

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE SULFURIC ACID ANTITRUST LITIGATION	: MDL Docket No. 1536
	: Case No. 03 C 4576
	:
	:
This Document Relates To:	: Honorable Judge David H. Coar
	: Magistrate Judge Jeffrey Cole
	:
ALL RELATED ACTIONS	:
	:

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR REIMBURSEMENT OF EXPERTS' COSTS AND EXPENSES**

I. INTRODUCTION

Plaintiffs' counsel have obtained a \$5 million class settlement with defendant E. I. Du Pont de Nemours and Company ("DuPont") in this case.¹ Plaintiffs' counsel respectfully seek an award of \$1,594,441.06 from the settlement proceeds to reimburse Plaintiffs' counsel for previously incurred litigation costs related to experts. For the reasons set forth below, these expenses were reasonable and necessary.

II. FACTUAL BACKGROUND

This litigation was commenced in 2003 with the filing of a number of antitrust class action lawsuits against defendants by direct purchasers of Sulfuric Acid. The lawsuits were transferred to this Court for coordinated or consolidated pretrial proceedings pursuant to the Judicial Panel on Multidistrict Litigation's Transfer Order dated July 1, 2003. In Pretrial Order No. 1, dated July 29, 2003, the Court, among other things, consolidated the various cases and appointed Steven A. Asher of Weinstein Kitchenoff & Asher LLC (formerly of Fox Rothschild

¹ As of September 5, 2006, the balance in the Settlement Fund is \$5,029,042, including accrued interest. See Affidavit of Joseph M. Barton In Support of Motion for Partial Reimbursement of Costs and Expenses ("Barton Decl."), ¶5.

LLP); Mary Jane Edelstein Fait of Wolf Haldenstein Adler Freeman & Herz LLC; Joseph C. Kohn of Kohn, Swift & Graf, P.C.; and Steven O. Sidener of Gold Bennett Cera & Sidener LLP to serve as plaintiffs' co-lead counsel.

On August 4, 2006, this Court granted preliminary approval of a class-wide settlement with DuPont and ordered Plaintiffs' counsel to disseminate notice of the settlement to the proposed settlement class. The settlement with DuPont includes the payment of \$5 million into a settlement fund and DuPont's agreement to cooperate with Plaintiffs' counsel.² Pursuant to the August 4 Order, notice of the DuPont settlement is being mailed to potential class members on or about September 19, 2006 and published in *The Wall Street Journal* on or about September 29, 2006. The final approval hearing is scheduled for December 20, 2006.

The DuPont settlement notice informs class members that Plaintiffs' counsel will request reimbursement of costs and expenses in an amount not to exceed \$1.67 million. Specifically, the notice sets forth that:

Class Counsel have expended and incurred out of pocket costs and expenses to date of approximately \$2.9 million in litigating this case, including for expert witness fees, deposition transcripts, photocopying costs, travel costs, and other necessary expenses. (This does not include any amount for attorneys fees based upon the time counsel has expended). Plaintiffs' counsel intend to apply to the Court at the Final Approval Hearing for partial reimbursement of these costs and expenses in an amount not to exceed \$1.67 million.

See Notice of Class Action Settlement With Defendant E. I. Du Pont de Nemours and Company ("Notice"), attached as Ex. A. of the Barton Decl.

² Section F, paragraph 28, of the Settlement Agreement with DuPont provides "DuPont shall pay or cause to be paid into the Settlement Fund the amount of \$5,000,000 (five million dollars)." Section J, paragraph 41, of the Settlement Agreement provides "DuPont agrees to cooperate with Class Counsel in its continuing prosecution of this litigation by providing Class Counsel with reasonable cooperation in order to assist Plaintiffs in prosecuting this Action against the remaining defendants."

III. ARGUMENT

A. The Costs for Which Plaintiffs' Counsel Seek Reimbursement Are Reasonable

As stated in the Notice and provided for in the Settlement Agreement, Plaintiffs' counsel requests reimbursement of a portion of the costs and expenses which they have incurred in connection with the prosecution of this action in the amount not to exceed \$1.67 million.³

Plaintiffs' counsel have advanced their litigation costs since the inception of this case. The most significant cost to date has been for experts to opine on class certification, liability, impact and damages. As detailed in the invoices submitted herewith, Plaintiffs' counsel has incurred expert costs and expenses totaling \$1,594,441.06 for which reimbursement is hereby sought.⁴ See Barton Decl., ¶3.

Under the Common Fund Doctrine, Class counsel "is entitled to reimbursement of all reasonable out-of-pocket litigation expenses and costs in the prosecution of claims and settlement, including expenses incurred in connection with document production, *consulting with experts and consultants*, travel and other litigation-related expenses." (emphasis added). *In re Cardizem DC Antitrust Litig.*, 218 F.R.D. 508, 535 (E.D. Mich. 2003). See also, *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 192 ("There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of ...

³ Section G, paragraph 33, of the Settlement Agreement with DuPont provides that "Plaintiffs and Class Counsel shall be reimbursed and paid solely out of the Settlement Fund for all expenses including, but not limited to...past, current, or future litigation expenses...."

⁴ Prior to this request, Plaintiffs' counsel have not applied for an award of attorneys' fees or reimbursement of out-of-pocket expenses. To date, Plaintiffs' counsel has incurred approximately \$2.9 million in total costs since the inception of the litigation based on monthly reports submitted in this litigation. See Barton Decl., ¶4. At this time, Plaintiffs' counsel are only making a request to be reimbursed for the expert costs they have incurred. The Notice to the Class provides, "This is without prejudice to counsel seeking at a later date reimbursement for the unpaid balance of costs and expenses and/or attorneys fees, from this or any other settlement or judgment that has been obtained."

reasonable litigation expenses from that fund.”); *In re SmithKline Beckman Corp. Sec. Litig.* 751 F. Supp. 525, 531 (E.D. Pa. 1990) (same). In determining whether the requested expenses are compensable in this common fund, the Court considers whether the particular costs are the type routinely billed by attorneys to paying clients in similar cases. *In re Synthroid Marketing Litig.* 264 F.3d 712, 722 (7th Cir. 2001) (holding that reimbursable litigation expenses should be set at the level the market permits). Reasonable experts’ costs are typically reimbursed by Courts. *In re Electrical Carbon Products Antitrust Litig.*, --- F. Supp. 2d ---, 2006 WL 2505881, *20 (D.N.J. August 30, 2006) (reimbursing counsel for the cost of reasonable and necessary expert expenses), a copy of which is attached as Ex. E. to the Barton Decl.

The experts’ costs incurred in this case over the last three years are as follows:

NAME OF EXPERT	COST OF WORK PERFORMED
Dr. James T. McClave	\$1,363,740.09
Dr. Robert Tollison	\$152,800.35
Dr. Martin Asher	\$77,900.62
TOTAL	\$1,594,441.06

Dr. James T. McClave was retained by Plaintiffs’ counsel to provide his opinion regarding the economic damages in this case. He prepared and submitted his expert report on October 28, 2005 in which he provided the details of his opinions about and calculations of the economic damages suffered by the plaintiffs in this case. In order to perform their damages study, Dr. McClave and his staff at Infotech had to obtain and analyze the electronic transaction data from defendants, *i.e.* defendants’ sales of sulfuric acid to class members on a daily, weekly, and monthly basis over a many-year period. It required many hours of work to obtain this data and to understand the various codes and fields defendants used, which effort is detailed in

affidavits Dr. McClave filed in this Court, and which required motions to compel. The data then had to be modeled by Dr. McClave using a statistically reliable methodology.

Dr. McClave is exceptionally well-credentialed for the work he performed in this case. He has authored four statistics textbooks which currently are and have been in print for many years: *Statistics for Business and Economics*, 9th Edition (Prentice Hall, 2005, with G. Benson); *A First Course in Business Statistics*, 9th Edition (Prentice Hall, 2006, with G. Benson and T. Sincich); *Statistics*, 10th Edition (Prentice Hall, 2006, with F. Dietrich and T. Sincich); and *A First Course in Statistics*, 9th Edition (Prentice Hall, 2006, with T. Sincich).

Dr. McClave's damages methodology has been upheld by numerous courts, *see, e.g.: In re Polypropylene Carpet Antitrust Litigation*, 93 F.Supp.2d 1348, 1357 (N.D. Ga. 2000); *State of Ohio v. Louis Trauth Dairy Inc.*, 925 F.Supp. 1247, 1252 (S.D. Ohio 1996); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564-567 (11th Cir. 1999).

In addition to preparing his report, Dr. McClave then analyzed the methodologies used by defendants' experts, who contended that different explanatory variables should have been used than the ones he used in his initial report. In a comprehensive rebuttal report, Dr. McClave addressed each of their assertions and showed them to be without solid statistical and analytical foundation. Dr. McClave has been deposed twice in this litigation.

A copy of Dr. McClave's invoices describing the work performed, the number of hours worked and the hourly rates charged, and his curriculum vita are attached as Ex. B. of the Barton Decl.

Dr. Robert Tollison was retained by Plaintiffs' counsel to analyze certain aspects of this case. In particular, he was asked to investigate, analyze, and render opinions on the

methodology of the Plaintiffs' damages expert, Dr. McClave, and the degree to which one can describe the relationships among the Defendant firms and entities as horizontal in nature.

Dr. Tollison is a full and named Professor of Economics at Clemson. He holds a Ph.D. from the University of Virginia, and has been a professor of economics since 1969, serving on the faculties of Cornell, Texas A&M, Virginia Tech, George Mason, and Mississippi. He has published hundreds of papers on economics and is the author of several textbooks.

Dr. Tollison also served as Director of the Bureau of Economics at the Federal Trade Commission, and was one of three antitrust law enforcement officials at the Commission. He directed the work of 100 economists. Dr. Tollison has received several Distinguished Faculty and various other awards throughout his career. In 2001, he was named Researcher of the Year in the Department of Economics and in the School of Business at the University of Mississippi.

The Seventh Circuit has recognized his scholarship. Judge Easterbrook, cited with approval to Dr. Tollison's work in *U.S. v. Walters*, 997 F.2d 1219, 1224 (7th Cir. 1993). Judge Cudahy cited with approval his work in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 599 (7th Cir. 1996).

In addition to preparing his initial report, Dr. Tollison analyzed the lengthy reports of the three economists defendants retained---Dr. Hall of Stanford University, and Drs. Stiroh and Topal. Dr. Tollison showed how their economic theory and applications did not properly apply to this case. Dr. Tollison has also been deposed twice in this litigation.

A copy of Dr. Tollison's invoices describing the work performed, the number of hours worked and the hourly rates charged, and his curriculum vita are attached as Ex. C. to the Barton Decl.

Dr. Martin Asher was retained by Plaintiffs' counsel in connection with plaintiffs' class certification motion. Dr. Asher is in the Department of Economics of the Wharton School of the University of Pennsylvania. He was deposed once in this litigation.

A copy of Dr. Asher's invoices describing the work performed, the number of hours worked and the hourly rates charged, and his curriculum vita are attached as Ex. D. to the Barton Decl.

In sum, the experts retained by Plaintiffs' counsel have provided important and necessary testimony in this litigation and their expenses are reasonable.

IV. CONCLUSION

Plaintiffs' counsel respectfully seek an award of \$1,594,441.06 from the DuPont settlement proceeds to reimburse Plaintiffs' counsel for previously incurred expert costs. Such an award is reasonable and appropriate.

Dated: September 13, 2006

Respectfully submitted,

/s/ Mary Jane Edelstein Fait

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