IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-00124-WJM-SKC
Consolidated with Civil Action No. 1:19-cv-00758-WJM-SKC

OREGON LABORERS EMPLOYERS PENSION TRUST FUND, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

MAXAR TECHNOLOGIES INC.,
HOWARD L. LANCE, and
ANIL WIRASEKARA,

Defendants.

LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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Lead Counsel respectfully submits this memorandum in support of its application for an award of attorneys' fees and expenses and an award to Lead Plaintiff Oregon Laborers Employers Pension Trust Fund ("Oregon Laborers") pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class.[1]

I. INTRODUCTION

Lead Counsel aggressively litigated this highly complex securities litigation for over four years, overcame obstacles throughout the case, and achieved a commendable result for the Class. In awarding fees, courts consider several factors, including the quality and quantity of work as reflected in the results obtained. Here, Lead Counsel worked tirelessly in devoting over 13,900 hours without pay in order to obtain a very favorable Settlement for the Class. The Settlement Fund consists of $27,000,000, plus interest earned thereon. For all the reasons set forth herein and in the accompanying Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation and Memorandum of Points and Authorities in Support Thereof ("Settlement Memorandum") and Declaration of Trig R. Smith in Support of Motions for Final Approval of Class Action Settlement, Plan of Allocation, and an Award of Attorneys' Fees and Expenses and Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Smith Decl."), the Settlement is an outstanding result.

The $27,000,000 all-cash recovery was achieved through the skill, experience, and effective advocacy of Lead Counsel in the face of highly complex factual and legal issues, considerable risk,

[1] Pursuant to D.C.COLO.L.Civ.R. 7.1(a): Lead Counsel has conferred with Defendants' Counsel prior to filing this motion. Lead Counsel is authorized to state that Defendants do not oppose the relief Lead Counsel seeks in this motion, but Defendants do not endorse or join in Lead Counsel's motion.

and an aggressive defense. The Settlement was reached only after Lead Counsel partially overcame Defendants' motion to dismiss by sufficiently alleging, and arguing the legal merits of, Lead Plaintiff's claims and obtaining class certification. Absent the Settlement, and assuming Lead Plaintiff prevailed on Defendants' certain-to-be-filed summary judgment and *Daubert* motions, the claims against Defendants could have continued for many years through trial, and likely appeals. The Settlement provides Class Members with a substantial cash benefit now, rather than a potential recovery after several years of continued litigation, and eliminates the possibility of no recovery at all or of the costs of litigation diminishing the recovery.

As compensation for its efforts, Lead Counsel respectfully requests an award of attorneys' fees of 30% of the Settlement Amount and payment of litigation expenses of $825,853.33, plus interest on both amounts at the same rate and for the same period of time as that earned on the Settlement Fund. Lead Counsel's efforts to date have been without compensation of any kind and the fee has been wholly contingent upon the result achieved. Faced with complex issues, and opposed by experienced defense counsel, Lead Counsel nevertheless succeeded in securing a favorable result for the Class. Lead Counsel believes its reputation as a leader in this field, its diligent efforts, and its dedication to the interests of the Class substantially contributed to obtaining the Settlement. The requested fee is well within the range of percentages normally awarded in securities class action and other common fund settlements in this Circuit, and it is the appropriate method of compensating counsel.

The Litigation may have been settled at a far lesser amount earlier in the litigation, but Lead Counsel continued to incur risk and expense by litigating to a more favorable resolution. Throughout the Litigation, Lead Counsel demonstrated it was prepared to take this case through trial

and beyond to achieve a terrific result for the Class. Since fee awards are designed to encourage counsel to get the best possible result for the class, the amount requested in this case is warranted given the exceptional recovery obtained and the significant obstacles and risks Lead Counsel faced in bringing and prosecuting this case.

Lead Plaintiff, an institutional investor that has overseen the Litigation, approves of and endorses the requested fee. The endorsement by the Court-appointed Lead Plaintiff is particularly significant because the PSLRA was passed to encourage more diligent institutional investors to seek lead plaintiff status and oversee securities class actions. *Peace Officers' Annuity & Benefit Fund of Ga. v. DaVita Inc.*, 2021 WL 1387110 (D. Colo. Apr. 13, 2021) ("*DaVita I*"). Lead Counsel respectfully requests that this Court approve the requested amount of fees and litigation expenses as justified under the particular facts of this case.

Separately, Lead Plaintiff seeks an award of $3,900.00 pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class. Lead Plaintiff supports its application with a declaration setting forth the basis for the award, which is substantially lower than awards in other similar cases. *See* Declaration of Ryan Stephens ("Stephens Decl."), submitted herewith. Lead Plaintiff respectfully requests that the Court approve the requested award.

II. LEAD COUNSEL IS ENTITLED TO A REASONABLE PERCENTAGE OF THE COMMON FUND

Fee awards in meritorious cases promote private enforcement of, and compliance with, the federal securities laws, which "seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007). For over fifty years, the Supreme Court has repeatedly emphasized that

private securities actions provide "'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to [SEC] action.'"[2] *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (in common fund cases, "a reasonable fee is based on a percentage of the fund bestowed on the class"). The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered on the theory "'that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.'" *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994) (awarding fees based on percentage of settlement fund) (quoting *Boeing*, 444 U.S. at 478).

In 1995, Congress passed the PSLRA and codified the percentage-of-recovery approach for awarding fees in common fund securities fraud cases. 15 U.S.C. §78u-4(a)(6). Under the PSLRA, "Congress plainly contemplated that percentage-of-recovery would be the primary measure of attorneys' fees awards in federal securities class actions." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 586 (S.D.N.Y. 2008); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). Indeed, by its plain terms, the PSLRA sets the "award of attorneys' fees and expenses to 'a reasonable percentage' of any recovery." *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006).

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[2] Internal citations are omitted and emphasis is added throughout.

The Tenth Circuit has generally adhered to the percentage of the fund method for awarding attorneys' fees in common-fund cases such as this. *Gottlieb*, 43 F.3d at 482 ("the more recent trend has been toward utilizing the percentage method in common fund cases"). In *Gottlieb*, for instance, the Tenth Circuit explained that a percentage method for setting a fee "is less subjective than the lodestar plus multiplier approach," matches the marketplace most closely thus providing better incentive to counsel, and is better suited where class counsel "was initially retained on a contingent fee basis." 43 F.3d at 484; *see also Uselton v. Com. Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir. 1993) (accepting the propriety of the percentage approach "rather than lodestar" in the awarding of attorneys' fees); *Peace Officers' Annuity & Benefit Fund of Ga. v. DaVita Inc.*, 2021 WL 2981970, at *1 (D. Colo. July 15, 2021) ("*DaVita II*") ("In common fund cases, the Tenth Circuit has 'recognized the propriety of awarding attorneys' fees . . . on a percentage of the fund, rather than lodestar, basis.'") (internal citation omitted).

"There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method of determining attorney fees in these cases." *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005); *see also Rep. of the Third Cir. Task Force, Court Awarded Att'y Fees*, 108 F.R.D. 237, 254 (3d Cir. 1985). ***First***, "[the percentage] methodology rewards efficiency and provides plaintiffs' counsel with a strong incentive to effectuate the maximum possible recovery under the circumstances." *In re St. Paul Travelers Sec. Litig.*, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006); *see also In re N.M. Indirect Purchasers Microsoft Corp. Antitrust Litig.*, 149 P.3d 976, 993 (N.M. Ct. App. 2006) ("The percentage method is preferred in some jurisdictions, including the Tenth Circuit, because this method rewards efficient

and prompt resolutions of class actions . . . .").[3] ***Second***, the percentage method is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage-of-the-recovery method. *See Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). ***Third***, use of the percentage method decreases the burden imposed upon courts by the "lodestar" method, and assures that class members do not experience undue delay in receiving their share of the settlement. *See Telik*, 576 F. Supp. 2d at 585 ("the 'primary source of dissatisfaction' with the lodestar methodology 'was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits'").

III. LEAD COUNSEL SEEKS A PERCENTAGE CONSISTENT WITH WHAT COURTS IN THIS DISTRICT AND CIRCUIT HAVE FOUND TO BE REASONABLE

As the Supreme Court has recognized, an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for their services in the open marketplace. *See Mo. v. Jenkins by Agyei*, 491 U.S. 274, 285 (1989). In complex cases, such as this one, "a fee award of one-third of the common fund [is] 'well within the range typically awarded in class actions.'" *Nakamura v. Wells Fargo Bank, Nat'l Ass'n*, 2019 WL 2185081, at *2 (D. Kan. May 21, 2019); *see Shaw*, 2015 WL 1867861, at *6 ("'customary fee . . . in a common fund settlement is approximately one third of the total economic benefit'").

Lead Counsel's request for attorneys' fees of 30% is consistent with fee percentages awarded by district courts within the Tenth Circuit in common fund cases. *See, e.g.*, *Paulson v. McKowen*,

[3] *See also Shaw v. Interthinx, Inc.*, 2015 WL 1867861, at *5 (D. Colo. Apr. 22, 2015) ("'The Tenth Circuit favors the common fund approach, as opposed to the lodestar method, because a percentage of the common fund is less subjective than the lodestar plus multiplier approach, matches the marketplace most closely, and is the better suited approach when class counsel were retained on a contingent fee basis . . . .'") (awarding one third of common fund).

2023 WL 2528783, at *8 (D. Colo. Mar. 15, 2023) (awarding one-third fee); *In re Sandridge Energy, Inc. Sec. Litig.*, No. 12-1341-G, ECF 592, ¶3 (W.D. Okla. Dec. 30, 2022) (awarding one-third fee), attached as Exhibit A hereto; *DaVita II*, 2021 WL 2981970, at *4 (awarding 30% of $135 million settlement); *Yellowdog Partners, LP v. CURO Grp. Holdings Corp.*, No. 2:18-cv-02662-JWL-KGG, ECF 107, ¶4 (D. Kan. Dec. 18, 2020) (awarding 30% fee) (Ex. B hereto); *In re Molycorp, Inc. Sec. Litig.*, 2017 WL 11598681, at *1 (D. Colo. June 16, 2017) (awarding 30%). Based on the fees routinely awarded in common fund settlements like this, Lead Counsel's 30% fee request is both fair and reasonable.

IV. THE "*JOHNSON* FACTORS" SUPPORT THE REASONABLENESS OF LEAD COUNSEL'S FEE REQUEST

Courts in this jurisdiction consider the factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), *abrogated by Blanchard v. Bergeron*, 489 U.S. 87 (1989), for added guidance on setting reasonable fees. *See Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) (noting that "federal courts have relied heavily on the factors articulated . . . in [*Johnson*] in calculating and reviewing attorneys' fees awards"). The *Johnson* factors are: (1) time and labor required; (2) novelty and difficulty of the issues; (3) skill required to perform the legal services properly; (4) preclusion of other employment; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) amount involved and results obtained; (9) experience, reputation, and ability of the attorneys; (10) undesirability of the case; (11) nature and length of professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. The weight to be given to each of the *Johnson* factors

varies from case to case, and each factor is not always applicable. *DaVita II*, 2021 WL 2981970, at *2. The factors applicable to this Litigation are addressed below.[4]

When evaluated under the applicable *Johnson* factors, Lead Counsel's fee request is reasonable.

A. The Amount Involved and the Results Obtained

"While other criteria in determining reasonable attorney fees are legitimate considerations, the amount of the recovery, and end result achieved, is of primary importance." *Oppenlander v. Standard Oil Co. (Ind.)*, 64 F.R.D. 597, 605 (D. Colo. 1974). *See also DaVita II*, 2021 WL 2981970, at 2 ("Courts in this District have repeatedly found that when determining the amount of fees to be awarded, the 'greatest weight should be given to the monetary results achieved for the benefits of the class.'"). In addition, this factor "'may be given greater weight [in a common fund case when the court] determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class.'" *Millsap v. McDonnell Douglas Corp.*, 2003 WL 21277124, at *8 (N.D. Okla. May 28, 2003) (quoting *Brown*, 838 F.2d at 456). Through its extensive efforts during the prosecution and settlement of this Litigation for over four years, Lead Counsel has obtained a substantial recovery for the Class of $27,000,000.

Based on an analysis of the parties' respective positions, Lead Counsel estimates that the Class's reasonable recoverable damages were approximately $96 million. The Settlement represents approximately 28% of this estimated amount. Smith Decl., ¶75. And it does so while avoiding the

[4] The following factors do not pertain to this Litigation: time limitations imposed by the client or the circumstances, and the nature and length of the professional relationship with the client. Thus, Lead Counsel will not analyze these factors. *See Uselton*, 9 F.3d at 854 (recognizing that "'rarely are all of the *Johnson* factors applicable'").

substantial risks Lead Plaintiff faced in establishing the Class's damages at trial. Indeed, the recovery here is multiples above the median recovery of 4.9% in securities class actions in 2022 where damages are between $75 and $149 million.[5] That Lead Counsel has secured such a result in the face of significant risks demonstrates that the requested fee of 30% is reasonable and fair.

B. The Customary Fee – the Percentage Requested – Is Consistent with Those Typically Awarded in This District and This Circuit

As discussed above, Lead Counsel's request for 30% of the Settlement Amount is consistent with percentages routinely approved as fair and reasonable by courts in this District and in this Circuit in other complex class actions. *See* §III, *supra*.

C. Time and Labor Required

1. The Amount of Time and Labor Dedicated by Lead Counsel Justifies the Requested Fee

The amount of time and labor Lead Counsel dedicated to the prosecution and settlement of the Litigation also demonstrates the reasonableness of the 30% fee request. As detailed in the Smith Declaration, Lead Counsel vigorously prosecuted this Litigation for over four years. This case was settled only after Lead Counsel, among other things: (i) conducted an extensive investigation, including investigative interviews of relevant third-party witnesses; (ii) filed a detailed amended complaint; (iii) successfully overcame, in substantial part, Defendants' motion to dismiss the Consolidated Complaint; (iv) identified, retained and consulted with experts in accounting, the satellite industry; market efficiency, causation and damages; (v) conducted comprehensive fact, class

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[5] *See* Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements: 2022 Review and Analysis*, at 6, Fig. 5 (Cornerstone Research 2023), available at https://www.cornerstone.com/wp-content/uploads/2023/03/Securities-Class-Action-Settlements-2022-Review-and-Analysis.pdf and attached as Ex. A to the Smith Decl.

and expert discovery, which involved numerous contentious meet and confer sessions with defense counsel and third party witnesses and the taking or defending of nearly a dozen depositions; (vi) reviewed and analyzed over 560,000 documents produced by Defendants and third parties; (vii) successfully moved for class certification supported by an expert report; (viii) sought discovery from individuals and entities in Canada; (ix) responded to Defendants' discovery requests; (x) coordinated discovery with counsel for plaintiffs in a related derivative action; and (xi) engaged in vigorous and protracted settlement negotiations with Defendants' Counsel, with the continued assistance of an experienced mediator.[6] *See generally* Smith Decl. These significant efforts over a four-year period, paved the way for Lead Counsel to obtain a substantial financial recovery for the Class, and Lead Counsel should now be appropriately compensated for its efforts.

2. A Lodestar Cross-Check Also Supports Lead Counsel's Fee Request

The requested fee not only represents a reasonable percentage of the benefit obtained, but also reasonably reflects the work invested by Lead Counsel. As demonstrated by Lead Counsel's fee declaration, after the review of all billing entries and the exercise of billing judgment, over 13,900 hours, resulting in an aggregate lodestar of $8,662,461.25, have been invested in this Litigation. *See* accompanying Declaration of Spencer A. Burkholz Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("RGRD Fee Decl."), ¶4. As a result, Lead Counsel's request for an award of 30% of the Settlement Amount

[6] Lead Counsel has and will continue to perform legal work on behalf of the Class should the Court approve the proposed Settlement and Plan of Allocation. Additional resources will be expended assisting Class Members with their Proofs of Claim and related inquiries and working with the Claims Administrator, Gilardi & Co. LLC, to ensure the smooth progression of claims processing.

($8,100,000) – a 0.93 ***negative*** lodestar multiplier – is a slight discount on the time actually spent litigating the matter.

While courts in this Circuit regularly approve positive multipliers,[7] courts have repeatedly recognized that the reasonableness of a fee request under the percentage method is reinforced where the requested percentage fee would represent a negative multiplier of the lodestar, as is the case here. *See Paulson*, 2023 WL 2528783, at *7 ("[C]lass counsel will receive less than would have been warranted under the lodestar method. This weighs in favor of the reasonableness.); *Bennett v. Sprint Nextel Corp.*, 2015 WL 13648083, at *1 (D. Kan. Aug. 12, 2015) (fee award resulted in significant negative multiplier); *Cox v. Spring Commc'ns Co. L.P.*, 2012 WL 5512381, at *3 (D. Kan. Nov. 14, 2012) (finding that the Kansas-only portion of a cumulative $41,500,000 attorneys' fee request was reasonable, in part because it was "subject to a ***negative*** multiplier") (emphasis in original); *Barr v. Qwest Commc'ns Co., LLC*, 2013 WL 141565, at *5 (D. Colo. Jan. 11, 2013) ("the fee-and-expense award is far from excessive" as it represents a negative multiplier); *In re Thornburg Mortg., Inc. Sec. Litig.*, 912 F. Supp. 2d 1178, 1259 (D.N.M. 2012) ("The attorneys' fees represent a negative multiplier of the total lodestar amount and are an acceptable percentage of the Class' award.").

Accordingly, the reasonableness of Lead Counsel's 30% fee request is confirmed by a lodestar cross-check analysis.

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[7] *See, e.g.*, *DaVita II*, 2021 WL 2981970, at *3 (awarding fee representing 2.75 multiplier, "which is at the low end of the typical range of multipliers routinely approved by courts in this District and the Tenth Circuit"); *In re Miniscribe Corp.*, 309 F.3d 1234, 1245 (10th Cir. 2002) (affirming application of a 2.57 multiplier); *In re Crocs., Inc. Sec. Litig.*, 2014 WL 4670886, at *4-*5 (D. Colo. Sept. 18, 2014) (holding that the 1.23 multiplier was "well below" other approved multipliers that range from 2.5 to 4.6); *Vaszlavik v. Storage Corp.*, 2000 WL 1268824, at *3-*4 (D. Colo. Mar. 9, 2000) (noting that "[c]ourts in common fund cases regularly award multipliers of two to three times the lodestar or more to compensate for risk and to reflect the quality of the work performed").

D. The Novelty and Difficulty of the Legal and Factual Questions Support Lead Counsel's Fee Request

An analysis of the novelty and difficulty of the issues involved in the Litigation also favors granting Lead Counsel's request for attorneys' fees. "Securities fraud class actions are by their nature, complex and difficult to prove." *In re Charter Commc'ns, Inc.*, 2005 WL 4045741, at *14-*15 (E.D. Mo. June 30, 2005). *See also Crocs*, 2014 WL 4670886, at *3 ("[l]itigating an action under the PSLRA is not a simple undertaking"). This Litigation focused on highly complex factual and legal issues involving Maxar's GeoComm satellite business, and the accounting for asset impairment charges, specifically whether the failure to take an impairment charge was the result of fraudulent intent or judgment that just turned out to be wrong. Lead Counsel required the assistance of experts and consultants to understand the operation of Maxar's business and the alleged falsity and materiality of Defendants' statements during the Class Period. *See In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 632 (D. Colo. 1976) (finding novelty and difficulty of issues supported requested fees where "[t]he litigation . . . involved unique and substantial issues of law in the technical area of SEC Rule 10b-5 . . . difficult, complex and oft-disputed class action questions, and difficult questions regarding computation of damages").

1. Risk in Establishing Liability

As just discussed above and in the Settlement Memorandum (at §IV.C.1.), Lead Plaintiff faced substantial risks in moving forward with the Litigation. While Lead Plaintiff disagrees with Defendants' contentions, there was a substantial risk of recovering limited or no damages if the Court or jury agreed with any of Defendants' arguments on the remaining claims at summary judgment or at trial. In addition, Defendants Lance and Wirasekara directly challenged their status as "control persons" subject to liability under §20(a). Smith Decl., ¶28. Again, Lead Plaintiff

disagreed, but recognized that Defendants would be able to present testimony from numerous fact and/or expert witnesses that could call into question these Defendants' liability.

2. Risk in Establishing Causation and Damages

Even if Lead Plaintiff ultimately succeeded in overcoming each and every defense Defendants could raise regarding liability, Lead Plaintiff also faced risks in establishing causation and damages. Lead Plaintiff would be required to prove that Defendants' alleged false statements and omissions of material fact inflated the price of Maxar common stock during the Class Period, and that, upon the disclosures relating to such misinformation, the price of Maxar shares dropped, damaging Lead Plaintiff and the Class. *See Dura*, 544 U.S. at 341-42.

Even though Lead Counsel worked extensively with a causation and damages expert and believed it would be able to present expert testimony to meet Lead Plaintiff's burden on loss causation and establish damages with respect to the alleged corrective disclosures, Defendants would likely seek to exclude that expert's testimony through a *Daubert* motion and, even if unsuccessful, Defendants undoubtedly would advocate at trial for a substantially smaller damages figure, or zero. The jury would have been presented with expert testimony on the portions of Maxar's stock price declines related to the disclosure of the alleged fraud and tasked with determining what amount, if any, of the price declines was fraud-related. As a result, the crucial element of damages would almost certainly have been reduced at trial to a "battle of the experts." *See* Smith Decl., ¶10; *see also, e.g.*, *In re EVCI Career Coll. Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *8 (S.D.N.Y. July 27, 2007) (noting unpredictability of battle of damage experts); *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 239 (3d Cir. 2001) ("establishing damages at trial would lead to a 'battle of experts' . . . with no guarantee whom the jury would believe"). Accounting for the foregoing risks,

the Class would by no means be assured of a ruling in its favor. Accordingly, the novelty and difficulty of these legal and factual questions further support the Settlement achieved and the requested attorneys' fees.

E. The Skill Required and the Experience, Reputation, and Ability of Lead Counsel Support the Requested Fee

The skill required and the experience, reputation, and ability of the attorneys also support the requested fee award. *See Johnson*, 488 F.2d at 717-19. Lead Counsel is among the nation's preeminent law firms in class action securities litigation and has successfully litigated and tried numerous class actions on behalf of major institutional investors. *See* RGRD Fee Decl., Ex. F (RGRD firm resume).

The quality of opposing counsel is also important in evaluating the quality of services rendered by Lead Counsel. *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). During the course of this Litigation, Defendants have been represented by experienced and skilled defense counsel, first Latham & Watkins LLP and then O'Melveny & Myers LLP, which spared no effort in the defense of their clients' claims. In the face of this formidable opposition, Lead Counsel developed its case so as to persuade Defendants to agree to a substantial $27,000,000 financial recovery for the Class. The skill, experience, reputation, and ability of both Lead Plaintiff's and Defendants' counsel further support the requested fee award.

F. The Contingent Nature of the Fee Weighs in Favor of the Requested Award

Courts in this Circuit have found that "the risk of non-recovery" weighs heavily in considering an award of attorneys' fees. *Vaszlavik*, 2000 WL 1268824, at *4; *see also Crocs*, 2014 WL 4670886, at *4 ("A contingent fee arrangement often weighs in favor of a greater fee because

'[s]uch a large investment of money [and time] place[s] incredible burdens upon law practices.'") (alterations in original). Lead Counsel has prosecuted this Litigation on a wholly contingent basis for over four years and has borne all the risks, including surviving a motion to dismiss and obtaining class certification. Surviving a motion to dismiss in a securities class action is particularly difficult. As the Fifth Circuit has recognized, "[t]o be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

Lead Counsel understood from the outset that it was embarking on a complex, expensive, and lengthy litigation, which would require a significant investment of attorney time and expenses, with no guarantee of ever being compensated for the investment of such time and money. Lead Counsel also understood that Defendants would (and, in fact, did) retain large and highly experienced corporate defense firms to mount a strong defense. In undertaking this risk, Lead Counsel was obligated to, and did, ensure that sufficient resources were dedicated to the prosecution of this Litigation. When this case settled, Lead Plaintiff was undertaking expensive discovery, and dispositive motions would likely be filed at its conclusion.

Litigation of these cases can be extremely protracted and yet salaries, leases, and other expenses must be paid, while counsel waits for several years to be paid, if at all. For example, in a case handled by Lead Counsel, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, No. 1:02-cv-05893 (N.D. Ill.), Lead Counsel litigated the case through trial and appeal for 14 years before reaching a settlement. In Lead Counsel's view, it is their hard earned reputation and willingness to go all the way to get the best possible result that benefits the Class and makes it a highly sought out firm for clients. Nevertheless, in every case the risk of losing and not being paid at all remains, as

there are numerous class actions in which plaintiffs' counsel expended thousands of hours and lost, receiving no compensation. *See Xcel*, 364 F. Supp. 2d at 994 ("Precedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy.").[8]

The risks of contingent litigation are also highlighted by the fact that a dramatic change in the law can result in the dismissal of a claim after a great deal of time and effort has been expended on the case. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, 842 F. Supp. 2d 522 (S.D.N.Y. 2012) (granting judgment on the pleadings following change of law in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010)); *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d 1130, 1143 (10th Cir. 2009) (affirming grant of summary judgment for energy company in PSLRA case based on Supreme Court decision in *Dura*). Thus, there existed a real risk that Lead Counsel (and the Class) would invest substantial resources and efforts and receive nothing. *See Eatinger v. BP Am. Prod. Co.*, No. 6:07-cv-01266-EFM-KMH, ECF 375 at 14 (D. Kan. Sept. 17, 2012) (Ex. C hereto) ("Finally, the contingent nature of the case meant that at the end of the day, Class Counsel could have been left with no fee and no recovery of the enormous expenses that it had paid and carried for years."). As such, this factor further supports the requested fee award.

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[8] Even surviving a motion to dismiss is not a guarantee of ultimate success. *See, e.g.*, *Pompano Beach Police & Firefighters' Ret. Sys. v. Las Vegas Sands Corp.*, 732 F. App'x 543 (9th Cir. 2018) (summary judgment granted in favor of defendants in securities fraud action after seven years of litigation); *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009) (summary judgment granted in favor of defendants after eight years of litigation and after plaintiffs' counsel incurred over $6 million in expenses and worked over 100,000 hours), *aff'd*, 627 F.3d 376 (9th Cir. 2010). Even plaintiffs who get past summary judgment and succeed at trial may find a judgment in their favor overturned on appeal or on a post-trial motion. For example, in *BankAtlantic*, the Eleventh Circuit upheld a lower court's decision overturning a jury verdict in favor of the lead plaintiff on the issue of loss causation. *See Hubbard v. BankAtlantic Bankcorp, Inc.*, 688 F.3d 713 (11th Cir. 2012).

G. The Preclusion of Other Employment by Plaintiffs' Counsel Supports the Requested Fee

As demonstrated by the 13,900 hours incurred in prosecuting this Litigation, Lead Counsel was precluded from other employment due to its acceptance of this Litigation. Accordingly, this factor weighs in favor of approving the fee request. *See Lucas v. Kmart Corp.*, 2006 WL 2729260, at *6 (D. Colo. July 27, 2006) ("Large-scale class actions . . . necessarily require a great deal of work, and a concomitant inability to take on other cases.").

H. The Undesirability of the Case Supports the Requested Attorneys' Fees and Expenses

Securities class action cases have often been recognized as "undesirable" due to the financial burden on counsel, and the time demands required to litigate cases of such size and complexity. *See, e.g.*, *Eatinger*, slip op. at 13 (Ex. 3) ("The time, effort, and out-of-pocket investment makes a class action undesirable to most attorneys."); *Millsap*, 2003 WL 21277124, at *12 ("This case is . . . undesirable, in the way that all contingent fee cases are undesirable, because it produced no income, but has required significant expenditures . . . ."). Like the rest of the relevant *Johnson* factors, this factor too supports the approval of Lead Counsel's requested fees.

V. THE REACTION OF THE CLASS TO THE REQUESTED FEE FURTHER SUPPORTS ITS REASONABLENESS

Although not specifically cited as a factor for consideration by the Tenth Circuit, courts also recognize the significance of the class members' reaction to the request for attorneys' fees and expenses. *See Sprint*, 443 F. Supp. 2d at 1262. Lead Plaintiff fully supports the Settlement and Lead Counsel's request for its fees and expenses. *See* Stephens Decl., ¶¶8-9. Here, over 34,000 copies of the notice of the proposed Settlement were mailed to potential Class Members and nominees, advising them that Lead Counsel would be requesting an award of attorneys' fees not to

exceed 30% of the Settlement Amount and litigation expenses not to exceed $1 million, plus interest on both amounts at the same rate as earned by the Settlement Fund, all to be paid from the Settlement Fund. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Report on Requests for Exclusion Received to Date (ECF 194), Ex. A (Notice at 3). As of the filing of this memorandum, not one Class Member has objected to these requests, further bolstering the reasonableness of the fee request.

VI. LEAD COUNSEL IS ENTITLED TO AN AWARD OF ITS REASONABLE LITIGATION EXPENSES

"As with attorneys' fees, an attorney who creates or preserves a common fund for the benefit of a class is entitled to receive reimbursement of all reasonable costs incurred." *Vaszlavik*, 2000 WL 1268824, at *4. Here, Lead Counsel requests an award of litigation expenses and charges in the amount of $825,853.33 incurred by it to date in connection with the prosecution of the Litigation on behalf of the Class, plus interest on such amount at the same rate as earned by the Settlement Fund. A large portion of these expenses was used to pay for Lead Plaintiff's experts. Additional costs were for investigation, document duplication and database management, on-line research, and mediation fees. These expenses and other expenses were directly related to the prosecution of this Litigation and are all the type of expenses that would be paid by a fee-paying client. *See* RGRD Fee Decl., Ex. B; *DaVita II*, 2021 WL 2981970, at *4 (awarding similar expenses which are "routinely awarded in similar actions"). To date, no objections have been received regarding this expense request. Accordingly, Lead Counsel respectfully requests an award of $825,853.33 for these expenses and charges.

VII. THE REQUESTED PSLRA AWARD FOR LEAD PLAINTIFF SHOULD BE APPROVED

The PSLRA limits a class representative's recovery to an amount "equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class," but also provides that "[n]othing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class." 15 U.S.C. §78u-4(a)(4).[9] Here, as set forth in the Stephens Declaration, ¶10, Lead Plaintiff is seeking $3,900 pursuant to 15 U.S.C. §78u-4(a)(4) in connection with its representation of the Class.

Lead Plaintiff has been fully committed to pursuing the Class's claims against Defendants since moving for appointment as Lead Plaintiff. Lead Plaintiff has actively and effectively fulfilled its obligations as the representative for the Class, complying with all of the many demands placed on it during the prosecution and settlement of the Litigation, and providing invaluable assistance to Lead Counsel. Among other things, Lead Plaintiff reviewed and approved the filing of significant pleadings and briefs, engaged in conferences and correspondence with Lead Counsel regarding the Litigation, participated in discovery by searching for and collecting responsive documents, provided deposition testimony, and consulted with Lead Counsel regarding mediation and settlement strategy. *See* Stephens Decl., ¶¶4-6. These are precisely the types of activities courts have found to support awards to class representatives. *See DaVita I*, 2021 WL 1387110, at *7 (granting awards of $10,000 to lead plaintiff pursuant to 15 U.S.C. §78u-4(a)(4) where they actively participated in litigation);

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[9] In enacting the PSLRA, Congress intended to grant courts discretion in this regard. *See* H.R. Conf. Rep. No. 104-369, at 35 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 734 (lead plaintiffs should be compensated for activities "associated with service as lead plaintiff . . . and [the committee] grants the courts discretion to award fees accordingly").

MolyCorp, 2017 WL 11598681, at *2 (awarding approximately $10,000 in the aggregate to three lead plaintiffs).

Lead Counsel respectfully submits that Lead Plaintiff's participation in the Litigation fully warrants the Court's approval of an award to it of $3,900.

VIII. CONCLUSION

For the reasons set forth above, Lead Counsel respectfully requests that the Court enter an order awarding attorneys' fees of 30% of the Settlement Amount, expenses of $825,853.33 plus interest earned on both amounts, and an award to Lead Plaintiff of $3,900 pursuant to 15 U.S.C. §78u-4(a)(4).

DATED: October 2, 2023

Respectfully submitted,

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Lead Counsel for Lead Plaintiff

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on October 2, 2023, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Spencer A. Burkholz
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Mailing Information for a Case 1:19-cv-00124-WJM-SKC Oregon Laborers Employers Pension Trust Fund et al v. Maxar Technologies Inc. et al

Electronic Mail Notice List

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Phillup G Newhope
,

Logan Durant
,

Michael W Slaunwhite
,

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE SANDRIDGE ENERGY, INC. SECURITIES LITIGATION	))))	**Case No. CIV-12-1341-G**

ORDER

Now before the Court is Lead Counsel's Application for an Award of Attorneys' Fees and Expenses and Award to Plaintiffs (Doc. No. 571, the "Fee Application"). Having considered the parties' submissions and argument presented at the hearing on final approval of the Settlement and related motions held on October 6, 2022, the Court GRANTS the Fee Application, and ORDERS as follows:[1]

1. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Class who have not timely and validly requested exclusion.

2. Notice of Lead Counsel's Fee Application was given to all Class Members who could be located with reasonable effort. The form and method of notifying the Class of the Fee Application met the requirements of Federal Rule of Civil Procedure 23 and the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 (15 U.S.C. §78u-4(a)(7)), due process, and any other applicable law,

[1] Unless otherwise indicated, capitalized terms that are not otherwise defined herein have the same meanings ascribed to them in the Stipulation and Agreement of Settlement, dated November 12, 2021 ("Stipulation"). *See* Doc. No. 564-1.

constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to persons and entities entitled thereto.

3. The Court hereby awards attorneys' fees of one-third of the Settlement Amount ($7,269,166), plus expenses in the amount of $2,399,866.02, together with the interest earned on both amounts for the same time period and at the same rate as that earned on the Settlement Fund until paid. The Court finds that the amount of fees awarded is fair, reasonable, and appropriate under the "percentage-of-recovery" method.

4. The fees and expenses shall be allocated among other Plaintiffs' Counsel in a manner which, in Lead Counsel's good faith judgment, reflects such counsel's contribution to the institution, prosecution, and resolution of the Litigation.

5. The awarded attorneys' fees and expenses and interest earned thereon, shall be paid to Lead Counsel immediately upon execution of the Order Granting Final Approval of Settlement, Judgment, and this Order and subject to the terms, conditions, and obligations of the Stipulation, and in particular, Section 6.2 thereof, which terms, conditions, and obligations are incorporated herein.

6. In making this award of fees and expenses to Lead Counsel, the Court has considered and found that:

(a) the Settlement has created a fund of $21,807,500 in cash that is already on deposit, and numerous Class Members who submit, or have submitted, valid Proof of Claim and Release forms will benefit from the Settlement created by Lead Counsel;

(b) over 112,800 copies of the Notice were disseminated to potential Class Members and nominees indicating that Lead Counsel would move for attorneys' fees in an amount not to exceed one-third of the Settlement Amount and for expenses in an amount not to exceed $2.7 million, plus interest on both amounts, and no objections to the fees or expenses were filed by Class Members;

(c) Lead Counsel pursued the Litigation and achieved the Settlement with skill, perseverance, and diligent advocacy;

(d) Lead Counsel expended substantial time and effort pursuing the Litigation on behalf of the Class;

(e) Lead Counsel pursued the Litigation entirely on a contingent basis;

(f) the Litigation involves complex factual and legal issues and, in the absence of settlement, would involve lengthy proceedings whose resolution would be uncertain;

(g) had Lead Counsel not achieved the Settlement, there would remain a significant risk that the Class may have recovered less or nothing from the Settling Defendants;

(h) public policy concerns favor the award of reasonable attorneys' fees and expenses in securities class action litigation; and

(i) the attorneys' fees and expenses awarded hereby are fair and reasonable and consistent with awards in similar cases within the Tenth Circuit.

7. Pursuant to 15 U.S.C. §78u-4(a)(4), the Court awards $3,709.00 to Plaintiff Construction Laborers Pension Trust of Greater St. Louis, $5,902.35 to Plaintiff Laborers

Pension Trust Fund of Northern Nevada, $3,360.00 to Plaintiff Angelica Galkin, and $5,162.50 to Plaintiff Vladimir Galkin for the time they spent directly related to their representation of the Class.

8. Any appeal or any challenge affecting this Court's approval regarding the Fee Application shall in no way disturb or affect the finality of the Judgment entered with respect to the Settlement.

9. In the event that the Settlement is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of the Stipulation, this Order shall be rendered null and void to the extent provided in the Stipulation and shall be vacated in accordance with the Stipulation.

IT IS SO ORDERED this 30th day of December, 2022.

CHARLES B. GOODWIN
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KANSAS CITY

YELLOWDOG PARTNERS, LP, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. CURO GROUP HOLDINGS CORP., et al., Defendants.	)))))))))))	Civil Action No. 2:18-cv-02662-JWL-KGG CLASS ACTION

ORDER FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES AND LEAD PLAINTIFF AWARD PURSUANT TO 15 U.S.C. §78u-4(a)(4)

This matter having come before the Court for hearing on December 18, 2020, on the motion of Lead Counsel for an award of attorneys' fees, expenses and Lead Plaintiff award (the "Fee Motion") (Doc. # 98), the Court, having considered all papers filed and proceedings conducted herein, having found the Settlement of this Litigation to be fair, reasonable and adequate, and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Order incorporates by reference the definitions in the Stipulation of Settlement dated as of July 31, 2020 (the "Stipulation"), and all capitalized terms used, but not defined herein, shall have the same meanings as set forth in the Stipulation.

2. This Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all Members of the Settlement Class who have not timely and validly requested exclusion.

3. Notice of Lead Counsel's Fee Motion was given to all Settlement Class Members who could be located with reasonable effort. The form and method of notifying the Settlement Class of the Fee Motion met the requirements of Rule 23 of the Federal Rules of Civil Procedure and the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 (15 U.S.C. §78u-4(a)(7)), due process, and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to persons and entities entitled thereto.

4. The Court hereby awards attorneys' fees of 30% of the Settlement Amount, plus expenses in the amount of $123,584.38, together with the interest earned on both amounts for the same time period and at the same rate as that earned on the Settlement Fund until paid. The Court finds that the amount of fees awarded is fair, reasonable, and appropriate under the "percentage-of-recovery" method.

5. The fees and expenses shall be allocated among other Plaintiff's Counsel in a manner which, in Lead Counsel's good faith judgment, reflects such counsel's contribution to the institution, prosecution, and resolution of the Litigation.

6. The awarded attorneys' fees and expenses and interest earned thereon, shall be paid to Lead Counsel immediately upon execution of the Final Judgment and Order of Dismissal with Prejudice and this Order and subject to the terms, conditions, and obligations of the Stipulation, and in particular, Section 6.2 thereof, which terms, conditions, and obligations are incorporated herein.

7. In making this award of fees and expenses to Lead Counsel, the Court has considered and found that:

(a) the Settlement has created a fund of $8,980,000.00 in cash that is already on deposit, and numerous Settlement Class Members who submit, or have submitted, valid Proof of Claim and Release forms will benefit from the Settlement created by Lead Counsel;

(b) over 9,400 copies of the Notice were disseminated to potential Settlement Class Members and nominees indicating that Lead Counsel would move for attorneys' fees in an amount not to exceed 30% of the Settlement Amount and for expenses in an amount not to exceed $300,000.00, plus interest on both amounts, and no objections to the fees or expenses were filed by Settlement Class Members;

(c) Lead Counsel pursued the Litigation and achieved the Settlement with skill, perseverance, and diligent advocacy;

(d) Lead Counsel expended substantial time and effort pursuing the Litigation on behalf of the Settlement Class;

(e) Lead Counsel pursued the Litigation entirely on a contingent basis;

(f) the Litigation involves complex factual and legal issues and, in the absence of settlement, would involve lengthy proceedings whose resolution would be uncertain;

(g) had Lead Counsel not achieved the Settlement, there would remain a significant risk that the Settlement Class may have recovered less or nothing from Defendants;

(h) public policy concerns favor the award of reasonable attorneys' fees and expenses in securities class action litigation; and

(i) the attorneys' fees and expenses awarded hereby are fair and reasonable and consistent with awards in similar cases within the Tenth Circuit.

8. Pursuant to 15 U.S.C. §78u-4(a)(4), the Court awards $2,500.00 to Lead Plaintiff Carpenters Pension Fund of Illinois for the time it spent directly related to its representation of the Settlement Class.

9. Any appeal or any challenge affecting this Court's approval regarding the Fee Motion shall in no way disturb or affect the finality of the Judgment entered with respect to the Settlement.

10. In the event that the Settlement is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of the Stipulation, this Order shall be rendered null and void to the extent provided in the Stipulation and shall be vacated in accordance with the Stipulation.

IT IS SO ORDERED.

DATED: December 18, 2020

s/ John W. Lungstrum
JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Gene R. Eatinger, on behalf of himself and all similarly situated royalty owners, Plaintiffs, v. BP America Production Company, Defendant.	))))))))))	Case Number 07-1266-EFM-KMH

ORDER APPROVING SETTLEMENT AGREEMENT, AWARDING FEES AND EXPENSES TO CLASS COUNSEL, AND AWARDING INCENTIVE

This matter came before the Court for hearing pursuant to an Order dated August 3, 2012 (Dkt. 346), setting a hearing to determine whether or not to approve a Settlement in this class action case. Due and adequate notice was given of the Settlement as required in that Order. The Court has considered all papers filed and all proceedings in this case, the applicable law, and is well informed about this matter. The Court finds and orders as stated herein.

1. This Order incorporates by reference the definitions in the Settlement Agreement (herein "Agreement") (Dkt. 340-1), and all capitalized terms used herein shall have the same meanings as assigned to them in the Agreement except as expressly stated herein. The term "Class" means the Class defined by this Order. The term "Class Member" shall mean any member of the Class defined by the Agreement and this Order, but excludes those persons and entities who were excluded by the definition of the Class or by this Order which lists those who validly exercised their right to opt-out of the Class.

2. This Court has jurisdiction over the subject matter of the case and over the Defendant, Class Representative, and all Class Members.

3. The parties shall bear their own costs, except as otherwise provided in the Agreement. The persons or entities that validly and properly opted-out of the Class and are, therefore, not Class Members, are: 1) Pioneer Natural Resources USA, Inc.; 2) Devon Energy Production Company, L.P.; 3) Anadarko E&P Company, L.P.; 4) ExxonMobil Oil Corporation and Exxon Mobil Corporation; and 5) Osborn Heirs Company. (Dkt. 359)

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court approves the settlement set forth in the Agreement and the Class as defined by the Agreement. The Court finds that settlement is, in all respects, fair, reasonable, and adequate, and in the best interests of the Class Representative, the Class, and each of the Class Members. This Court further finds the settlement set forth in the Agreement is the result of arm's-length negotiations between experienced counsel representing the interests of the Class on the one hand, and Defendant BP on the other. Accordingly, the settlement embodied in the Agreement is hereby approved in all respects and shall be consummated in accordance with its terms and provisions. The parties are hereby ordered to perform the terms of the Agreement.

5. On August 2, 2010, pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court certified a class that was substantially similar to the Class, found that all requisites for class certification had been specifically satisfied, and appointed Class Counsel and a Class Representative. That Order (Dkt. 166 and 168 – modified class definition) is incorporated by reference.

In the Pretrial Order (Dkt. 327), the time frame of the class was extended to December 31, 2011, after which Defendant BP was no longer the working interest owner legally responsible for paying royalties to Class Members under Class Leases.

6. The Class is:

All royalty owners of BP America Production Company (and its predecessors and successors) from wells located in Kansas that have been paid royalties for gas and/or gas constituents (such as residue gas or methane, natural gas liquids, helium, nitrogen, or condensate) before January 1, 2012 and whose gas was processed at BP's Jayhawk Processing plant.

Excluded from the Class are: (1) the Mineral Management Service (Indian tribes and the United States); (2) Chesapeake Energy Corp., Chesapeake Operating Inc., Chesapeake Royalty, and any Chesapeake affiliated entity; (3) Defendant BP, its affiliates, predecessors, and employees, officers and directors; and (4) any claims for Gathering Charges.

With respect to the Class, this Court finds that: (a) the persons in the Class are so numerous that joinder of all persons in the Class is impracticable; (b) there are questions of law and fact common to the Class which predominate over any individual questions; (c) the claims of the Class Representative are typical of the claims of the Class; (d) the Class Representative and Class Counsel have fairly and adequately represented and protected the interests of all of the persons in the Class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering: (i) the interests of the persons in the Class in individually controlling the prosecution of the separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by persons in the Class; (iii) the desirability or undesirability of continuing the litigation of these claims in this particular forum; and (iv) the difficulties likely to be encountered in the management of the case. (Dkt. 166). The findings and reasons for certifying the original class apply equally to the Class as defined by the Agreement and this Order. The Class satisfies all requirements for class certification under Rule 23.

7. Upon entry of this Order, the Class Representative does, and each of the Class Members shall be deemed to have, and by operation of this Order shall have, fully, finally, and

forever released, relinquished and discharged all Released Claims against the BP Released Parties. Any and all Released Claims are permanently barred, enjoined, and finally discharged.

8. Upon entry of this Order, each and every Class Member is deemed to have accepted and ratified the Agreement.

I. Findings of Fact and Conclusions of Law on Due Process of Settlement Class Notice

9. The distribution of the Notice of Proposed Settlement of Class Action was the same distribution approved by this Court of a prior notice advising of the certification of the class (Dkt. 172, 346) and again constituted the best notice practicable under the circumstances to all persons entitled to such notice, including individual notice to all persons in the Class who could be identified through reasonable effort, and said Notice fully satisfied the requirements of Federal Rule of Civil Procedure 23, the requirements of due process, and any other applicable law.

10. The Notice was written in plain English and included (i) a description of the Settlement Class; (ii) a description of the proposed settlement; (iii) the names of Class Counsel; (iv) a statement of the maximum amount of attorneys' fees that may be sought by Class Counsel; (v) a statement of the maximum amount of an incentive award that may be sought by the Class Representative; (vi) the fairness hearing date; (vii) a description of eligibility to appear at the hearing; (viii) a statement of the deadlines for filing objections to the settlement, for submitting a claim, and for filing requests for exclusion; (ix) the consequences of exclusion; (x) the consequences of remaining in Settlement Class; and (xi) how to obtain further information. (Dkt. 358-1).

11. BP provided from its records of persons or entities to which it was making, or had made, royalty payments, a mailing list of Class Members to be used in giving Notice. BP also

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provided BP Payment Information (as defined in the notice sent to the settlement class) containing payment information only for Class Members plus payment information for the opt-outs listed above and 4 entities (identified with BP royalty numbers) that were excluded from the Class by the definition of the Class. Notice was provided to all Class Members by first class mail at the address on BP's initial list. Some mailings were returned, and both BP, by providing another updated list, and Class Counsel, through various means described below, engaged in, and Class Counsel continues to engage in, efforts to identify and locate these people. Class Counsel hired a private investigator to conduct skip traces to locate, or attempt to locate those whose addresses had changed, traced Social Security numbers through the U.S. Social Security Death Index database and US Info Search, and determined that many on the list, or their predecessor, had received Notice or were deceased. Many more have been and were in BP's suspense account list. As a result, the Notice reached approximately 95% of the Class Members. Moreover, there was information about this case on the internet and the Agreement, Notice, and Preliminary Distribution Plan were posted on a website hosted by the Notice Administrator.

12. Adequate notice of the settlement of the Class Action Litigation has been given as required by law to the members of the Settlement Class. All members of the Settlement Class have been afforded a reasonable opportunity to opt out of the Settlement Class and to object to the settlement.

13. Those persons who are not Class Members are free to pursue or not pursue their own claims in other litigation as they see fit at their own cost and expense. No claims by anyone who is not a Class Member are being asserted in this case against BP.

II. Findings of Fact and Conclusions of Law on Class Settlement Factors

14. This Court approved Notice to the Class after its terms were announced and presented to Court by the filing of the Settlement Agreement, Joint Motion (Dkt. 340) and after a telephonic hearing held by the Court (Dkt. 336).

15. In its prior order, this Court set a final approval hearing to determine whether the settlement was fair, reasonable, and adequate. (Dkt. 346).

16. In determining whether a settlement should be approved as fair, reasonable, and adequate, the following factors may be examined: (a) whether the settlement was fairly and honestly negotiated; (b) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (c) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; (d) the opinion of the parties that the settlement is fair and reasonable. *Gottlieb v. Wiles,* 11 F.3d 1004, 1014 (10th Cir.1993); *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984); *Newberg on Class Actions* §18.58 (factors to be considered at fairness hearing include: (1) likelihood of recovery; (2) recommendations and experience of counsel; (3) amount and nature of discovery; (4) future expense and likely duration of litigation; and (5) number of objectors and quality of objections). The Court considered all relevant factors in determining to approve the Settlement.

17. *The Settlement Was Fairly Negotiated.* The Settlement was achieved after hard fought litigation, mediation, more litigation, more mediation, more litigation, and further settlement discussions among experienced and adversarial attorneys. There is no evidence of collusion. The Settlement was fairly negotiated.

18. *The Outcome of the Litigation Was Not Assured.* Both parties were convinced of their legal and factual positions. The litigation was not assured one way or the other. Although

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the Kansas Marketable Condition Rule was consistent with the Class's theory, the case involved primarily processing deductions which in Kansas had not been pursued in other prior royalty owner class actions.

19. *The Value of Immediate Recovery Outweighed the Possibility of Future Relief After Protracted and Expensive Litigation.* BP made it clear that it would vigorously pursue the litigation, and if not successful, appeal. It did so recently in a royalty owner class action in New Mexico federal court, and, after a jury verdict against BP, obtained a reversal on appeal. Any future relief to the Class was literally years away. The Settlement is substantial and outweighs the possibility of future relief.

20. *The Opinions of the Parties.* Both parties are represented by experienced counsel who opine that the Agreement is fair, reasonable, and adequate for the Class. And the Class Representative concurs.

21. The Court is satisfied that Agreement was the product of arm's-length negotiations in which the Class and BP were both represented by experienced counsel who diligently represented the interests of their respective clients. The Agreement was reached after vigorous litigation as reflected by the record. This Court had made several rulings including a ruling about affirmative defenses asserted by BP as to the effect of prior class action settlements on the vast majority of the claims in this case. At the time of settlement, extensive briefing had been filed by the parties as to a motion for summary judgment that was pending. Each side also had the benefit of experts of their own choosing in assessing matters about the case and with regard to settlement. The Class Members were all paid royalties by BP and information on BP's royalty payments to Class Members was provided on a hard-drive that comprised some 65 gigabytes of information. So, given the common method of payment used by BP to pay Class

Members for royalties with respect to Class Wells, Class Counsel and experts for the Class had access to detailed information about what was paid and not paid to Class Members by BP during most of the class period, particularly with respect to royalty payments on NGLs and helium, the alleged underpayment for which comprised virtually all of the damages claims sought by the Class. The settlement process was lengthy, arduous, fair, unbiased, and, ultimately, productive.

22. The extensive record and briefing on file establish that BP strongly contested liability and damages. It was prepared and had the resources to try the case and appeal any adverse ruling that it felt could be appealed. Though very ably represented by Class Counsel, there was no assurance that Class Members would recover anything or that, if they did, it would be anything like amounts requested. Virtually all of the alleged damages sought by the Class involved BP's alleged underpayment of royalties on NGLs and Helium by allegedly wrongfully deducting various fees or deducting unreasonably high fees, assuming that some fees were deductable. BP claimed that such claims, and others as well, were barred by a prior class action settlement. The Class contended otherwise. Both parties moved for summary judgment on such affirmative defenses by BP. The Court ruled that there were fact issues on BP's defenses that would have to be resolved at trial, not by competing summary judgment motions.

23. The class experts had opinions about damages under two different theories, and, BP's experts had opinions that such damages claims were far too high even if liability was assumed. BP also presented experts and arguments contending that there was no liability whatsoever. The issues regarding liability and the proper calculation of damages, if any, were never resolved by the Court.

24. While the Class may have recovered more of the damages years from now after trial and appeal, the risk existed that the Class would recover nothing at all or far less than what

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was obtained in settlement. The amount obtained in settlement is substantial. Further, no Class Member voiced any objection to the settlement, indicating wide-spread approval. (Dkt. 359). Balanced against myriad of litigation and appellate risks, risks of statutory changes or enactments affecting the case, and other risks to recovery and of the risk of delay in payment and in the event of any recovery, the Court finds the settlement is fair, reasonable and adequate in all respects and that should be, and is, approved by the Court in accordance with Rule 23. The Court bases its approval upon its review of the file and information presented and the *cumulative* written and testimonial evidence presented and the Court's assessment of that evidence, and not based upon any *single* witness, document, or other piece of evidence.

III. Findings of Fact and Conclusions of Law on Plan of Allocation and Distribution

25. The plan of allocation and distribution must be fair, adequate, and reasonable. *Law v. National Collegiate Athletic Ass'n,* 108 F.Supp.2d 1193, 1196 (D.Kan. 2000). The Plan of Allocation and Distribution Order is found at Docket Number 363-8. The Plan here is based upon the NGLs and helium that BP paid royalties upon to Class Members. This is appropriate as the NGLs and helium claims are virtually all of the Class claims asserted against BP for alleged underpayments by BP of royalties. The assumptions about who should receive distributions are reasonable and proper and are bolstered by the requirement that anyone receiving funds that rightfully belong to another must pay any such amount to the rightful owner. The practical result of the Plan is that amounts from BP wells are being distributed in proportion to the underpayment claims that were asserted with regard to such wells and the monies appropriately distributed so that Class Members entitled to receive the distributions with respect to alleged underpayments do so on a proportionate basis that reflects the actual production of such wells. Based on the evidence submitted, the Court finds that the Plan of Allocation and Distribution

Order (Dkt. 363-8) is fair, adequate, and reasonable. Accordingly, the Plan of Allocation and Distribution Order is incorporated by reference and approved and ordered. The Claims Administrators, previously appointed by Dkt. 357 (incorporated herein), shall follow the Plan of Allocation and Distribution approved by this Court in making distributions to Class Members. In cases where there is some question about who should receive a distribution, the matter shall be determined by the Claims Administrators and the party receiving such distribution shall be responsible to make payment to any rightful owner in any event. In addition, the Claims Administrators are to be paid reasonable fees and expenses out of the Net Settlement Fund as set forth in the Agreement. (Dkt. 340-1 at 4, 7).

IV. Findings of Fact and Conclusions of Law on Class Counsels' Fees and Expenses and Incentive Award to Class Representative

26. In a diversity case, like this case, the award of attorneys' fees is governed by Kansas law. *See, e.g., Combs v. Shelter Mut. Ins. Co*., 551 F.3d 991, 1001 (10th Cir. 2008) ("In diversity cases, attorney fees are a substantive matter controlled by state law."); *Boyd Rosene & Associates, Inc. v. Kansas Mun. Gas Agency,* 123 F.3d 1351, 1352-53 (10th Cir. 1997) ("in this circuit, the matter of attorney's fees in a diversity suit is substantive and is controlled by state law.") Kansas law permits the award of attorneys fees in a class action based upon a percentage of total recovery calculated in accordance with KRPC 1.5(a)(1-8). Many Kansas class action cases have done so. *See, e.g., Shutts v. Phillips Petroleum Co.,* 235 Kan. 195, 679 P.2d 1159 (1984), *aff'd in part and rev'd in part on other grounds*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed. 2d 628 (1985); and *Freebird, Inc. v. Cimarex Energy Co*., 46 Kan.App.2d 631, 264 P.3d 500, (2011), *rev. denied* (Kan. June 13, 2012) (awarding one-third fee in royalty owner underpayment class settled before class certification and merits discovery). The Court has considered the

applicable Kansas law and factors set forth in KRPC 1.5(a)(1-8) and finds that the law and all of the factors support the award that the Court makes herein.

27. *Contingent Fee*. Certain factors are more applicable to contingent class litigation than other factors. The starting point is the contingent nature of such engagements. Given that the case was taken on a contingent fee basis, it should be analyzed for fee reasonableness on that basis. The Kansas law recognizes this when awarding class action fees under a percentage of the common fund approach. *Hawkins v. Dennis,* 258 Kan. 329, 349-50, 905 P.2d 678 (1995) (holding that a contingent fee award was reasonable despite defendant's protest that it represented four times the usual hourly rate).

28. *The Results Obtained*. This is the most important factor in contingent fee litigation. "[T]he consideration of the benefit the lawsuit has produced" is "[o]f major importance" in deciding the reasonableness of attorneys' fees in the class action context. *Shutts,* 235 Kan. at 223. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Here, $19 million was obtained for the Class that it would not have otherwise received.

29. *Fee Customarily Charged.* There really are few plaintiff class action firms in Kansas, especially those with oil and gas expertise. Those that do class action litigation routinely command a one-third fee, especially in gas royalty litigation. *See Littell et. al. v. OXY USA, Inc*., Case No. 98 CV 51 (Stevens Co. Dist. Ct.) (awarding "one-third" fee) (March 4, 2008); *Alford v. Pioneer Natural Resources USA, Inc*., 93-CV-37 (Stevens Co. Dist. Ct.) (awarding "one-third" fee) (Feb. 9, 2007); and *Coulter v. Anadarko Petroleum Corporation*, No. 98-CV-40 (Stevens Co. Dist. Ct.) (awarding "one-third" fee) (Sept. 17, 2009). *See also, Premier Pork, Inc. v. Rhone-Poulene S.A.,* 2006 WL 1388464 n. 3 at *5 (Kan. Dist. Ct., January 31, 2006) (*citing* numerous royalty owner class actions awarding one-third fees). Courts in Oklahoma have similarly ordered a one-

third or higher contingent attorney fee in royalty underpayment class actions. *See Cimarron Pipeline Const., Inc., v. National Council on Compensation Ins.,* Nos. 89-822 & 89-1186 (W. D. Okla. 1993) (34.9% of $35 million); *Kouns v. Conoco*, Inc., No. CJ-98-61, Dist. Ct. for Dewey County, Oklahoma (order approving fees filed December 2, 2004); and *Velma-Alma Independent School District No. 15 v. Texaco, Inc*., Consolidated Case Nos. CJ-2002-304, CJ-04-581-E and CJ-2005-496M, Dist. Ct. for Stephens County, Oklahoma (awarding 40% of the $27 million common fund, order approving fees filed Dec. 22, 2005). Thus, a one-third fee is a reasonable starting point.

30. In addition, it is customary in contingent fee litigation for the percentage to be higher in the event of an appeal, usually 40% or more. If the Settlement requires appellate work to defend the Settlement or any part thereof contained in this Order, Class Counsel would be entitled to a higher fee, perhaps the usual 40%, but Class Counsel has only requested an additional 5% which is eminently reasonable. However, if the appeal does not involve or delay the Settlement payout, Class Counsel would not be entitled to additional compensation from the Settlement Fund.

31. *Experience, Reputation, and Ability of Counsel.* Class Counsel is not a neophyte in complex civil litigation or class actions. Class Counsel has been lead or co-lead Class Counsel in cases all over the country, including some of the most recent Kansas appellate class action decision. *See* Sharp Affidavit. The reputation and ability of Class Counsel is well known and well respected. This factor would weigh in favor of enhancing the usual one-third contingent fee.

32. *Time and Labor Required.* This is of lesser importance in a non-hourly case, but the evidence shows that this case took substantial time and labor to complete. The novelty and difficulty of the questions involved was high as Class Counsel pursued theories on Conservation Fees, non-gathering

deductions, and other difficult questions. The expert presentations and arguments by BP were not matters that had been tried and decided by any Kansas court. The skill requisite to perform the legal service properly as Class Counsel is likewise high. Thus, the fee could be enhanced over the usual one third fee.

33. *Novelty and Difficulty.* The questions presented contained many novel issues mentioned above and even the ones that were not novel were difficult against a formidable opponent, BP, which is a large participant in the oil and gas industry, having industry expertise and knowledge, and supported by experienced and talented attorneys. The core issue actually involved processing deductions arguably not pursued by other class action lawyers against BP's predecessor in a prior class action, and has never been pursued in Kansas except by Class Counsel in this case and other cases like it.

34. *Skill Required.* This factor overlaps with the factor above as well as the experience and skill of class counsel. *In re Qwest Communication Int'l Sec. Litig*., 625 F.Supp.2d 1143, 1150 (D.Colo. 2009) (considering some factors together). The novelty and difficulty of the issues made the skill required high. There are "few simple class action cases". *In re Qwest Communication Int'l Sec. Litig*., 625 F.Supp.2d 1143, 1149 (D.Colo. 2009). This case required a high degree of skill. In a similar royalty underpayment class action, the court stated that "Class Counsel's knowledge and experience ... significantly contributed to a fair and reasonable settlement". *Anderson v. Merit Energy Co.,* 2009 WL 3378526, at *3. The same is true here. This factor supports a one-third fee, and more if an appeal is necessary.

35. *Undesirability of the Case*. The time, effort, and out-of -pocket investment makes a class action undesirable to most attorneys. The record reflects that over three million dollars in attorney and paralegal time was expended, for which Class Counsel was not being paid as the

case progressed. Indeed, without a recovery, no fee at all would have been received for the enormous investment of time. Moreover, the litigation expenses that Class Counsel was expected to bear, and did bear without any assurance of recovery, were likewise enormous, topping a half million dollars. The Defendant had deep pockets and could be expected, and did, hire talented attorneys to contest the litigation at every turn. Finally, the contingent nature of the case meant that at the end of the day, Class Counsel could have been left with no fee and no recovery of the enormous expenses that it had paid and carried for years. Class Counsel only requests a one-third fee after litigation expenses and 5% more if the Settlement is appealed. Those litigation expenses, totaling $573,387.90, were reasonable and necessary for the successful completion of the class case and are hereby approved. The fee of one-third of the Settlement Fund after netting out litigation expenses is also approved. If the case requires appellate work regarding this Order, Class Counsel should be compensated an additional 5% of the Settlement Fund for the added risk, labor, and expenses associated therewith. Such expenses and such one-third fee (and additional appellate fee if necessary) are hereby ordered to be paid from the Settlement Fund of $19 million plus accrued interest.

36. Kansas courts have adopted a three part test for considering incentive awards: "(1) the actions the class representative took to protect the interests of the class; (2) the level of benefit that the class received from the class representative's actions; and (3) the quantity of time and effort the class representative spent in pursuing the litigation." *Freebird, Inc. v. Cimarex Energy Co*., 46 Kan.App.2d 631, 644, 264 P.3d 500, 510 (2011), *rev. denied* (Kan. June 13, 2012) (approving a 1% incentive award over an objection in another royalty underpayment case). Here, the Class Representative, Gene Eatinger was especially vigilant in investigating royalty owner claims and securing competent Class Counsel. The Class Representative was thereafter

actively and continuously involved in the discovery and settlement process on behalf of the Class. Mr. Eatinger requests an incentive award of one half of one percent of the Settlement Amount of $19 million plus accrued interest. The incentive award in this case which is less than 1% approved in *Freebird*. Case law from analogous jurisdictions where gas class actions occur confirms the reasonableness and appropriateness of granting an incentive award of one percent or more of the common fund. *See Velma-Alma Independent School District No. 15 v. Texaco, Inc*., Consolidated Case Nos. CJ-2002-304, CJ-04-581-E and CJ-2005-496M, Dist. Ct. for Stephens County, Oklahoma (awarded 1-2% of the respective total settlement amounts, filed December 22, 2005); and *Robertson v. Sanguine, Ltd.,* Case No. CJ-02-150, Dist. Ct. for Caddo County, Oklahoma (approved 1% Class Representative fee, filed July 11, 2003). The requested incentive award under the law and circumstances is fair and reasonable. A class representative incentive award of 1/2 of one percent of the Settlement Fund with interest is hereby ordered and shall be paid to the Class Representative by the Claims Administrators in accordance with the Agreement.

37. The Court approves payment of Class Counsel's Fees and Expenses, including the Class Representative's incentive award, as set forth above.

38. Neither the Agreement nor the settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Agreement or the settlement: (a) is or may be deemed to be or may be offered, attempted to be offered, or used in any way by the parties as a presumption, a concession, or an admission of or evidence of, any fault, liability or wrongdoing by the BP Released Parties or of the validity of any Released Claims against the BP Released Parties; or (b) is or may be offered or received as evidence or otherwise used by any person in these or any other actions or proceedings, whether civil,

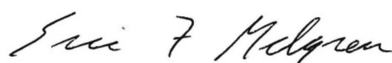
criminal, or administrative, against any parties to the Agreement other than to enforce the terms of the Agreement or orders or Orders issued by the Court in connection with the settlement. Class Representative, Class Counsel, BP , or any Class Member may file the Agreement or Order in any action (a) that may be brought against any of them in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, full faith and credit, release, good faith settlement, order bar, or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim, or (b) to enforce or otherwise effectuate the terms of the Agreement or orders or Orders issued by the Court in connection with the settlement, such Claims being excluded from the releases contained herein.

39. Without affecting the finality of this Order in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of this settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; and (c) all parties hereto for the purpose of construing, enforcing, and administering the injunction set forth in paragraph 7 of this Order.

40. In the event that the settlement does not become effective in accordance with the terms of the Agreement or the Order does not become Final, then this Order shall be rendered null and void to the extent provided by and in accordance with the Agreement and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement.

IT IS SO ORDERED.

SIGNED this 17th day of September, 2012.



Honorable Eric F. Melgren
UNITED STATES DISTRICT JUDGE