218 N.J. 450, 472-73, 95 A.3d 210 (2014).

To determine whether the Legislature intended to confer a substantive right on an individual when it enacted a ****238** given statute, we apply the standard prescribed by the United States Supreme Court in [Blessing v. Freestone](#), 520 U.S. 329, 340-41, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). [Tumpson](#), 218 N.J. at 476, 95 A.3d 210 (adopting the standard). We have noted that under the [Blessing](#) standard, “[a] plaintiff must show that (1) Congress intended the statute to ‘benefit the plaintiff’; (2) ‘the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence’; and (3) ‘the statute must unambiguously impose a binding obligation on the States.’” [Id.](#) at 475, 95 A.3d 210 (quoting [Blessing](#), 520 U.S. at 340-41, 117 S.Ct. 1353). We also concluded that “[i]n accord with the [Blessing](#) test, even if we find that a statute confers a right, we still must determine whether the Legislature did not intend remedies of our Civil Rights Act to supplant those of other statutes.” [Id.](#) at 476, 95 A.3d 210.

Here, the Community Organizations allege that the Commission deprived them of their “substantive rights of equal treatment guaranteeing them fair representation in the ward boundaries” and “their substantive rights to reside in a ward that consists of compact territory that preserves their communities of interest” pursuant to the MWL and the New Jersey Constitution's equal protection guarantee. They also allege that the Commission deprived them of their “substantive rights of equal protection to reside in a ward whose boundaries are drawn free from arbitrary, irrational, inconsistently applied, and/or impermissible considerations.”

***63** In light of our holding that the Commission's map did not violate either [N.J.S.A. 40:44-14](#) or the New Jersey Constitution's equal protection guarantee, we affirm the Appellate Division's determination that the trial court properly dismissed the Community Organizations' NJCRA claim. See [Jersey City United](#), 478 N.J. Super. at 154-55, 311 A.3d 989. We do not reach the question whether a violation of the MWL could give rise to an NJCRA claim under the [Blessing](#) test.

IV.

We affirm in part and reverse in part the judgment of the Appellate Division and reinstate the trial court's judgment dismissing with prejudice plaintiffs' complaints in accordance with [Rule 4:6-2\(e\)](#).

CHIEF JUSTICE [RABNER](#) and JUSTICES [PIERRE-LOUIS](#) and [FASCIALE](#) join in JUSTICE [PATTERSON](#)'s opinion. JUSTICE [WAINER APTER](#) filed a separate opinion concurring in part and dissenting in part, in which JUSTICES [NORIEGA](#) and [HOFFMAN](#) join.

JUSTICE [WAINER APTER](#), concurring in part and dissenting in part.

The municipal wards adopted by the Jersey City Ward Commission in 2022 are significantly less compact than the wards that had been in place since 2012. Considering only the wards' geographic shapes, plaintiffs demonstrated a substantial decline in compactness using both mathematical measures and a simple visual inspection. All agree that the Municipal Ward Law (MWL) requires ward commissioners to “fix and determine the ward boundaries so that each ward is formed of compact and contiguous territory.” [N.J.S.A. 40:44-14](#). Plaintiffs allege that the Commission violated this statutory requirement. The trial court dismissed plaintiffs' MWL claim, but the Appellate Division reversed that dismissal and remanded for limited factfinding on whether the wards are compact within the meaning of the MWL. I agree with the ***64** Appellate Division that plaintiffs alleged sufficient facts to survive a motion to dismiss their MWL claim. I ****239** would, however, modify the Appellate Division's remand order. I therefore respectfully concur in part and dissent in part.

I.

As the majority correctly notes, our redistricting precedents limit judicial review to whether a map conforms with constitutional and statutory requirements: we must uphold a map absent an affirmative showing that it is “unlawful or reflects invidious discrimination.” [In re Establishment of Cong. Dists. by N.J. Redistricting Comm'n](#), 249 N.J. 561, 574, 268 A.3d 299 (2022); *ante* at —, —, — A.2d at —, —. In assessing whether a constitutional or statutory violation has been shown, we do not ask whether a “fairer” or “better” map could have been drawn. [Establishment of Cong. Dists.](#), 249 N.J. at 569, 268 A.3d 299.

Yet the MWL plainly instructs that municipal ward commissioners “shall fix and determine the ward boundaries so that each ward is formed of compact and contiguous territory.” [N.J.S.A. 40:44-14](#). In addition, the difference in population between the most populous and least populous ward must be no more than ten percent of the mean population of the wards. [Ibid.](#)

Therefore, although the scope of judicial review is limited, in reviewing a claim for a violation of the MWL, a court must assess whether the wards are compact, contiguous, and compliant with population constraints. Because, in my view, the majority diminishes the compactness requirement, I respectfully dissent from the majority's resolution of plaintiffs' MWL claim.

A.

As an initial matter, I agree with the majority that there is no basis in the text or structure of the MWL to read into the prescription that “each ward is formed of compact and contiguous *65 territory,” [N.J.S.A. 40:44-14](#), a mandate to keep together “communities of interest.” [Ante](#) at ———, ——— A.2d at ———.

Ward commissions must act quickly to redraw ward boundaries: they must meet within three months of the Governor's receipt of each federal decennial census and file a new map within thirty days of that meeting. [N.J.S.A. 40:44-13\(c\)](#), -15(a). And the statute provides limited tools to accomplish that task, allowing commissions to hire “a surveyor or engineer and such other assistants as shall be necessary to aid them in the discharge of their duties.” [Id.](#) at -12. Within this framework, a commission has no practical ability to discern, consider, and actualize “general, but undefined, concepts of ‘communities of interest.’” [Jersey City United Against the New Ward Map v. Jersey City Ward Comm'n](#), 478 N.J. Super. 132, 149, 311 A.3d 989 (App. Div. 2024).

I also concur with the majority and the New Jersey League of Municipalities that it is up to the Legislature, not this Court, to make policy determinations regarding the benefits of keeping together “communities of interest.” [Ante](#) at ———, ———, ——— A.2d at ———, ———. The Legislature provided no such mandate in the MWL. [See](#) [N.J.S.A. 40:44-9](#) to -18. I therefore agree with the majority that the Commission was

not required to “consider the map's impact on communities of interest as part of its inquiry about compactness.” [Ante](#) at ———, ——— A.2d at ———.

B.

The majority is likewise correct that compactness refers to “the geographic contours of a given ward,” [ante](#) at ———, ——— A.2d at ———, or the geographic density of the “territory” within each ward, [N.J.S.A. 40:44-14](#).

****240** The Appellate Division in [Davenport v. Apportionment Commission](#) defined “compactness to mean that between two districts of equal area the one with the smaller perimeter is the more compact.” 124 N.J. Super. 30, 43, 304 A.2d 736 (App. Div. 1973). Here, the Appellate Division used -- and the majority approves -a dictionary definition of compact as “having a dense structure or *66 parts or units closely packed or joined” and “occupying a small volume by reason of efficient use of space.” 478 N.J. Super. at 148, 311 A.3d 989 (quoting [Merriam-Webster's Collegiate Dictionary](#) 252 (11th ed. 2020)); [ante](#) at ———, ——— A.2d at ———. The majority adds an additional definition: “[m]arked by concentration in a limited area.” [Ante](#) at ———, ——— A.2d at ——— (quoting [Webster's Third International Dictionary](#) 461 (unabridged) (2002)). These definitions give appropriate weight and content to the compactness requirement. [See also](#) [Acker v. Love](#), 496 P.2d 75, 76 (Colo. 1972) (defining compactness as “concern[ing] a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered”).

C.

Yet respectfully, after setting forth these definitions, the majority devalues them. The majority quotes [Jackman v. Bodine](#), 49 N.J. 406, 419, 231 A.2d 193 (1967), and [Davenport v. Apportionment Commission](#), 65 N.J. 125, 133-34, 319 A.2d 718 (1974), for the proposition that compactness is “an elusive concept” and a “much reduced factor” that “may be of limited utility in creating legislative districts” and, in the majority's view, municipal wards as well. [Ante](#) at ———, ———, ——— A.2d at ———, ———. In my view, a correct reading of those opinions, and the constitutional provisions they interpret, reveals that although compactness “may be of limited utility in creating legislative districts in the light of the odd configurations of [New Jersey] and its

municipalities,” [Davenport](#), 65 N.J. at 133, 319 A.2d 718, no similar constraint applies to ward boundaries under the MWL. It is therefore incumbent upon us to apply the Legislature’s compactness requirement in this case.

Our Constitution provides that “no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State.” [N.J. Const. art. IV, § 2, ¶ 3](#). Whereas the constitutional requirement to keep counties together was struck down in [Scrimminger v. Sherwin](#), 60 N.J. 483, 495-97, 291 A.2d 134 (1972), and *67 [Davenport](#), 65 N.J. at 132-33, 319 A.2d 718, in furtherance of the Federal Constitution’s one-person-one-vote principle, the constitutional requirement to keep municipalities together, unless the population of the municipality exceeds “one-fortieth of the total number of inhabitants of the State,” remains. [N.J. Const. art. IV, § 2, ¶ 3](#); see N.J. Legis. Comm’n, [Meeting Transcript for Jan. 8, 2022](#) 4 (statement by the Hon. Philip S. Carchman), accessible via <https://www.apportionmentcommission.org/schedule.asp> (“With the exception of Newark and Jersey City, whose populations exceed that of a single legislative district, municipalities cannot be split among districts.”).

It is because municipalities are the “building blocks” of state legislative districts, [Scrimminger](#), 60 N.J. at 498, 291 A.2d 134, and municipalities are themselves often “odd[ly] configur[ed],” [Davenport](#), 65 N.J. at 133, 319 A.2d 718, that we have acknowledged that compactness may be an “elusive concept” when it comes to legislative redistricting, *ibid.* See [Jackman](#), 49 N.J. at 419, 231 A.2d 193 (“Where the districts are being created on the basis of existing political subdivisions, it seems to **241 us that compactness, although not irrelevant, becomes a much reduced factor.” (emphasis added)); [Davenport](#), 65 N.J. at 133, 319 A.2d 718 (“Compactness ... may be of limited utility in creating legislative districts in the light of the odd configurations of our State and its municipalities.” (emphases added)).

The same cannot be said for municipal wards. Unlike the Constitution, the MWL does not require that wards be drawn around any existing political subdivisions; indeed, there are no political subdivisions smaller than a municipal ward from which the wards could be built. See [N.J.S.A. 40:44-14](#). The “odd configurations of our State and its municipalities” are therefore irrelevant to whether municipal wards can be drawn compactly under the MWL, aside from any portion of a ward boundary that tracks the outer boundary of the municipality

itself. [Davenport](#), 65 N.J. at 133, 319 A.2d 718. In other words, the fact that compactness is less feasible in the context of legislative districts, which must be built *68 around municipalities, does not give ward commissions license to disregard the unambiguous compactness requirement in the MWL.

Significantly, as the majority notes, the MWL was enacted in 1981, ante at —, — A.2d at —, several years after this Court’s 1967 decision in [Jackman](#) and 1974 decision in [Davenport](#). The Legislature is presumed to be “familiar with existing case law.” [State v. McCray](#), 243 N.J. 196, 217, 233 A.3d 523 (2020) (quoting [Great Atl. & Pac. Tea Co. v. Borough of Point Pleasant](#), 137 N.J. 136, 148, 644 A.2d 598 (1994)). If, based on the statements in [Jackman](#) and [Davenport](#), the Legislature viewed compactness as “an elusive concept” that would be “of limited utility” in drawing municipal ward boundaries, it would not have written it into the MWL without reservation or qualification.

As earlier noted, the MWL contains only three substantive restrictions on how ward boundaries can be drawn: “The ward commissioners shall fix and determine the ward boundaries so that each ward is formed of [1] compact and [2] contiguous territory,” and “[3] [t]he population of the most populous ward so created shall not differ from the population of the least populous ward so created by more than 10% of the mean population of the wards.” [N.J.S.A. 40:44-14](#). The Legislature chose to include all three; we must respect that choice. [Middletown Twp. PBA Local 124 v. Township of Middletown](#), 193 N.J. 1, 12, 935 A.2d 516 (2007) (“A court has no power to substitute its own idea of what a statute should provide in the face of clear and unambiguous statutory requirements.” (quotation omitted)). To give effect to the text of the MWL, ward commissions therefore must draw wards to be compact and contiguous and to fall within the population-deviation limits.

D.

The Appellate Division “expressly reject[ed] ... plaintiffs’ attempt to use the Polsby-Popper Measure or the Reock Measure” to show that the 2022 wards were not compact. *69 [Jersey City United](#), 478 N.J. Super. at 150, 311 A.3d 989. The majority likewise states that “it was within the Commission’s discretion to decline to utilize the Polsby-Popper Measure and the Reock Score.” Ante at —, — A.2d at —.

I would hold that in alleging a claim for a violation of the MWL based on non-compactness, plaintiffs may rely on mathematical measures such as the Reock and Polsby-Popper scores. Both are common methods of calculating compactness. Both grade district shapes on a scale of 0 to 1, with 0 being non-compact and 1 being perfectly compact. Both can usefully compare ****242** wards and give an idea of a ward's relative compactness. And both relate to the Appellate Division's description of a compactness measure in [Davenport](#) as “drawing a circle around each of the proposed districts” to evaluate which “occupy relatively greater areas within the circle.” [124 N.J. Super. at 43, 304 A.2d 736](#). Indeed, courts in many jurisdictions rely upon the Reock and Polsby-Popper scores in analyzing compactness and non-compactness. See, e.g., [In re Senate Joint Resol. of Legis. Apportionment 100](#), 334 So. 3d 1282, 1287 (Fla. 2022); [Pearson v. Koster](#), 367 S.W.3d 36, 55-56 (Mo. 2012); [Alpha Phi Alpha Fraternity, Inc. v. Raffensperger](#), 700 F. Supp. 3d 1136, 1197-99 (N.D. Ga. 2023), [appeal docketed](#), No. 23-13914 (11th Cir. Nov. 28, 2023).

Although I would not adopt a particular numerical cutoff beneath which a ward is not compact, I would hold that mathematical measures can help a plaintiff state a claim that a ward is not compact, or is materially less compact than it previously was, in violation of the MWL. Mathematical measures are not dispositive, but dismal compactness scores can help a plaintiff survive a motion to dismiss.

E.

Finally, I would hold that to state a claim for a violation of the compactness requirement of the MWL, a plaintiff may not allege that a ward map drawn many years ago, and unchanged since, is not compact. This is so because wards can permissibly be drawn to ***70** preserve continuity from prior maps. See [Davenport](#), [65 N.J. at 134-35, 319 A.2d 718](#) (“Providing protection of incumbents serves a valid purpose and is a relevant factor to be taken into account in creating a legislative districting plan.”). If a ward appears visually non-compact, but its shape was preserved from one census cycle to the next, plaintiffs should not be able to force the old map to be redrawn.

However, if a ward commission draws a new ward map that is substantially less compact than the previous map, that change could suggest that the commission did not adequately

consider compactness or inappropriately subordinated it to extra-statutory considerations. If the commission could not explain how a substantial decline in compactness was necessary to meet other MWL requirements, it would be obligated to redraw the ward boundaries to meet the MWL's compactness requirement.

II.

In this case, I would hold that plaintiffs alleged sufficient facts to survive the motion to dismiss their MWL claim pursuant to [Rule 4:6-2\(e\)](#). I therefore agree with the Appellate Division that the MWL claim should not have been dismissed. I would, however, modify the Appellate Division's remand order to expand the scope of the remand.

A.

Before explaining why plaintiffs alleged sufficient facts to survive a motion to dismiss, I would uphold the Appellate Division's reversal of the trial court's dismissal of plaintiffs' MWL claim because the Commission did not file a cross-petition for certification and did not challenge the Appellate Division's MWL holding at all.

As the majority notes, the trial court dismissed all of plaintiffs' claims. [Ante](#) at —, — A.2d at —. The Appellate Division affirmed the dismissal of all claims except the MWL claim, reversed ***71** that dismissal, and remanded the MWL claim for limited factfinding. [Jersey City United](#), [478 N.J. Super. at 149-55, 311 A.3d 989](#).

Plaintiffs filed a petition for certification, asking this Court to grant review and reverse ****243** the dismissal of their non-MWL claims. As for the MWL claim, plaintiffs requested that we broaden the scope of the Appellate Division's remand order, arguing that it “render[ed] the claim and the [MWL] statute meaningless.”

The Commission did not file a cross-petition for certification objecting to the Appellate Division's remand order. In fact, the Commission did not quarrel with the Appellate Division's revival of plaintiffs' MWL claim at all. Instead, the Commission argued that the MWL remand had already been scheduled and should be allowed to proceed. According to the Commission, “whether [plaintiffs] -- or, for that matter, the

Commission -- may ultimately have grounds for appeal and certification remains to be seen.”

“[A]ppeals are taken from judgments, not opinions, and, without having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the [lower] court's judgment.” [State v. Watson](#), 254 N.J. 558, 609, 298 A.3d 1049 (2023) (quoting [Chimes v. Oritani Motor Hotel, Inc.](#), 195 N.J. Super. 435, 443, 480 A.2d 218 (App. Div. 1984)). But if a respondent “is seeking to expand the substantive relief granted by the [lower] court, as opposed to merely arguing an additional legal ground to sustain the [lower] court's judgment, the [respondent] must file a cross-appeal.” [State v. Eldakroury](#), 439 N.J. Super. 304, 307 n.2, 108 A.3d 649 (App. Div. 2015) (citing [Jennings v. Stephens](#), 574 U.S. 271, 276, 135 S.Ct. 793, 190 L.Ed.2d 662 (2015)).

In addition, if a respondent does not argue that the judgment below should be altered, any such argument is waived. See [Watson](#), 254 N.J. at 609, 298 A.3d 1049 (“[A] respondent who is merely seeking to maintain his judgment may brief and argue on the appeal any points that will sustain his judgment and if he does not brief and argue such points he will be taken to have waived them.” *72 (quoting [State v. Lefante](#), 14 N.J. 584, 589-90, 103 A.2d 585 (1954))).

Here, by dismissing the MWL claim outright, this Court is enlarging the Appellate Division's judgment in favor of the Respondent Commission without the Commission filing a cross petition or ever even requesting that relief. I would affirm the Appellate Division's judgment as to the MWL claim on that basis alone.

B.

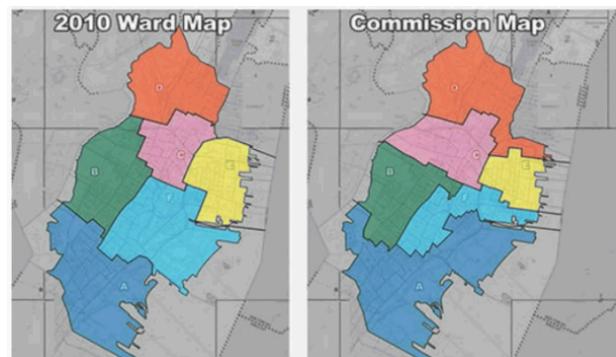
I would also hold that a remand is justified on the merits of plaintiffs' MWL claim.

In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, courts must “assume the facts as asserted by plaintiff[s] are true and give [them] the benefit of all inferences that may be drawn in [their] favor.” [Velantzas v. Colgate-Palmolive Co.](#), 109 N.J. 189, 192, 536 A.2d 237 (1988). “At [such a] preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint.” [Printing Mart-Morristown v. Sharp Elecs. Corp.](#), 116 N.J. 739, 746, 563 A.2d 31 (1989).

Applying that generous standard, I would hold that plaintiffs stated a claim for violation of the MWL. In their complaint, the Community Organizations provided compactness scores indicating that the new wards are significantly less compact than were the wards that existed under the 2012 map.¹ They alleged that using the **244 Polsby-Popper measure, the 2022 map received an average score of 0.4006, with Ward F scoring 0.2089 and Ward D scoring *73 0.2576. By comparison, the Community Organizations stated that the previous ward map received an average Polsby-Popper score of 0.5368, with Ward F scoring 0.4848 and Ward D scoring 0.5328. Thus all wards, in the aggregate, are less compact, and Wards F and D are less than one-half as compact as they had been.

The Community Organizations also alleged that using the Reock score, the 2022 map averaged 0.3447, with Ward F scoring 0.1604 and Ward D scoring 0.2753. This was compared to an average Reock score of 0.5019 for the 2012 map, with Ward F scoring 0.4998 and Ward D scoring 0.5133. The 2022 scores were thus “significantly lower” than the 2012 scores, demonstrating a significant decline in compactness between the 2012 and 2022 maps.

Even under an “eyeball test,” see [ante](#) at — n.6, — A.2d at — n.6, the wards created in the 2022 map look substantially less compact than the wards that existed in 2012.²



According to the majority, “[t]he contours of Wards A and D are principally determined not by the Commission, but by Jersey City's uneven borders with adjoining municipalities and natural *74 features such as the Hudson and Hackensack Rivers.” [Ante](#) at —, — A.2d at —. But the significant decrease in the compactness of Wards A and D between 2012 and 2022 cannot be attributed to the borders of Jersey City with the Hudson River to the east, the Hackensack River to the west, or adjoining municipalities to the north or south.

Ibid. Instead, the boundaries of Wards A and D that are significantly less compact in the 2022 map than they were in 2012 are where they meet other Jersey City wards: where Ward A meets B and F, and where Ward D meets C and E. Rather than simply tracking the outer borders of ****245** the city, the 2022 map creates new jagged borders within the city itself.

In addition, as plaintiffs identify, Ward F transformed from a relatively square shape to a jagged sideways L-shape. Wards A and D became many-sided shapes that defy easy description, with numerous appendages that make them less compact than they were previously. And the boundaries between wards went from generally smooth straight or curved lines to uneven routes filled with twists and turns. This is especially true of the boundaries between Wards F and A, F and E, D and C, and D and E.

Plaintiffs correctly submit -- and the relevant mathematical analysis supports -- that the wards' compactness substantially declined since the prior map. And the Commission did not explain why that is so. Indeed, the Commission did not explain how it considered compactness at all. As the majority notes, the Commission's report states that it "sought to craft a map that would (1) impose the least amount of demographic change to each ward while (2) lowering the deviation between the most populous ward and the least populous to the lowest possible percentage." Ante at —, — A.2d at —. Absent from the report is any statement of whether or how the Commission considered compactness, beyond listing compactness as a requirement in the MWL. Therefore, plaintiffs pleaded sufficient facts to allege that the Commission did not comply with the MWL's express compactness requirement, and their MWL claim should not have been dismissed.

***75** C.

For these reasons, I would leave in place the Appellate Division's remand for further factfinding, but enlarge it slightly, as plaintiffs request. As an initial matter, I would not apply the Appellate Division's rational basis test. The MWL provides no basis for a rational basis test, see N.J.S.A. 40:44-9 to - 18, and the Appellate Division did not ground the test in our prior case law.

Instead, the purpose of the remand would be to determine whether the new wards are compact within the meaning of the

MWL. Appropriate evidence could include mathematical and geographic measures of compactness as well as examination of the Commissioners. At the very least, plaintiffs should be permitted to question the Commissioners as to whether and how they considered compactness in drawing the new map.

If on remand the Commission explained that the reduction in compactness was necessary to achieve the MWL's population requirements, and a ward's odd shape was due to the location of a high-rise apartment building that needed to be shifted between wards to ensure that requirement was met, the map would satisfy the MWL. This is because the MWL does not mandate a particular level of compactness. N.J.S.A. 40:44-12 to -15. As earlier noted, it provides for an expedited process with limited resources. Ibid. Ward commissioners are tasked with balancing multiple, possibly conflicting, factors. Ibid. They are not required to prioritize compactness over the other MWL requirements. See id. at -14. But if the Commission did not consider compactness, or deprioritized compactness for a nefarious or extra-statutory purpose, then the Commission would be required to re-draw the map to comply with the MWL.

Contrary to the majority's suggestion, remanding for a fact-finding hearing on whether the wards are compact within the meaning of the MWL would not add any procedural requirements to the statute. See ante at —, — A.2d at —. It would simply apply the MWL's compactness requirement ****246** as written. Where, as here, plaintiffs allege that the 2022 map is much less compact than ***76** the 2012 map pursuant to both mathematical measures and the eyeball test, and where, as here, the Commission has not explained why, the Commission should be required to redraw the map to meet the MWL's compactness requirement unless it can explain, on remand, why redrawing the wards to address the fifty-nine percent population deviation between Wards E and D required such a drastic decline in compactness for all six wards.

III.

I agree with the majority that plaintiffs' remaining claims were properly dismissed. Ante at — – —, — A.2d at — – —. I write briefly to explain why that is so regardless of the outcome on the MWL claim.

First, our State Constitution's equal protection guarantee protects "against the unequal treatment of those who should

be treated alike.” [Greenberg v. Kimmelman](#), 99 N.J. 552, 568, 494 A.2d 294 (1985); accord [Lewis v. Harris](#), 188 N.J. 415, 442, 908 A.2d 196 (2006); [Caviglia v. Royal Tours of Am.](#), 178 N.J. 460, 472, 842 A.2d 125 (2004). As the majority notes, [ante](#) at ———, ——— A.2d at ———, our courts have rejected equal protection challenges absent some “discriminatory governmental classification.” [Brady v. N.J. Redistricting Comm'n](#), 131 N.J. 594, 610-11, 622 A.2d 843 (1992); accord [Gonzalez v. N.J. Apportionment Comm'n](#), 428 N.J. Super. 333, 366, 369, 53 A.3d 1230 (App. Div. 2012).

Here, plaintiffs did not allege invidious discrimination based on race or any other protected characteristic. Instead, they claim that some residents were denied the right to reside in compact wards that preserve communities of interest and therefore allow them to exert equal electoral power. As discussed above, communities of interest are not part of the MWL's compactness requirement. And even if the Commission violated the MWL's compactness requirement, plaintiffs failed to allege any specific facts to show that the Commission intentionally discriminated against them or made any classification of similarly situated Jersey City residents in drawing *77 the new ward map. I therefore would affirm the Appellate Division's holding that plaintiffs failed to allege that the Commission unconstitutionally treated one class of people differently from another. See [ante](#) at ———, ——— A.2d at ———; [Jersey City United](#), 478 N.J. at 151-52, 311 A.3d 989.

Second, plaintiffs' New Jersey Civil Rights Act (NJCR) claim was properly dismissed because, even if the MWL was violated, it does not create individual rights that can be vindicated through a lawsuit for money damages. As the majority explains, [ante](#) at ———, ——— A.2d at ———, to bring a cause of action under the NJCR) for money damages, [N.J.S.A. 10:6-2\(c\)](#), the statute allegedly violated must confer substantive individual rights on plaintiffs, [Tumpson v. Farina](#), 218 N.J. 450, 472, 95 A.3d 210 (2014). “A plaintiff must show that [the Legislature] intended the statute to ‘benefit the plaintiff.’” [Tumpson](#), 218

N.J. at 475-76, 95 A.3d 210 (quoting [Blessing v. Freestone](#), 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), and adopting [Blessing](#)'s federal law test for NJCR) claims). “For a statute to create such private rights,” its text must generally “be ‘phrased in terms of the persons benefited.’” [Gonzaga Univ. v. Doe](#), 536 U.S. 273, 284, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (quoting [Cannon v. Univ. of Chi.](#), 441 U.S. 677, 692 n.13, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)).

****247** When we have found statutes to confer substantive rights on individuals that can be enforced through a claim for money damages under the NJCR), the statutes have contemplated those individuals within their plain text. See [Harz v. Borough of Spring Lake](#), 234 N.J. 317, 321, 191 A.3d 547 (2018) (statute “specifically provide[d] that ‘[a]ppeals to the board of adjustment may be taken by any interested party affected by any decision of an administrative officer’” (second alteration in original) (quoting [N.J.S.A. 40:55D-72\(a\)](#))); [Tumpson](#), 218 N.J. at 478, 95 A.3d 210 (statute prescribed that “[t]he voters shall ... have the power of referendum” (alteration in original) (quoting [N.J.S.A. 40:69A-185](#))). Unlike the statutes in [Harz](#) and [Tumpson](#), the MWL does not mention individuals, such as voters or ward residents, at all. See [*78 N.J.S.A. 40:44-9](#) to -18. It simply specifies what ward commissions must do. [Ibid.](#) A violation of the MWL therefore cannot give rise to an individual claim for money damages under the NJCR).

IV.

Because plaintiffs sufficiently alleged a violation of the MWL's compactness requirement to survive a motion to dismiss, I would affirm the Appellate Division's remand as modified. I therefore respectfully concur in part and dissent in part.

All Citations

261 N.J. 30, 336 A.3d 219

Footnotes

- 1 In addition to the claims at issue in this appeal, the Community Organizations alleged that the Commission violated their right of free speech and their right of free association under [Article I, Paragraphs 6 and 18 of the New Jersey Constitution](#); that the Commission violated the Open Public Meetings Act (OPMA), [N.J.S.A. 10:4-6](#) to -21, by making decisions in private meetings; that the Commission retaliated against Councilman Gilmore for his campaign advocacy by removing his supporters from Ward F; and that the Commission violated the NJCR) based on those constitutional and statutory allegations.

- 2 In their complaint, the Community Organizations explained that the Polsby-Popper Measure “looks at the ratio of the area of a district and compares it to the area of a circle whose circumference equals the perimeter of the district,” with scores ranging between zero and one, and scores closer to one indicating a more compact district. They asserted that the Reock Score “looks at the ratio of the area of the district and compares it to the area of the smallest (minimum bonding) circle that encloses the entire district’s shape,” with scores ranging between zero and one, and scores closer to one indicating a more compact district.
- 3 In addition to addressing the MWL, equal protection, and NJCRA issues that are relevant to this appeal, the trial court resolved standing and timeliness disputes and dismissed plaintiffs’ OPMA, free speech and associational rights claims, as well as the NJCRA claim premised on those claims, pursuant to [Rule 4:6-2\(e\)](#).
- 4 The MWL’s legislative history indicates that the Legislature considered the recommendations of the County and Municipal Government Study Commission, known as the “Musto Commission,” which were set forth in a publication entitled [Forms of Municipal Government in New Jersey](#). See [Sponsor’s Statement to S. 3157](#) (L. 1981, c. 496). The Legislature decided to implement only one of those recommendations -- that “the general law for re- drawing wards and the Optional Municipal Charter Law provisions for re-redrawing wards, be updated and consolidated into a single, uniform ward statute prior to the 1980 census.” Cnty. & Mun. Gov’t Study Comm’n, [Forms of Municipal Government in New Jersey](#) 57 (17th Report, Jan. 1979) (citing [N.J.S.A. 40:44-1](#) to -8 and [N.J.S.A. 40:69A-197](#) to -204, both of which were repealed by L. 1981, c. 496).
- 5 The New Jersey Constitution imposes a compactness requirement for the determination of General Assembly districts; such districts

shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported on the last preceding decennial census of the United States.

[\[N.J. Const. art. IV, § 2, ¶ 3.\]](#)
- 6 Several federal courts have referred to a visual review of a map to determine the compactness of districts as the “eyeball” test. See, e.g., [Alpha Phi Alpha Fraternity, Inc. v. Raffensperger](#), 700 F. Supp. 3d 1136, 1257 (N.D. Ga. 2023) (“The eyeball test is commonly utilized to determine if a district is compact or not.”); [Singleton v. Merrill](#), 582 F. Supp. 3d 924, 1010 (N.D. Ala. 2022) (noting that an expert witness “testified that the ‘most common’ compactness metric is ‘just eyeballing it as you draw the plan’ ”); [Lopez v. Abbott](#), 339 F. Supp. 3d 589, 608 (S.D. Tex. 2018) (recognizing “the ‘eyeball test’ by which the Court may make a visual inspection of the map to determine whether the district is compact” and finding that the challenged maps passed that test).
- 7 There is no consensus in the courts of our sister states regarding the role of mathematical measures in assessing compactness. Some state high court decisions have approved the use of such measures as one potential method of determining compactness. See, e.g., [In re Senate Joint Resol. of Legis. Apportionment 100](#), 334 So. 3d 1282, 1287 (Fla. 2022) (stating that compactness can be evaluated both visually and by employing standard mathematical measurements); [Pearson v. Koster](#), 367 S.W.3d 36, 49 & n.10 (Mo. 2012) (explaining that an article admitted into evidence stated that “there is no threshold level that can be shown by statistics” but noting “[t]hat does not mean that [statistical] measures are completely irrelevant but rather that they alone do not demonstrate that a map is or is not compact”); [Carter v. Chapman](#), — Pa. —, 270 A.3d 444, 464 n.23 (2022) (relying on mathematical measures in evaluating compactness of proposed congressional districts). Other decisions have emphasized the limitations of such measures in assessing compactness. See, e.g., [Vesilind v. Va. State Bd. of Elections](#), 295 Va. 427, 813 S.E.2d 739, 750-51 (2018) (noting the lack of any “accepted bright-line test or score in the social sciences for when a district can no longer be considered ‘compact’ ”); [In re Legis. Districting of State](#), 299 Md. 658, 475 A.2d 428, 443 (1982) (stating that “a mathematical formulation for determining whether a particular district is unconstitutionally noncompact was not within the contemplation of the constitutional framers”).
- 8 Judge Carchman defined “communities of interest” to include “neighborhoods, communities, or groups of people who share common values, goals, and concerns -- such as cultural, ethnic, linguistic, economic, or religious interests, or shared

infrastructure concerns, shared environmental concerns, or shared industry,” but not connections based on “political considerations, such as partisan affiliations or loyalty to a particular incumbent.” Ibid.

- 9 In support of their allegation that the Legislature mandated consideration of communities of interest in the determination of ward boundaries in large municipalities, the Community Organizations invoke the Musto Commission's observation that “wards generally are not authorized by the Legislature for very small communities, the assumptions being that the rationale in favor of wards becomes weaker in a small municipality, and that wards would fragment the community unnecessarily.” Forms of Municipal Government in New Jersey, at 57. That comment by the Musto Commission, not cited by the Legislature as a basis for the MWL, does not address N.J.S.A. 40:44-14's compactness requirement, but relates only to the question whether a given municipality should be divided into wards. It is irrelevant to our inquiry.
- 1 As earlier noted, the majority states that “it was within the Commission's discretion to decline to utilize the Polsby-Popper Measure and the Reock Score.” Ante at —, — A.2d at —. But the Community Organizations did not allege that the Commission was required to use these scores; instead, they submitted the scores to demonstrate that the wards the Commission drew are not compact, especially as compared to their previous iterations.
- 2 The image plaintiffs submitted (reproduced here) labels the map created in 2012 as the “2010 Ward Map” because it was created using data from the 2010 census. We refer to it as the “2012 map” throughout.

Exhibit L

Bio of Justin A. Meyers, Esq.:

Justin A. Meyers is admitted to practice in New Jersey (2006), New York (2007), and Washington, D.C. (2008). Justin earned his B.A. in Philosophy *magna cum laude* at Boston University in 2001, and his J.D. and M.B.A. at Vanderbilt University in 2006. Early in his career, he obtained a reported Appellate Division decision in *Murnane v. Finch Landscaping, LLC*, 420 N.J. Super. 331, *cert. denied*, 208 N.J. 600 (2011). In 2013, he was counsel to Cause of Action Institute for Legal Reform, a Washington, D.C. based non-profit focused on exposing government fraud, waste and abuse, where he helped author an amicus brief that was cited by the U.S. Supreme Court in a leading campaign finance decision, *McCutcheon v. FEC*, 572 U.S. 185 (2014). After returning to private practice in New Jersey in 2017, he defended the family of a girl accused of “bullying” a Rockaway Township grammar student in a cyberbullying case that received nationwide attention, *Grossman v. Rockaway Township*, Docket No. MRS-L-1173-18 (later the subject of a documentary film, *Mallory*). Justin has been an advisor to a startup that designed software to help banks and financial advisors comply with FATCA reporting requirements, and has worked as an anti-money laundering consultant to an international financial institution based in Europe. He is presently counsel to a putative class of consumers defrauded by illicit casinos operating as “sweepstakes casinos” in *Julian Bargo, et al. v. Apple Inc., et al.*, Case No. 2:25-cv-02025, and to a class of merchant customers suing to recover unauthorized credit card fees from a payment processor in *Dr. Marc J. Gannon v. United Bank Card, Inc.*, 3:23-cv-04313, and counsel to a biopharmaceutical startup seeking to recover for legal malpractice against their former patent counsel, *Moerae Matrix, Inc. v. McCarter & English*, Docket No. MRS-L-371-22.

Exhibit M

Bio of Derek S. Fanciullo, Esq.:

A founding partner of Matsikoudis & Fanciullo, LLC, Mr. Fanciullo has helped his clients compel multiple large corporations to clean up lands that had contaminated and abandoned; force employers who engaged in retaliation against whistleblowers, enabled sexual assault and harassment, and facilitated discrimination at their facilities to pay millions of dollars for their wrongs; and secure damages awards for severe personal injuries they have suffered as a consequence of corporate indifference.

Mr. Fanciullo has also crafted complex agreements for commercial clients: For example, he authored an intricate Purchase & Sale Agreement for an industrial developer attempting to acquire real property in a Superfund site; drafted a complex Asset Purchase Agreement and piloted a client's acquisition of a well-known Monmouth County dental practice, then spearheaded the separation of the partners of said practice; negotiated and quarterbacked the sale of a client's energy consulting company; and developed and implemented an alternative executive compensation program for a business seeking to reacquire common stock from its directors.

Mr. Fanciullo began his legal career as an Assistant Corporation Counsel for the City of Jersey City. Among his accomplishments as a government attorney, Mr. Fanciullo formulated and executed novel legal strategies in spearheading Jersey City's fight against a dangerous natural gas pipeline, and compelled the federal the Pipeline Hazardous Materials and Safety Administration (PHMSA) to open its regulatory scheme to amendments to make pipelines safer. Mr. Fanciullo also helped oversee the City's interests in the implementation of court orders through which the City had compelled large corporate polluters to clean up hundreds of acres of land they had contaminated with hexavalent chromium. In a separate vein, Mr. Fanciullo compelled multiple developers to live up to their redevelopment agreements with the City.

For more than a dozen years prior to becoming an attorney, Mr. Fanciullo earned multiple Emmy® Award nominations as a television news reporter. Among his achievements as a broadcast journalist, Mr. Fanciullo raised awareness of the severe health risks jockeys must take to make weight before horse races, triggered changes in Kentucky state election law with an investigative series on voter fraud, and held a powerful insurance company attempting to evade payment accountable to the poor single father of a 10-year-old comatose boy. He and his work have appeared on CNN, Fox News Channel and the NBC family of networks. Beyond his Emmy® recognition, Mr. Fanciullo garnered roughly two dozen Associated Press and Society of Professional Journalists Awards for excellence in his craft.

As detailed in his attached resume, a summary of Mr. Fanciullo's education, attorney admissions and accomplishments are as follows:

a. Education:

J.D. – New York University School of Law - 2011

B.S. Journalism – Northwestern University - 1997

b. Jurisdictions Admitted:

New Jersey – 2011

Illinois – 2016

New York - 2018

c. General Legal Experience: Mr. Fanciullo has been a civil litigator for the entirety of his career. Mr. Fanciullo has formally tried two matters; however, upon the closure of New Jersey's courts due to the COVID-19 pandemic, Mr. Fanciullo effectively fully tried another matter in front of an arbitration panel, and secured a judgment of \$385,000 for his client (for personal injuries including, *inter alia*, a broken arm and elbow).

- d. Professional Distinctions: None relevant
- e. Area(s) of Specialization: Environmental Litigation; Employment litigation (harassment, discrimination and whistleblower matters); General Civil Litigation; Appellate Practice; Small to Mid-Size Business Transactions

Exhibit N

Bio of Aspen-Jade C. Tucker, Esq.:

Mr. Tucker joined the Firm as its Associate upon graduation from Seton Hall Law School. During his tenure with the Firm, Mr. Tucker has been intimately involved in various aspects of the Firm's litigation practice, including, but not limited to, assisting in the prosecution of a variety of matters involving harassment, discrimination and retaliation of and against employees, and aiding in the implementation of agreements that hold polluters accountable for the contamination they have created.

a. Education:

J.D. – Seton Hall University School of Law - 2022

B.S. Political Science – Ramapo College of New Jersey – 2018

b. Jurisdictions Admitted:

New Jersey – 2022

New York - 2024

a. General Legal Experience: Mr. Tucker has been a civil litigator for the entirety of his career. He has assisted the Firm in all areas of general civil litigation including, but not limited to, trial preparation and prosecution, research and writing, motion practice, depositions, as well as the drafting of complaints and answers.

b. Professional Distinctions: None relevant

c. Area(s) of Specialization: General Civil Litigation