EFiled: Nov 10 2015 12:21PM EST
Transaction ID 58142382
Case No. 9318-VCL

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

IN RE KINDER MORGAN ENERGY PARTNERS, L.P. CAPEX LITIGATION	)))	CONSOLIDATED CASE No. 9318-VCL

LEAD PLAINTIFF'S CORRECTED OPENING BRIEF IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT, CLASS CERTIFICATION AND APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Lead Plaintiff Jon Slotoroff ("Lead Plaintiff"), on behalf of himself and the former common unitholders of Kinder Morgan Energy Partners, L.P. ("KMP" or the "Company"), respectfully submits this brief in support of: (1) final approval of the proposed $27.5 million Settlement[1] of this consolidated class action (the "Action" or "Litigation") on the terms set forth in the Stipulation; (2) final approval of the proposed plan of allocation of the Settlement proceeds; (3) final approval of the Settlement Class; and (4) an award of $6.875 million in attorneys' fees and $456,468 in expenses to Plaintiff's counsel.

PRELIMINARY STATEMENT

This case was brought to remedy an abuse of power by Kinder Morgan G.P., Inc. (together with its parent corporation, Kinder Morgan, Inc., "KMI"), the general partner of KMP, a Master Limited Partnership ("MLP") that operated pipelines and other energy-related businesses. Although the contractual relationship between KMP and KMI allowed KMI considerable leeway over KMP's management in most respects, it required KMI to act in "good faith" when

[1] The "Settlement" refers to the agreement embodied in the Stipulation and Agreement of Settlement, dated August 14, 2015, between and among the parties to the above-captioned action (the "Stipulation") (attached as Exhibit A to the Transmittal Affidavit of David M. Haendler In Support of Motion for Final Approval of Settlement, Class Certification and Application for an Award of Attorneys' Fees and Reimbursement of Expenses (the "Haendler Aff."). All capitalized terms used herein shall have the meanings set forth in the Stipulation unless otherwise specified.

determining whether KMP's capital expenditures were made for the purposes of maintaining existing capacity ("Maintenance Capex") or for the purpose of expanding capacity ("Expansion Capex"). Pursuant to KMP's Third Amended and Restated Partnership Agreement (the "Partnership Agreement")[2] the way capital was allocated had a significant effect on the amount of KMP's distributions to KMP's limited partners and KMI, the way that distributions were divided between KMP's limited partners and KMI, and KMP's need to raise capital through issuances of equity and debt.

Following a thorough pre-suit investigation and analysis, Lead Plaintiff considered that KMI had systematically breached the Partnership Agreement by mischaracterizing capital expenditures that were properly treated as Maintenance Capex as though they were Expansion Capex. Those misallocations (a) harmed KMP by forcing it to issue excess distributions and raise excess capital (thereby exposing KMP to the risk of catastrophe if the capital markets dried up);[3] and

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[2] A copy of the Partnership Agreement is attached as Exhibit D to the Transmittal Affidavit of Bradley R. Aronstam in Support of Defendants' Motion To Dismiss, filed March 24, 2014.

[3] Indeed, a recent article in the financial press noted that "Wall Street has soured on once-hot master limited partnerships tied to pipelines and other energy infrastructure," with a 29% fall in an MLP benchmark index this year partially driven by "concerns that the MLP business model, which relies heavily on equity and debt sales to fund growth, is breaking down." Andrew Barry, *Growth Challenges Mount at Kinder Morgan*, Barron's, Nov. 2, 2015 (attached to

(b) harmed KMP's limited partners by improperly distributing money to KMI that should have been paid (99%) to the unitholders.

During the discovery phase of this Action, KMI announced a merger with KMP and other subsidiaries (the "Consolidation"). The Consolidation eliminated Lead Plaintiff's derivative claims, mooting a large part of this Action and limiting the damages at issue to compensation for KMP unitholders for past harms.

Following hard-fought and arm's-length negotiations, the parties reached a Settlement in which Defendants have agreed to pay $27.5 million to KMP's former common public unitholders to settle the surviving direct claims regarding alleged breaches of, and tortious interference with, the Partnership Agreement between February 5, 2011 and November 26, 2014. The Settlement provides a noteworthy recovery to the Settlement Class and is fair, reasonable and adequate, as is the proposed Plan of Allocation. The Class should be certified and the Settlement and Plan of Allocation should be approved.

Lead Plaintiff also requests the Court to approve an award of attorneys' fees of $6.875 million, which equates to approximately 25% of the Settlement Fund (and approximately 26.65% of the Fund after covering the anticipated expense reimbursement of $456,468), as compensation for the successful prosecution of the

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Haendler Aff. as Exhibit B).

Action and procurement of the Settlement. Because the efforts of Lead Plaintiff and his counsel are the sole cause of the Settlement, Lead Plaintiff respectfully submits that the requested fee and expense award is fair, reasonable and consistent with the precedent of this Court.

STATEMENT OF FACTS

A. Background of KMP and KMP's Distribution Structure

Between February 5, 2011 and November 26, 2014 (the "Class Period"), and at all relevant times up until the Consolidation, KMP was one of the nation's leading pipeline transportation and energy storage companies. KMP was organized as an MLP, and relied entirely on KMI for its management. KMI wholly owned and controlled KMP's general partner, Kinder Morgan G.P., Inc. ("KMGP"), and enjoyed incentive distribution rights ("IDRs") entitling it to approximately 50% of every marginal dollar authorized as a distribution during the Class Period.

KMP's quarterly distributions were based upon the non-GAAP metric Distributable Cash Flow ("DCF"), which represented KMP's earnings before depreciation and amortization minus Maintenance Capex. KMP's distributions to KMI and to unitholders were therefore largely dictated by whether KMI categorized KMP's capital expenditures as Maintenance Capex or Expansion Capex, with Maintenance Capex reducing distributions to KMI and KMP's

unitholders, dollar-for-dollar. But because Expansion Capex was not subtracted from DCF, projects characterized as Expansion Capex were paid for via the issuance of new equity and debt, which diluted the interests of KMP's equity investors while increasing KMI's IDR payments.

The Partnership Agreement dealt with this conflict of interest by providing certain metrics for determining whether capital spending should be allocated as Maintenance Capex or Expansion Capex, and mandating that, where "capital expenditures are made in part to effectuate the maintenance capacity level referred to [in the definition of maintenance capex] and in part for other purposes," KMI was required to allocate such expenditures proportionally between Maintenance Capex and Expansion Capex.[4]

B. Background of the Litigation

After consulting with a forensic accountant and experts with a focus on capital budgeting in the energy industry, Lead Plaintiff initiated this Action on February 5, 2014, alleging that KMI consistently misallocated as Expansion Capex capital expenditures that were appropriately treated as Maintenance Capex under the Partnership Agreement (thereby ensuring outsized distributions to KMI, with the costs of such distributions borne primarily by the limited partners).

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[4] Partnership Agreement, Article II, definition of "Maintenance Capital Expenditures."

On March 3, 2014, Defendants filed a motion to dismiss the Action. On March 27, 2014, plaintiffs Darrell Burns and Terrence Zehrer filed a substantially similar action also challenging KMP's capital allocations. On April 8, 2014 the Court entered an order consolidating the actions, and on April 14, 2014, the Court entered an order appointing Jon Slotoroff as Lead Plaintiff, appointing Grant & Eisenhofer P.A. and Bernstein Litowitz Berger & Grossmann LLP as Co-Lead Counsel, and designating Gardy & Notis, LLP and Robbins Arroyo LLP as Additional Counsel.[5]

On March 24, 2014, Defendants filed their opening brief in support of their motion to dismiss the Action, arguing that Lead Plaintiff's claims were derivative and that Lead Plaintiff had failed to make a demand. On May 19, 2014, after the motion to dismiss had been fully briefed, Defendants withdrew the motion without prejudice in light of the Court's decision in *Allen v. El Paso Pipeline GP Company, LLC*, 90 A.3d 1097 (Del. Ch. 2014).

[5] On March 6, 2014, Kenneth Walker filed a derivative action in the District Court of Harris County, Texas, against KMI, KMGP, Kinder Morgan Management LLC, Richard Kinder, Steven Kean, Ted Gardner, Gary Hultquist, and Perry Waughtal, alleging claims for breach of duty, breach of the implied covenant of good faith and fair dealing, abuse of control, and gross mismanagement, styled *Walker v. Kinder Morgan, Inc., et al.*, C.A. No. 2014-11872 (the "Texas Action"). On April 9, 2014, the District Court of Harris County, Texas, granted an Agreed Order staying the Texas Action pending this Court's ruling on a motion to dismiss. This Settlement resolves both the claims in this Action and the substantially similar Texas Action.

C. Lead Plaintiff Obtains Substantial Discovery From Defendants

Over the course of discovery, Lead Plaintiff served one set of interrogatories and six requests for production of documents on Defendants, obtained 144,805 documents, and had reviewed more than 246,000 pages of documents at the time the Settlement was reached. Of particular note, Defendants produced thousands of Authorization for Expenditure ("AFE") forms authorizing capital projects, including more than 1,700 projects that involved budgeted capital expenditures of over $1 million. In coordination with retained experts, Lead Plaintiff undertook to assess all of the capital projects with budgets of over $1 million to determine which projects were potentially subject to challenge.

Lead Plaintiff also took the depositions of five senior-level employees of KMI, including a Rule 30(b)(6) deposition of KMI's Chief Financial Officer, Kimberly Dang, and depositions of the President and Chief Operating Officer of KMP's CO2 business unit. Lead Plaintiff served deposition notices for a total of 31 KMI employees. In addition, Lead Plaintiff produced more than 17,000 pages of documents in response to Defendants' document requests.

D. Lead Plaintiff's Assessment Of The Merits Of The Case

During discovery, Lead Plaintiff learned facts suggesting that KMI was indeed systematically breaching the Partnership Agreement, but also learned that much of KMP's Expansion Capex fell into a gray area under the Partnership

Agreement.

Discovery revealed that when KMP engaged in a project that had both expansion and maintenance aspects, KMP would allocate 100% of the costs of the project to Expansion Capex, notwithstanding that the Partnership Agreement contemplates that "[w]here cash capital expenditures are made in part to effectuate the capacity maintenance level . . . and in part for other purposes," the General Partner would make a good faith allocation between the two.[6] Although guidance was provided on a project-by-project basis as well as in the budget process, KMP did not adopt ***any*** written policy substantively addressing the characterization of Maintenance Capex or Expansion Capex until months ***after*** this lawsuit was filed.[7] Thus, Lead Plaintiff had evidence that Defendants were systematically failing to treat mixed projects in the way that the Partnership Agreement required.

Discovery also revealed that a substantial portion of KMP's Expansion Capex expenditures during the Class Period were made by its CO2 business unit, which, *inter alia*, pumps carbon dioxide out of source fields, and then pumps it into the ground at oil fields in order to boost production. The Partnership Agreement's

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[6] Partnership Agreement, Article II, definition of "Maintenance Capital Expenditures."

[7] Excerpts of Transcript of February 6, 2015 Deposition of Kim Dang at 128:24 - 140:6 (attached to Haendler Aff. as Ex. C).

definitions of Maintenance Capex and Expansion Capex did not readily encompass KMP's CO2 business, such that there was a heated debate among the parties as to how those expenditures should be allocated.[8] According to an analysis of KMP's capital expenditures between 2011 and 2013 by Lead Plaintiff's experts, if the CO2 unit was set aside, KMP's ratio of Maintenance Capex to depletion, depreciation & amortization ("DD&A") was generally in line with that of its industry peers, potentially indicating that the CO2 unit's capital allocations would be a focus of the litigation.

Thus, although Lead Plaintiff felt there was a strong case that in projects involving both maintenance and expansion KMI was systematically misallocating capital in violation of the Partnership Agreement, Defendants had a colorable argument that many of their Expansion Capex allocations were permissible under the Partnership Agreement, or at a minimum, were not made in bad faith.

E. Lead Plaintiff's Assessment Of Potential Damages

During discovery, Co-Lead Counsel worked closely with their retained

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[8] Specifically, the Partnership Agreement defines "Maintenance Capital Expenditures" as expenditures made to maintain the throughput, deliverable capacity, terminaling capacity, and fractionation capacity of KMP's assets. According to the CO2 unit's vice president of engineering technology, none of these metrics are meaningful in the day-to-day operations of the CO2 business. Excerpts of Transcript of May 29, 2015 Deposition of Lanny Schoeling at 53:23-55:10 (attached to Haendler Aff. as Exhibit D).

experts to develop a damages model that would fairly and adequately quantify the direct harm that the alleged capital misallocations in this case caused to individual Class Members. As set forth in the Affidavit of JT Atkins filed herewith ("Atkins Aff.") (attached to Haendler Aff. as Exhibit E), a "Recharacterization" model was the most supportable formula to calculate the direct harm that misallocation caused unitholders. Atkins Aff. at ¶¶3-4.

The Partnership Agreement provides that distributions may be made from "Cash From Operations" (in which case they flow through the IDR structure, such that KMI receives approximately 50% of them and KMP's limited partners receive the other 50%) or may be made from "Cash From Interim Capital Transactions" (in which case they do not flow through the IDR structure, such that KMI receives 1% of them and KMP's limited partners receive the other 99%). Atkins Aff. at ¶¶5-7. Co-Lead Counsel and their experts concluded that capital misallocation would directly impact Class Members by causing distributions that should be characterized as Cash From Interim Capital Transactions to be characterized as Cash From Operations, skewing distributions in favor of KMI. Atkins Aff. at ¶¶8-12.

Under this model, assuming that Lead Plaintiff could prove that KMP was systematically misallocating capital during the Class Period, and that KMP's overall ratio of Maintenance Capex to DD&A should have closely resembled those

of peer MLPs, Lead Plaintiff estimated the damages to the Class from mischaracterization of distributions at approximately $195 million. *Id.* Lead Plaintiff also determined that under these assumptions, no mischaracterization of distributions would have occurred until the fourth quarter of 2012, such that prior to that point Class Members would not have suffered any damages from mischaracterization. *Id.* at ¶¶8-10.

F. KMP and KMI Agree To The Consolidation

On August 9, 2014, KMI, KMP, and other related entities agreed to the Consolidation, in which each common unit of KMP (excluding the common units held by KMI and its subsidiaries) was converted into cash, KMI stock, or a mix of the two. The merger was completed on November 26, 2014, and KMP's common units were delisted and removed from trading on the New York Stock Exchange.

The Consolidation addressed and resolved Lead Plaintiff's allegations regarding Defendants' unsustainable allocation of capital expenditures and the resulting harm to KMP. By removing the IDR structure and lowering the cost of capital, the Consolidation eliminated the danger that KMP would suffer catastrophic consequences if it could not attract new equity investments to fill the shortfall caused by outsized distributions.

The Consolidation also likely extinguished Lead Plaintiff's derivative standing and, more importantly, mooted his derivative claims arising from harm to

KMP. Lead Plaintiff continued, however, to litigate his direct claims concerning the damages that were inflicted on KMP unitholders between February 5, 2011 and November 26, 2014 as a result of Defendants' breaches of the Partnership Agreement.

G. Settlement of the Litigation

In August 2014, as document discovery continued, KMI and KMP announced the Consolidation. In September 2014, the parties notified the Court that they had agreed to adjourn all future deadlines in the then-existing Scheduling Order in order to explore settlement. The parties then scheduled an in-person meeting that included the senior partners from both sides, as well as KMI's General Counsel.

On September 23, 2014, at an in-person meeting, defense counsel made a thorough presentation to Co-Lead Counsel regarding Defendants' views of the case, including the Partnership Agreement, and Co-Lead Counsel laid out at a high level their own views of the matter and their bases for holding KMI liable for harm done to KMP's limited partners. Following further informal discussions between the parties and in a follow-up in-person meeting on November 11, 2014, Co-Lead Counsel provided to Defendants an extensive presentation regarding the evidence for liability and their theories of damages. The parties continued follow-up discussions and exchanges of information and on November 25, 2014, the parties

again asked the Court to further adjourn the Court deadlines as these discussions continued. Despite frank discussions in those meetings and follow-up discussions about the case and damages, the parties did not reach a settlement. Accordingly, the parties notified the Court on December 29, 2014, that they agreed to reinstate the previously adjourned Court deadlines for new dates in 2015. The litigation continued with further document discovery, interrogatories, and five depositions, including of the CFO of KMI. In light of the discovery record developed, the parties resumed settlement discussions in late May and reached the Settlement in mid-June.

ARGUMENT

I. THE SETTLEMENT SHOULD BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE

A. The Standard For Approving The Settlement

Delaware law has long favored the voluntary settlement of contested claims. *See, e.g.*, *In re Triarc Cos., Inc. Class & Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001); *Kahn v. Sullivan*, 594 A.2d 48, 58-59 (Del. 1991); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989) ("Delaware law favors the voluntary settlement of contested issues."); *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986).

Settlements are particularly favored in class actions because they promote judicial economy. *Prezant v. De Angelis*, 636 A.2d 915, 923 (Del. 1994).

In reviewing a proposed class action settlement, the Court is "not required to decide any of the issues on the merits," *Polk*, 507 A.2d at 536, but instead must determine whether the settlement is fair and reasonable. The critical "facts and circumstances" considered when assessing the overall fairness of a proposed settlement include: (i) the probable validity of the claims; (ii) the apparent difficulties in enforcing the claims through the courts; (iii) the delay, expense, and trouble of litigation; (iv) the amount of the compromise as compared with the amount of any collectible judgment; and (v) the views of the parties involved. *Polk*, 507 A.2d at 536; *Kahn*, 594 A.2d at 58-59. Ultimately, the critical issue when evaluating the fairness of a class action settlement is the balance between the value of the benefits achieved for class members against the strength of the claims being compromised. *Polk*, 507 A.2d at 535.

B. Analysis Of The Benefits Achieved Through The Settlement

This Settlement provides substantial benefits to former KMP unitholders. If the Settlement is approved by the Court, the Class Members, whose partnership units of KMP were converted to cash and/or shares of KMI in the consolidation, will receive a *pro rata* share of the $27. 5 million common fund distribution, net of

attorneys' fees and expenses. Absent the Settlement, the Class Members would not receive anything.

The significant $27.5 million recovery achieved for Class Members reflects not only the strength of the claims, but also Defendants' recognition that Lead Plaintiff and Co-Lead Counsel were determined and willing to take these claims to trial. The $27.5 million common fund, when weighed against the risks of continued litigation, supports approval of the Settlement.

C. Analysis Of The Strength Of The Claims At Trial

In comparison to the significant and immediate benefits achieved through the Settlement, the Class faced significant risks if this litigation continued. Trial in this matter was scheduled to begin on April 11, 2016. While Lead Plaintiff believes his claims would have prevailed, complicated legal and factual issues remained and there was no certainty that Lead Plaintiff would have been successful at trial. Therefore, Lead Plaintiff negotiated and agreed to the Settlement in order to provide substantial and immediate relief to the Class and to avoid the risks and expense of continued litigation.

1. Challenges to Establishing Liability

Co-Lead Counsel's discovery efforts revealed both strengths and weaknesses to the central argument that Defendants' capital allocations violated the Partnership Agreement and Defendants' contractual obligation to act in good

faith. Discovery revealed that Defendants were systematically failing to allocate capital in mixed projects in a way that the Partnership Agreement required, but also that much of the imbalance between KMP's Maintenance Capex and Expansion Capex was being driven by the CO2 business, where the Partnership Agreement did not provide clear guidance or metrics. *See* SOF § D, *supra*. Had the Action continued, then Lead Plaintiff faced the risk that he would not be able to prove that the CO2 unit's capital allocations were "so far beyond the bounds of reasonable judgment that [they seem] essentially inexplicable on any ground other than bad faith." *DV Realty Advisors LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101, 110 (Del. 2013) (*quoting Brinckerhoff v. Enbridge Energy Company, Inc.*, 67 A.3d 369 (Del. 2013)). This factor therefore supports the Settlement.

2. Challenges to Damages

Even if Lead Plaintiff was able to establish that Defendants were liable, Lead Plaintiff still faced two significant challenges in regards to his damages case. *First*, in order to prove damages Lead Plaintiff would have had to prove how much capital spending was misallocated. Defendants produced more than 1,700 "Authorization for Expenditure" forms authorizing capital expenditure projects of over $1 million. In order to quantify the amount of misallocated capital (and therefore the amount of damages), Lead Plaintiff faced the burden of analyzing

these projects, determining which were subject to challenge, reverse-engineering appropriate allocations, and proving those revised allocations to the Court. Presenting this record at trial would also present challenges, as Lead Plaintiff had to determine whether the Court would accept a statistical sampling of the AFEs or whether, as Defendants insisted, a lengthy and torturous review of each AFE was required.

Second, Lead Plaintiff faced the burden of proving how these capital allocations caused net harm to the Class. Had the Action not settled, Co-Lead Counsel expected that disputes over damages would have led to extensive expert discovery and briefing, with the risk that Lead Plaintiff might not be able to recover *any* damages for the Class if he ultimately could not show a damage model satisfactory to the Court.

D. The Experience and Opinion of Counsel and Their Client Favors Approval of the Settlement

This Court considers the opinion of experienced counsel and their clients in determining a settlement's fairness. *See generally Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964); *see also Polk*, 507 A.2d at 536 (noting that the Court considers "the views of the parties involved" in determining "the overall reasonableness of the settlement"). Co-Lead Counsel frequently appear before this Court, and the Court is familiar with their depth of experience in Delaware corporate litigation

and the significance of their recoveries for investors.

Lead Plaintiff and Co-Counsel negotiated the Settlement after conducting extensive fact and expert discovery, including the review of more than 246,000 pages of documents produced by Defendants and taking the depositions of KMP's CFO and four other senior executives. Lead Plaintiff and Co-Lead Counsel agreed to the Settlement after careful deliberation, analysis of the law governing the claims (in light of the discovery obtained), and full consideration of the relative strengths and weaknesses of the claims and any potential defenses. Based on their experience, their efforts in connection with this case, and analysis of the lawsuit, Lead Plaintiff and Co-Lead Counsel consider the Settlement to be fair and reasonable. *See* Affidavit of Jon Slotoroff at ¶3 (attached to Haendler Aff. as Ex. F). These circumstances support approval of the Settlement. *See Neponsit Inv. Co. v. Abramson*, 405 A.2d 97, 99 (Del. 1979) (approving settlement where plaintiff's counsel concluded that the purchase price was fair and that the deal was in the best interests of the stockholders based on substantial pretrial discovery).

Delaware courts also place considerable weight on the adversarial and vigorous nature of the settlement negotiations themselves when assessing the fairness of a class action settlement. *See, e.g., In re Allion Healthcare Inc. S'holders Litig.*, 2011 WL 1135016, at *3 (Del. Ch. Mar. 29, 2011). Because the Settlement was the product of repeated, arm's-length negotiations between Co-

Lead Counsel and sophisticated opposing counsel, those negotiations support a finding that the Settlement was fair, reasonable, and in the best interests of KMP's former unitholders.

E. The Objections to the Settlement Should Be Rejected

Nearly a million notices were mailed to potential Class Members.[9] As stated in the Notice, any objections to the Settlement are due no later than November 13, 2015. To date, eight objections have been filed (attached to Haendler Aff. as Exhibits H-O), none of which were asserted by institutional investors or persons with significant KMP holdings, several of which failed to provide proof of standing to file an objection. A small number of objections is convincing evidence of a proposed settlement's fairness, reasonableness and adequacy. *See, e.g.*, *Chiulli v. Hardwicke Cos., Inc.*, 1985 WL 11532, at *1 (Del. Ch. Feb. 11, 1985) (in the

[9] MLPs are required to maintain lists of each person who held partnership units during the tax year for tax purposes. *See* Affidavit of M. Rebekah Thigpen ("Thigpen Aff.") at ¶5 (attached to Haendler Aff. as Ex. G). The Claims Administrator identified 981,525 unique names and addresses in the tax records provided by Defendants and mailed a notice packet to each person so identified. *See* Thigpen Aff. ¶¶3, 5; Settlement ¶7. Because the notice recipients were identified through Forms K-1 required by the Internal Revenue Service, the notice program here was unusually accurate and complete – if not over-inclusive. For that reason, although Co-Lead Counsel also provided a published notice, counsel did not provide notice to brokers and nominees, even if the brokers requested packages for mass mailings, as doing so would have been duplicative of notices already sent and/or sent to recipients who did not receive Forms K-1 (and therefore are not Class members).

absence of objection, approval of settlement "would be almost perfunctory"); *Rome*, 197 A.2d at 58 (approving settlement agreement that was ratified by a very large majority of the stockholders). Here, where only eight objections have been received after nearly a million notice packets were distributed, that incredibly low objection rate weighs heavily in favor of approving the settlement.

The objections do not provide any basis for the Court to reject the Settlement or Lead Plaintiff's request for attorney's fees. Significantly, "the objectors do not contend that class counsel unreasonably compromised valuable claims in exchange for inadequate benefits to the class." *In re Chicago and North Western Transp. Co. S'holders Litig.*, 1995 WL 389627, at *2 (Del. Ch. June 26, 1995). In most instances, the objectors appear to disagree with class action procedures and litigation in general rather than to the specific terms of the Settlement before the Court. These objections are misguided and do not provide any basis for the Court to reject the Settlement.

The objections received raise four categories of concerns: (1) dissatisfaction with the per-unit recovery; (2) concern that the Settlement will impose harmful costs on KMI; (3) that Class Members should be permitted to opt out of the

Settlement; and (4) that participation in the Settlement will be unduly burdensome on Class members. None of those concerns have merit.[10]

First, with regard to per-unit recovery, Patrick Gilmartin and Richard Wilhoit contend that the per-unit recovery to the Class should be higher.[11] Yet neither offers any evidence that a larger recovery was available, or otherwise engages with the facts and legal theories of the case.[12]

Mr. Gilmartin requests that in measuring the value of the Settlement, the benefit to the Class be reduced by the cost of the defense of the litigation. This request has no basis in Delaware law. Rather, it is well-established that where class counsel have obtained a monetary recovery, the benefit to the Class is

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[10] In addition to the above-listed objections, on September 30, 2015, the Court received a letter from Leita Everson requesting that the Court apply due diligence when considering Co-Lead Counsel's application for attorneys' fees (attached to Haendler Aff. as Ex. P). It does not appear that Ms. Everson has any objection to the Settlement.

[11] Judy Kloth's objection arguably raises the same concern. Ms. Kloth objects, without particulars, to the proposed Plan of Allocation, the Settlement, and the request for attorneys' fees. Contrary to the requirements for objectors set forth in the Court-approved Settlement Notice, Ms. Kloth did not sign her letter, did not include her address and telephone number, did not include proof of Class membership, and did not provide a statement of her specific reasons for objecting to the Settlement. Because her objection is procedurally improper and lacks substance, it does not provide any basis to question the Settlement.

[12] Mr. Wilhoit's objection failed to attach proof of his KMP unitholdings to his letter as required and set forth in the Court-ordered Settlement Notice. Mr. Wilhoit also makes no reference whatsoever to the actual allegations, facts, or merits of the case to demonstrate that a greater recovery would be possible.

ascertained simply by looking to the size of the common fund created. The Delaware Supreme Court has held that,

> In determining the amount of a reasonable fee award, our holding in *Sugarland* assigns the greatest weight to the benefit achieved in the litigation. When the benefit is quantifiable, as in this case, by the creation of a common fund, *Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit. The *Sugarland* factor that is given the greatest emphasis is the size of the fund created, because ***a common fund is itself the measure of success and represents the benchmark from which a reasonable fee will be awarded.***

Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1259 (Del. 2012) (emphasis added, ellipses and quotation omitted); *see also Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1046 (Del. 1996) (noting that the percentage-of-fund method has been used to make fee awards in common fund cases for almost one hundred years).

Second, regarding the Settlement's impact on KMI, Douglas Steele wrote a letter to the Court objecting to the Settlement and the request for attorneys' fees on the grounds that he was happy with his investment in KMP, "was not harmed by the action of Kinder Morgan management that I can tell," and was concerned that the request for attorneys' fees would injure his interests as a KMI stockholder. Similarly, Leonard Malherbe wrote a letter to the Court claiming that the Settlement "appears to be a form of legal extortion," and that "[i]f one buys a

stock, that person should take full responsibility for their actions."[13] These unitholders' general happiness with management and belief in *caveat emptor* is not a basis to reject a multi-million dollar Settlement based on a colorable claim for a systematic breach of the Partnership Agreement.

Third, Robert Guritz objected to the Settlement because he believes that Class Members should have a right to opt out. At the Court's direction, Co-Lead Counsel responded to Mr. Guritz in a letter dated October 13, 2015 (File & Serve Xpress Transaction No. 58013136), informing him that the Delaware Supreme Court has held that members of a class certified under Delaware Chancery Court Rule 23(b)(1) and (b)(2) do not have a Constitutional right to opt out of the class, and that the Court will consider the question of Class Members' opt-out rights if necessary and appropriate. *See Nottingham Partners v. Dana*, 564 A.2d 1089, 1101 (Del. 1989). Similarly, the Court received a letter from Jon Parker objecting to the class action mechanism generally, and arguing that "[l]awyers for a class should be required to poll the class as to whether they want in[.]"[14] This disagreement with Delaware's class action procedures do not form a proper basis

[13] Mr. Malherbe did not attach proof of his KMP unitholdings to his letter, as required and set forth in the Court-ordered Settlement Notice.

[14] Mr. Parker did not attach proof of his KMP unitholdings to his letter as required and set forth in the Court-ordered Settlement Notice.

for an objection to this settlement.

Finally, Gregory Koster objects that the Court-ordered claim procedure "was clearly designed to make it burdensome and onerous for any class member to qualify or object."[15] Mr. Koster's objection is baseless. There is nothing unfairly burdensome about requesting Class Members to complete a claims form providing detail on when they purchased their holdings and the distributions they received, where the harm that they suffered from Defendants' alleged misconduct can only be calculated with this data. Nor is it unfairly burdensome to ask objectors to serve papers on counsel. Finally, Mr. Koster's suggestion that no members of the Class may manage to qualify for a payout is completely implausible, and inconsistent with numerous cases in the Delaware courts and elsewhere where Class Members have been paid on damages claims following similar procedures and requirements.

II. FINAL APPROVAL OF THE SETTLEMENT CLASS IS APPROPRIATE

Delaware courts liberally interpret Chancery Court Rule 23's requirements to favor class certification. *See Parker v. Univ. of Del.*, 75 A.2d 225, 227 (Del. 1950). This is especially so in stockholder or unitholder litigation. As this Court explained in *Shapiro v. Nu-West Indus., Inc.*, 2000 WL 1478536, at *4 (Del. Ch.

[15] Mr. Koster did not attach proof of his KMP unitholdings to his letter, as required and set forth in the Court-ordered Settlement Notice.

Sept. 29, 2000), "class certification . . . serves judicial efficiency since it allows a single court to determine claims involving one set of actions by defendants that have a uniform effect upon a class of identically situated shareholders." Because Lead Plaintiff has met the requirements of Chancery Court Rules 23(a) and (b) as set forth below, the preliminarily approved Class should receive final approval for settlement purposes.

A. Certification Is Proper Under Chancery Court Rule 23(a)

Chancery Court Rule 23(a) sets forth the threshold requirements that must be met for a class to be certified: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the class's interests.

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Ch. Ct. R. 23(a)(1). At the time the Settlement was reached, there were more than 437 million KMP limited partnership units outstanding, held by tens of thousands of individuals and entities dispersed throughout the United States, rendering joinder of all class members impracticable. The Claims Administrator identified almost a million unique names and addresses

in the unitholder tax information maintained by Defendants. Thigpen Aff. ¶3. Accordingly, Lead Plaintiff has satisfied Rule 23(a)(1)'s numerosity requirement. *See In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *13 (Del. Ch. Mar. 31, 2009) ("The test of numerosity under Rule 23(a)(1) is whether joinder of all class members would be impractical, not impossible").

2. Commonality

Class certification is proper when common questions of law or fact exist. *See Smith v. Hercules*, 2003 WL 1580603, at *7 (Del. Super. Ct. Jan 31, 2003); *Allen*, 2014 WL 2086371, at *1 (Del. Ch. May 19, 2014) (finding commonality requirement satisfied where the claims alleged common injuries to all class members arising from a breach of a limited partnership agreement). Because Lead Plaintiff alleged common injuries to all of KMP's common unitholders arising from a common course of conduct by Defendants in connection with KMP's capital allocations, and Defendants' alleged breaches of and tortious interference with the Partnership Agreement, commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires a class representative's claims to be typical of – but not identical to – those of the class. Typicality exists where a class representative's legal and factual position is "not … markedly different from that of the members of the class[.]" *Singer v. Magnavox Co.*, 1978 WL 4651, at *2

(Del. Ch. Dec. 14, 1978). As this Court explained in *In re Talley Industries, Inc. S'holder Litig.*, 1998 WL 191939, at *9 (Del. Ch. Apr. 13, 1998), typicality exists where "all Class members face the same injury flowing from the defendants' conduct." Here, Lead Plaintiff meets this requirement because he and the Class were affected by Defendants' misconduct in the same way. Lead Plaintiff's claims in this matter are exactly the same as those of the other Class members, and all were affected in the same way by Defendants' alleged breaches of and tortious interference with the Partnership Agreement. *See, e.g.*, *Allen*, 2014 WL 2086371, at *1 (holding that typicality requirement was satisfied in alleged class action asserting claims for breach of an MLP partnership agreement where "[t]he Representative Plaintiff owned units in El Paso MLP as of the challenged transaction and, accordingly, suffered the same injury as the other members of the Class."). Thus, Rule 23(a)(3)'s typicality requirement is met.

4. Adequacy of Representation

Rule 23(a)(4) requires a representative plaintiff to be an adequate class representative. In *Oliver v. Boston University*, 2002 WL 385553, at *7 (Del. Ch. Feb. 28, 2002), this Court explained that "a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic familiarity with the facts and issues involved in the lawsuit;" *see also Allen*, 2014 WL 2086371, at

*1 (finding adequacy requirement met where the class representative's interests "are fully aligned with those of the other Class members, and there has been no suggestion that his economic interests conflict with the interests of the Class."). Lead Plaintiff meets these requirements.

First, Lead Plaintiff's interests are identical to those of the Class. Lead Plaintiff owned units of KMP throughout the Class Period. There is no suggestion of any conflict between Lead Plaintiff and any member of the Class. Second, Lead Plaintiff retained competent counsel that are highly experienced in investor litigation. Co-Lead Counsel has successfully prosecuted stockholder and corporate governance class actions in this Court and others. *See Allen*, 2014 WL 2086371, at *1; *AXA Fin. Inc. S'holders Litig.*, 2002 WL 1283674 at *2 (Del. Ch. May 22, 2002). Lead Plaintiff is, therefore, an adequate representative for the Class under Rule 23(a)(4).

B. Certification Is Proper Under Chancery Court Rule 23(b)(1) and (b)(2)

Actions challenging compliance with MLP partnership agreements are appropriate for certification under Chancery Court Rules 23(b)(1) and (b)(2). *See Allen*, 2014 WL 2086371, at *2. "Certification under Rule 23(b)(1) is appropriate if prosecution of separate actions by individual class members would risk (i) inconsistent and varying results that would impose inconsistent obligations or

(ii) adjudications with respect to one class member which would be dispositive of the class's interests." *Id.* In the context of an MLP limited partnership agreement, "[claims] for breach of contractual duties, as defined by the limited partnership agreement, are essentially identical, and a ruling on one such member's claims would prove generally dispositive as to all of them." *Id.*

"Certification under Rule 23(b)(2) is appropriate if the defendants' conduct is generally applicable to the class, making appropriate class-wide declaratory or injunctive relief." *Id.* (quotation omitted). This Action readily satisfies these elements, insofar as each Class Member was a party to the same Partnership Agreement, such that each Class Member was affected in the same way by Defendants' alleged breaches of and tortious interference with the Partnership Agreement (save for the question of individualized damages). Thus, certification of the proposed Class is proper under Chancery Court Rules 23(b)(1) and (b)(2).

III. THE PLAN OF ALLOCATION IS FAIR AND SHOULD BE APPROVED

Lead Plaintiff's damages expert has opined that the underpayment of Quarterly Distributions began in the Fourth Quarter of 2012 and continued through and including the Third Quarter of 2014. *See* Atkins Aff. at ¶¶8-10.[16] Lead

[16] Specifically, as Lead Plaintiff's expert discusses, the damages model shows no cognizable damages from Defendants' alleged breaches of the Partnership

Plaintiff's damages expert has further opined that the proposed Plan of Allocation is a fair and reasonable method for distributing the settlement proceeds to unitholders. *Id*. at ¶19. For each Quarter beginning with the Fourth Quarter of 2012 through and including the Third Quarter of 2014, the Claims Administrator will calculate a Claimant's "Quarterly Loss Amount" by multiplying the number of Partnership common units held by the Claimant as of the close of trading on the Holding Date by the Alleged Per Unit Loss Amount for that Quarter set forth in the following Table:

Holding Date	**Relevant Quarterly Distribution**	**Alleged Per Unit Loss Amount**
January 28, 2013	4th Quarter 2012	$0.04
April 24, 2013	1st Quarter 2013	$0.04
July 26, 2013	2nd Quarter 2013	$0.16
October 28, 2013	3rd Quarter 2013	$0.11
January 28, 2014	4th Quarter 2013	$0.02
April 25, 2014	1st Quarter 2014	$0.04
July 28, 2014	2nd Quarter 2014	$0.16
October 28, 2014	3rd Quarter 2014	$0.10

Notice of Pendency and Proposed Settlement of Unitholder Action, Settlement Hearing, and Right to Appear at ¶49 (attached to Haendler Aff. as Ex. Q.) The

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Agreement until KMP's cumulative Cash from Operations was exhausted by misallocations. In the damages model, KMP reached that point in the fourth quarter of 2012, and KMP unitholders were underpaid beginning with the distribution for that quarter through and including the distribution for the third quarter of 2014. Atkins Aff. at ¶¶8-10.

sum of a Claimant's purported Quarterly Loss Amounts shall be his, her or its "Claim Amount" under the Plan of Allocation. *Id.* at ¶50.

The Net Settlement Fund will be distributed to Authorized Claimants on a *pro rata* basis based upon the relative size of their Claim Amounts. *Id.* at ¶51. A "Distribution Amount" will be calculated for each Authorized Claimant as follows:

- The Authorized Claimant's Claim Amount divided by the total Claim Amounts of all Authorized Claimants, multiplied by the total amount in the Net Settlement Fund.

Id. If any Authorized Claimant's Distribution Amount calculates to less than $10.00, it will not be included in the calculation and no distribution will be made to such Authorized Claimant. *Id.* To the extent that a Claimant did not hold Partnership common units as of the close of trading on any of the Quarterly Distribution Holding Dates set forth above, that Claimant did not suffer compensable losses pursuant to this Plan of Allocation and, for this reason, will not be eligible for recovery from the Net Settlement Fund. *Id.* at ¶¶49-51.

In evaluating a Plan of Allocation, the Court gives substantial weight to counsel's opinion. *See CME Grp., Inc. v. Chicago Bd. Options Exch., Inc.*, 2009 WL 1547510, *10 (Del. Ch. Jun. 3, 2009). Although a plan of allocation must be "fair, reasonable and adequate," it "does not need to compensate Class members equally to be acceptable." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009). Thus, "[a] reasonable plan may consider the relative values of competing claims."

Id. Here, the Plan of Allocation is fair, reasonable and adequate.

IV. THE REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES IS REASONABLE AND SHOULD BE APPROVED

For prosecuting this litigation on a fully contingent basis for more than a year and a half and obtaining a significant monetary benefit for unitholders, Co-Lead Counsel requests that they be awarded attorneys' fees in the amount of $6,875,000, plus $456,468 in expenses. An award of attorneys' fees and expenses is warranted where, as here, counsel's "efforts result in the creation of a common fund." *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989) (internal citations omitted).

"The determination of any attorney fee award is a matter within the sound judicial discretion of the Court of Chancery." *Americas Mining Corp.*, 51 A.3d at 1254 (upholding fee award of over $304 million); *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980). In exercising its discretion, this Court will consider: (1) the benefits achieved in the action; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel. *Sugarland*, 420 A.2d at 149-50; *Ams. Mining Corp.* 51 A.3d at 1254; *In re Plains Res. Inc. S'holders Litig.*, 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005). Each of these factors supports the award of counsel's requested fees here.

A. The Litigation Conferred Substantial Benefits on the Proposed Class

The benefits achieved through the Litigation and Settlement is the factor accorded the greatest weight in determining an appropriate fee award. *See Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("*Sugarland's* first factor is indeed its most important – the results accomplished for the benefit of the shareholders"). Here, solely as a result of this Litigation, the Settlement Class will receive an aggregate cash benefit of $27.5 million, net of attorneys' fees and expenses.

Co-Lead Counsel's fee request in connection with the Settlement Fund is 25%, well within the parameters of awards that the Court of Chancery has found to be reasonable in other stockholder litigation. *See*, *e.g.*, *Gatz v. Ponsoldt*, 2009 WL 1743760, at *3 (Del. Ch. June 12, 2009) (awarding 33% and finding that it was "within the range of reasonable fee awards in other class action cases"); *In re TD Banknorth S'holders Litig.*, C.A. No. 2557-VCL, at 12-14 (Del. Ch. June 25, 2009) (ORDER) (awarding 27.5% of the $50 million settlement fund, plus nearly $1 million in expenses for pre-trial settlement);[17] *In re ACS S'holders Litig.*, Cons.

[17] *See also In re Berkshire Realty Co., Inc. S'holder Litig.*, C.A. No. 17242 (Del. Ch. Aug. 10, 2004) (ORDER) (fee equal to 30% of $6.25 million fund, plus expenses); *In re Intek Global Corp. S'holders Litig.*, C.A. No. 17207-VCS (Del. Ch. Apr. 24, 2000) (ORDER) (fee equal to 33% of $4.3 million settlement) (cited in *Seinfeld*, 847 A.2d at 357 n.31); *In re Home Shopping Network, Inc. S'holder Litig.*, C.A. No. 12868 (Del. Ch. Jan. 24, 1995) (ORDER) (fee equal to 30% of

C.A. No. 4940-VCP (Del. Ch. Aug. 24, 2010) (ORDER) and Stip. of Settlement at 16 (Del. Ch. May 19, 2010) (awarding 25% plus expenses out of $69 million settlement fund); *In re Chaparral Res., Inc. S'holders Litig*., Cons. C.A. No. 2001-VCL (Del. Ch. Mar. 13, 2008) (ORDER) (awarding attorneys' fees of $12,250,000, or 33% of $36,780,554 settlement, and expenses of $1,089,298.10); *In re Telecorp PCS, Inc. S'holders Litig.*, C.A. No. 19260-VCS (Del. Ch. Aug. 20, 2003) (ORDER) and Settlement Tr. at 102 (Del. Ch. Aug. 20, 2003) (awarding 30% of $47.5 million fund); *In re Del Monte Foods Co. S'holders Litig.*, C.A. No. 6027-VCL (TRANSCRIPT) at 57 (Del. Ch. Dec. 1, 2011) (awarding $22.3 million in aggregate fees and expenses, and observing that the amount "represents approximately 25 percent of the $89.4 million consideration, which is an appropriate percentage").

B. The Efforts of Counsel

The time and effort of counsel serves as a "backstop check" on the reasonableness of a fee award. *Franklin Balance Sheet,* 2007 WL 2495018, at *14; *see also In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *12 (Del. Ch. June 27, 2011) (time and effort serves as a "cross-check"). This

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$13.925 million settlement fund); *In re Best Lock Corp. S'holders Litig.*, C.A. No. 16281-CC, at 11-12 (Del. Ch. Oct. 16, 2002) (TRANSCRIPT) (30% of projected fund worth $55 to $71 million resulting from pre-trial settlement).

factor has two separate components – time and effort – with effort being the more important factor of the two. *Del Monte*, 2011 WL 2535256, at *12-13.

In total, Co-Lead Counsel and Additional Counsel expended 13,887.1 hours in the prosecution and settlement of this Action. *See* Affidavit of Geoffrey C. Jarvis in Support of Lead Plaintiff's Application for an Award of Attorneys' Fees and Expenses ("Jarvis Aff.") (attached to Haendler Aff. as Ex. R) at ¶2; Affidavit of Mark Lebovitch in Support of Motion for an Award of Attorneys' Fees and Expenses ("Lebovitch Aff.") (attached to Haendler Aff. as Ex. S) at ¶3; Affidavit of James S. Notis in Support of Motion for an Award of Attorneys' Fees and Expenses ("Notis Aff.") (attached to Haendler Aff. as Ex. T) at ¶2; and Affidavit of George C. Aguilar in Support of Motion for an Award of Attorneys' Fees and Expenses ("Aguilar Aff.") (attached to Haendler Aff. as Ex. U) at ¶2.

The services provided by Co-Lead Counsel and Additional Counsel included: investigating the relevant facts; drafting a detailed complaint; reviewing and analyzing over 246,000 pages of discovery from Defendants; taking depositions, opposing a motion to dismiss; researching the applicable law to formulate litigation and negotiation strategies; working with financial experts to evaluate the liability and damages claims; negotiating the terms of the Settlement; and preparing the Settlement documents.

As explained in *Del Monte*, more important than the hours is "what plaintiffs' counsel actually did." In that case, as in this case, "the answer is 'quite a bit.'" 2011 WL 2535256, at *13. Co-Lead Counsel submit that the services they rendered were of a high quality, and were of a sort that could have been rendered only by lawyers who are well-qualified and highly experienced in prosecuting investor litigation.

Co-Lead Counsel also expended their time efficiently. As reflected in the affidavits of counsel, Co-Lead Counsel invested substantial time and expenses to prosecute this Action, and the requested fee is reasonable when viewed in comparison to these hours and expenses. At Co-Lead Counsel's current hourly billing rates, the "lodestar" value of their time is $6,024,793.75. *See* Jarvis Aff. at ¶2; Lebovitch Aff. at ¶3; Notis Aff. at ¶3; Aguilar Aff. at ¶2. Accordingly, the fee represents approximately 1.14 times the lodestar. The effective hourly rate such award would represent is approximately $495. This hourly rate is well below the awards approved by the Court in comparable cases, especially when considering the contingent nature of the engagement. *See, e.g., Franklin Balance Sheet*, 2007 WL 2495018, at *14 (awarding a fee that represented an effective rate of $4,023 per hour in a breach of fiduciary duty case that created a $32 million common fund); *In re NCS Healthcare S'holders Litig.*, 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (fee represented hourly rate of nearly $3,030 per hour); *Dragon v.*

Perelman, C.A. No. 15101, (TRANSCRIPT) at 48, 51 (Del. Ch. Aug. 29, 1997) (fee represented hourly rate of nearly $3,500); *In re Digex, Inc. S'holder Litig.*, C.A. No. 18336, (TRANSCRIPT) at 141-47 (Del. Ch. Apr. 6, 2001) (lodestar multiplier of 9); *In re Lin Broad. Corp. S'holders Litig.*, Cons. C.A. No. 14039 (ORDER) (Del. Ch. Sept. 15, 1995 (fee represented hourly rate of more than $3,800).

C. The Contingent Nature of the Fee

Co-Lead Counsel undertook this representation on a contingency basis, with the understanding that they would devote many hours of hard work to the prosecution of this Action without any assurance of receiving compensation for their services, or even reimbursement of out-of-pocket expenses. Additionally, due to the complexity of the issues in the case, Co-Lead Counsel faced a very real risk that they would not recover anything for their efforts. *See, e.g.*, *Del Monte*, 2011 WL 2535256, at *13 (contingency risk plaintiffs' counsel undertook in refusing the "relatively safe course of settling routinely for disclosures" constituted the "assumption of *bona fide* contingency risk" and "supports an award at the higher end of the range'); *In re Emerson Radio S'holder Deriv. Litig.*, 2011 WL 1135006, at *6 (Del. Ch. Mar. 28, 2011) ("plaintiffs' counsel here did not get into the case with an obvious and well-marked exit in sight. The defendants litigated vigorously, had strong defenses, and could have forced the plaintiffs to go the

distance. Accordingly, in undertaking this representation, plaintiffs' counsel incurred true contingent fee risk."). Delaware courts recognize that where, as here, counsel's compensation is contingent on achieving a successful result, a premium over counsel's hourly rate is appropriate. *See Chrysler Corp.v. Dann*, 223 A.2d 384, 389 (Del. 1966) (affirming award of attorneys' fees in part "in consideration of the contingent nature of the litigation").

D. The Standing and Ability of Counsel

Co-Lead Counsel are known to this Court and among the foremost firms in the nation representing investors in Delaware corporate litigation. The fees sought reflect their standing, experience and the benefits they delivered to the Class. Co-Lead Counsel had to, and did, employ their full set of skills in hard-fought litigation against a formidable team of defense lawyers. Thus, the requested fee award is reasonable.

E. The Expenses Incurred Were Reasonable

Lead Plaintiff requests reimbursement of $456,468 in out-of-pocket expenses incurred by Co-Lead Counsel and Additional Counsel. As detailed in the accompanying affidavits of Co-Lead Counsel and Additional Counsel, 74.6% of these expenses ($340,574) were expert fees. Jarvis Aff. at ¶4; Lebovitch Aff. at ¶¶5-6; Notis Aff. at ¶3; Aguilar Aff. at ¶3. The remaining expenses include court

reporters for depositions, fees from the Court of Chancery, reasonable travel fees, duplication fees, and electronic discovery.

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully submits that the proposed Settlement is fair, reasonable, and adequate and should be approved. In addition, Co-Lead Counsel's request for a Fee and Expense Award of $6,875,000, and expense reimbursement of $456,468 should be granted.

Dated: November 10, 2015

Respectfully submitted,

GRANT & EISENHOFER P.A.

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