IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:12-cv-00292-RM-KMT

In re MOLYCORP, INC. SECURITIES LITIGATION

LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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SECONDARY AUTHORITIES

Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") and Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), Court-appointed Lead Counsel for Lead Plaintiffs Randall Duck, Jerry W. Jewell, individually and as trustee of the Jerry W. Jewell Trust, Philip Marner and Donald E. McAlpin (collectively, "Lead Plaintiffs"), respectfully submit this memorandum of points and authorities in support of their motion[1] for (i) an award of attorneys' fees in the amount of 30% of the Settlement Amount and expenses incurred by Plaintiffs' Counsel[2] during the course of the Litigation in the amount of $249,327.83, plus interest on both amounts at the same rate as earned on the Settlement Fund; and (ii) reimbursement of costs and expenses directly related to Plaintiffs' representation of the Class, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-4(a)(4), in the aggregate amount of $10,251.69.[3]

I. INTRODUCTION

After more than four years of litigation, involving an extensive investigation into the Class's claims, a bankruptcy proceeding that completely altered the landscape of the Litigation, successful opposition of Defendants' motion to dismiss the operative complaint and a motion for summary judgment, and targeted fact discovery, Lead Counsel have successfully negotiated a $20.5 million cash settlement with Defendants.

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

[2] The term Plaintiffs' Counsel refers collectively to (i) Lead Counsel – Kessler Topaz and Robbins Geller, (ii) Court-appointed liaison counsel, Berens Law LLC ("Berens"), and (iii) Lowenstein Sandler LLP ("Lowenstein"), bankruptcy counsel for Lead Plaintiffs in connection with the chapter 11 bankruptcy cases of Molycorp, Inc. and its affiliated chapter 11 debtors.

[3] All capitalized terms that are not defined herein have the same meanings ascribed to them in the Stipulation of Settlement dated as of October 27, 2016 (the "Stipulation") (Dkt. No. 234) and the Joint Declaration of Trig R. Smith and Matthew L. Mustokoff in Support of Motions for Final Approval of Class Action Settlement, Plan of Allocation of Settlement Proceeds, and an Award of Attorneys' Fees and Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. Unless otherwise noted, all emphasis in quotations is added, and citations and footnotes are omitted.

The Settlement is a highly favorable result for the Class that will bring to a close contentious and challenging litigation. By this Settlement, Lead Counsel avoid the substantial risks of continued litigation, while securing a recovery representing approximately 22% of the Class's total recoverable damages as estimated by Lead Plaintiffs' damages consultants – a recovery nearly ***four times*** greater than the estimated damages recovered in recent securities class actions.[4] Notably, in the Tenth Circuit the Settlement is nearly ***14 times*** greater than the estimated damages recovered in securities class actions from 2007 through 2016, and more than double the median settlement amount for the same years.[5]

The Settlement was achieved through the diligent efforts of Lead Plaintiffs and their counsel. Among other work, Lead Counsel: (i) conducted a thorough factual investigation into the Class's claims, including reviewing and analyzing voluminous publicly available information concerning Molycorp, Inc. ("Molycorp") and the Defendants, and conducting interviews of several former Molycorp employees and other persons with knowledge of relevant information; (ii) drafted two detailed complaints based on this investigation; (iii) conducted extensive research regarding the law applicable to the claims asserted in the Litigation and Defendants' potential defenses thereto; (iv) opposed two rounds of motions to dismiss filed by Defendants; (v) opposed a motion for summary judgment by the Individual Defendants; (vi) conducted targeted discovery, including litigating a motion to compel discovery from the United States Securities and Exchange Commission ("SEC") in connection with its investigation into the accuracy of certain of Molycorp's public disclosures, reviewing and analyzing thousands of pages of technical mining related documents and data, and negotiating with Molycorp's counsel for the production of responsive information; (vii) prepared

[4] *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review and Analysis* at 8, Fig. 7 (Cornerstone Research 2017) ("Cornerstone Research") (attached as Ex. A to the Joint Decl.) (finding median securities settlement in 2016 recovered 5.8% of estimated damages where damages ranged from $50-$124 million).

[5] *See* Cornerstone Research at 23, App. 3 (finding median securities settlement in the Tenth Circuit for years 2007-2016 to be 1.6% of estimated damages and the median settlement amount to be $8.4 million).

comprehensive responses to discovery propounded by Defendants; (viii) consulted with experts and consultants; (ix) navigated Molycorp's bankruptcy proceedings with the assistance of experienced bankruptcy counsel; and (x) engaged in protracted and hard-fought settlement negotiations, including two separate formal mediation sessions with an experienced and highly respected neutral mediator. *See generally* Joint Decl., ¶¶4, 18-74.

In addition, the Settlement is particularly favorable when considered in light of the significant risks confronted in the Litigation. Throughout the case Defendants raised substantial defenses to both liability and damages – one of their main challenges being to Lead Plaintiffs' ability to prove falsity. While Lead Counsel are confident in their ability to prove falsity – that heavy rare earth elements ("HREEs") were not present at Molycorp's Mountain Pass facility – Defendants have maintained just the opposite. Moreover, even if Plaintiffs established liability, proving loss causation and resulting damages was equally risky. Defendants vigorously disputed that the misrepresentations alleged by Plaintiffs impacted the prices of Molycorp's common and preferred stock during the Class Period and that the revelation of the alleged fraud proximately caused Molycorp's stock prices to decline.

The result of Lead Counsel's efforts is an all-cash Settlement of $20.5 million, which has been deposited into escrow for the benefit of the Class. It is against this backdrop that Lead Counsel respectfully submit their request for a fee award of 30% of the Settlement Amount and expenses in the amount of $249,327.83. As discussed herein, the requested fee is fair and reasonable, particularly in light of the highly favorable recovery obtained for the Class, is well within the range of percentage attorneys' fees awarded in securities class actions and other comparable class actions within this Circuit and is fully supported by the Tenth Circuit's "*Johnson* factors." *See* §II.C. below. In total, Plaintiffs' Counsel and their paraprofessionals spent over 7,000 hours in prosecuting this Litigation for an aggregate lodestar of $4,257,935.50. A 30% fee award results in a 1.4 lodestar multiplier, which is at or below the range of multipliers approved in this Circuit. *See, e.g. In re*

Qwest Commc'ns Int'l, Inc. Sec. Litig., No. 01-1451-REB-CBS, 2006 U.S. Dist. LEXIS 71267, at *21 (D. Colo. Sept. 29, 2006) ("[L]ead counsel who create a common fund for the benefit of a class are rewarded with fees that often are ***at least*** two times the reasonable lodestar figure, and in some cases reach as high as five to ten times the lodestar figure."); *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21140, at *7-*8 (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").

The expenses requested by Lead Counsel are also reasonable and were necessary to Plaintiffs' Counsel's prosecution of this four-plus-year Litigation. Lead Counsel's request for fees and expenses is fully supported by Lead Plaintiffs.[6] In addition, in connection with Lead Counsel's fee and expense request, certain Plaintiffs are requesting reimbursement of their costs and expenses in connection with their representation of the Class in an aggregate amount of $10,251.69 pursuant to the PSLRA, 15 U.S.C. §78u-4(a)(4).

Pursuant to the Court's Order Preliminarily Approving Settlement, Approving Notice to the Class, and Scheduling a Final Approval Hearing dated March 6, 2017 (the "Preliminary Approval Order") (Dkt. No. 239), more than 154,700 copies of the Notice have been mailed to potential Class Members and their nominees, and the Summary Notice has been published in *The Wall Street Journal* and transmitted over the *PR Newswire*.[7] The Notice advises recipients that Lead Counsel will apply to the Court for attorneys' fees of 30% of the Settlement Amount and expenses not to exceed $600,000, plus interest thereon, to be paid from the Settlement Fund. The Notice also advises that Lead Plaintiffs may seek up to $28,000 in the aggregate for their costs and expenses

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[6] *See* Declarations of Lead Plaintiffs filed herewith.

[7] *See* Declaration of Carole K. Sylvester Regarding Dissemination of the Notice and Proof of Claim, Publication of the Summary Notice and Requests for Exclusion Received to Date dated May 3, 2017 (the "Sylvester Decl."), ¶¶11, 14, filed herewith.

incurred in representing the Class. While the deadline set by the Court for Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objections have been received. Joint Decl., ¶16.[8]

For all the reasons set forth herein, Lead Counsel respectfully request that the Court approve their request for attorneys' fees and expenses, including reimbursement of the costs and expenses of certain Plaintiffs in connection with their representation of the Class.

II. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE

A. Lead Counsel Are Entitled to an Award of Attorneys' Fees from the Common Fund

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); *US Airways, Inc. v. McCutchen*, __ U.S. __, 133 S. Ct. 1537, 1550 (2013). The purpose of this common fund doctrine is to fairly and adequately compensate class counsel for services rendered and to prevent unjust enrichment of persons who benefit from a lawsuit without bearing its cost. *See Boeing*, 444 U.S. at 478. The Tenth Circuit has explicitly recognized this Court's right to award attorneys' fees from a common fund in situations where, as here, the common fund is the result of the attorney's successful prosecution of the action. *See, e.g.*, *Gottlieb v. Barry*, 43 F. 3d 474, 482 (10th Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988); *Qwest*, 2006 U.S. Dist. LEXIS 71267, at *10.

Courts have also recognized that, in addition to providing just compensation, awards of attorneys' fees from a common fund should "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged

[8] The deadline to object to any aspect of the Settlement, including Lead Counsel's fee and expense request, is May 22, 2017. Should any objections be received, Lead Counsel will address them in their reply papers to be filed with the Court on June 2, 2017.

misconduct of a similar nature." *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8. 2010); *see also In re Crocs, Inc. Sec. Litig.*, No. 07-cv-02351-PAB-KLM, 2014 WL 4670886, at *5 (D. Colo. Sept. 18, 2014) ("Federal securities class actions require plaintiffs' counsel to expend substantial time and effort with no guarantee of success . . . . In light of these difficulties, 'public policy supports granting attorneys' fees that are sufficient to encourage plaintiffs' counsel to bring securities class actions that supplement the efforts of the SEC.'"). Moreover, compensating plaintiffs' counsel for the risks they take in bringing these actions is important because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y 2008).

B. The Requested Attorneys' Fees Are Reasonable as a Percentage of the Common Fund

For their efforts in creating a $20.5 million common fund, Lead Counsel seek a reasonable percentage of the fund recovered as attorneys' fees. Awarding attorneys' fees as a percentage of a common fund is entirely consistent with well-established Tenth Circuit precedent. In *Brown*, the Tenth Circuit affirmed the propriety of awarding attorneys' fees on a percentage basis in a common fund case. *Brown*, 838 F.2d at 454-55. Cases following *Brown* confirm a "***preference***" in this Circuit for the percentage method. For example, in *Gottlieb*, the court stated:

> In our circuit, following *Brown* and *Uselton*, either [the percentage or lodestar] method is permissible in common fund cases; however, *Uselton* implies a preference for the percentage of the fund method.

43 F.3d at 483;[9] *see also Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *4 ("[w]hile enhanced lodestar cases remain instructive, the Tenth Circuit has expressed 'a preference for the percentage of the fund method'").[10] The text of the PSLRA also supports awarding attorneys' fees in securities cases using

[9] *See also Uselton v. Commercial Lovelace Motor Freight*, 9 F.3d 849, 853 (10th Cir. 1993).

[10] Courts have recognized the advantages of the percentage approach over the alternative lodestar approach. *See Gottlieb*, 43 F.3d at 484 (noting that a percentage method for setting a fee "is less

the percentage method, providing that "[t]otal attorneys' fees and expenses awarded by the court for the plaintiff class shall not exceed ***a reasonable percentage of the amount . . . actually paid to the class.***" 15 U.S.C. §78u-4(a)(6). The percentage method also is consistent with arrangements in the private marketplace for contingency cases, in which individual clients typically agree to a fee based on the amount recovered. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984).[11]

Lead Counsel's 30% fee request falls within the range of fee percentages awarded in securities class actions and other comparable class actions in this Circuit. In *Brown*, the Tenth Circuit recognized that a typical percentage award in a common fund case is around one-third of the recovery. 838 F.2d at 455 n.2. In general, district courts in this Circuit agree. *See, e.g.*, *CompSource Okla v. BNY Mellon, N.A.*, No. CIV-08-469-KEW, 2012 U.S. Dist. LEXIS 185061, at *23 (E.D. Okla. Oct. 25, 2012) ("25% is on the low end of the range of acceptable fee awards in common fund cases which rage between 22% and 37%, and more in some cases"); *Lucken Family Ltd. P'ship, LLLP v.*

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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"). Further, "[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.*, No. 04-3801 (JRT/FLN), 2006 U.S. Dist. LEXIS 23191, at *10 (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. Nov. 15, 2006) ("The percentage method is preferred in some jurisdictions, including the Tenth Circuit, because this method rewards efficient and prompt resolutions of class actions."). "Simply put, it is much easier and far less demanding of scarce judicial resources to calculate a percentage of the fund fee than to review hourly billing practices over a long, complex litigation." *In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407, 1411 (D. Wyo. 1998).

[11] Supporting authority for the percentage method in other circuits is overwhelming and virtually every circuit court has approved the use of the percentage method of awarding fees in common fund cases. *See, e.g.*, *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Rawlings v. Prudential-Bache Props.*, 9 F.3d 513, 515-17 (6th Cir. 1993); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 564-65 (7th Cir. 1994); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991) ("After reviewing *Blum*, the [Third Circuit] Task Force Report, and . . . cases from other circuits, we believe that the percentage of the fund approach is the better reasoned in a common fund case."); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) (percentage of the fund recovered is the ***only*** permissible measure of awarding fees in common fund cases).

Ultra Res., Inc., No. 09-cv-01543-REB-KMT, 2010 WL 5387559, at *5 (D. Colo. Dec. 22, 2010) ("The customary fee awarded to class counsel in a common fund settlement is approximately one third of the total economic benefit bestowed on the class."); *Anderson v. Merit Energy Co.*, No. 07-CV-00916-LTB-BNB, 2009 U.S. Dist. LEXIS 100681, at *10 (D. Colo. Oct. 20, 2009) (same); *Rasner v. FirstWorld Commc'ns, Inc.*, No. 00-K-1376, slip op. (D. Colo. Jan. 19, 2005) (awarding 33% of recovery), attached as Exhibit 1 to the Declaration of Trig R. Smith in Support of an Award of Attorneys' Fees and Expenses ("Smith Decl."), filed herewith; *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *9 (awarding 30% fee and noting "[f]ees for class action settlements generally range from 20% - 50%" and "class action fee awards are typically 30% of the fund created by the settlement"); *Schwartz v. Celestial Seasonings, Inc.*, No. 95-K-1045, slip op. (D. Colo. Apr. 25, 2000) (awarding 33-1/3% of recovery), Smith Decl., Ex. 2; *Queen Uno Ltd. P'ship. v. Coeur D'Alene Mines Corp.*, No. 97-WY-1431-CB, slip op. (D. Colo. Aug. 11, 1999) (awarding 30% of recovery), Smith Decl., Ex. 3; *In re Einstein Noah Bagel Corp. Sec. Litig.*, No. 97-N-1614, slip op. (D. Colo. June 4, 1999) (awarding 30% of recovery), Smith Decl., Ex. 4; *In re Intelcom Grp., Inc. Sec. Litig.*, No. 95-D-1166, slip op. (D. Colo. Mar. 21, 1997) (awarding 33-1/3% of recovery), Smith Decl., Ex. 5; *Cimarron Pipeline Constr., Inc. v. Nat'l Council on Compensation Ins.*, No. CIV 89-822-T, 1993 U.S. Dist. LEXIS 19969, at *4 (W.D. Okla. June 8, 1993) ("Fees in the rage of 30-40% of any amount are common in complex and other cases taken on a contingent fee basis.").

As the foregoing demonstrates, Lead Counsel's fee request is consistent with attorneys' fees awarded in securities class actions and other complex actions.

C. The Circumstances of the Litigation Examined in Light of the Relevant *Johnson* Factors Justify the Fee Award

The Tenth Circuit has recognized that in determining the appropriate percentage of attorneys' fees in common fund cases, the court should be informed by an analysis of the factors articulated by the Fifth Circuit in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See also Brown*, 838 F.2d at 454-55; *Uselton*, 9 F.3d at 853; *Lane v. Page*, 862 F. Supp. 2d 1182, 1251

(D.N.M. 2012) (the Tenth Circuit "has adopted" the Fifth Circuit Test in *Johnson*). The *Johnson* factors are as follows:

> (1) The time and labor required. . . . (2) The novelty and difficulty of the questions. . . . (3) The skill requisite to perform the legal services properly. . . . (4) The preclusion of other employment. . . . (5) The customary fee. . . . (6) Whether the fee is fixed or contingent. . . . (7) Time limitations imposed by the client or the circumstances. . . . (8) The amount involved and results obtained. . . . (9) The experience, reputation, and ability of the attorneys. . . . (10) The "undesirability" of the case. . . . (11) The nature and length of the professional relationship with the client. . . . [and] (12) Awards in similar cases.

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 in every case. *See Gottlieb*, 43 F.3d at 483 n.4; *Lane*, 862 F. Supp. 2d at 1236 ("[R]arely are all of the *Johnson* factors applicable.").[12] As set forth below, application of the relevant *Johnson* factors supports Lead Counsel's fee request.

1. The Amount Involved and the Results Obtained

While listed as the eighth *Johnson* factor, the result achieved for the class is the most important in determining an appropriate fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained"); *Brown*, 838 F.2d at 456 (in a common fund case the results obtained may be given greater weight); *Gottlieb v. Wiles*, 150 F.R.D. 174, 181 (D. Colo. 1993) (proper focus in awarding fees is amount of restitution made to class), *rev'd on other grounds sub nom. Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) ("the amount of recovery, and end result achieved are of primary importance, for these are the true benefit to the client").

Through their efforts in prosecuting and resolving this Litigation, Lead Counsel have obtained a recovery of $20.5 million for the Class. Lead Counsel overcame significant challenges to

[12] *Johnson* factors 5 and 12, the customary fee and awards in similar cases, are two factors that are often assessed in tandem (*see Crocs*, 2014 WL 4670886, at *3) and are addressed *supra* in §II(B). In addition, the following *Johnson* factors do not pertain to this Litigation – preclusion of other employment, time limitations imposed by the client or the circumstances, and the nature and length of the professional relationship with the client, and are not discussed herein.

obtain this result. Indeed, the Court's dismissal of Lead Plaintiffs' Consolidated Class Action Complaint for Violations of Federal Securities Laws ("Consolidated Complaint") and Molycorp's Chapter 11 bankruptcy filing and subsequent dismissal from the case heightened the risk of this Litigation. Moreover, the Settlement avoids the risks, along with the costs and delays, of continued litigation, *i.e.*, class certification, additional motions for summary judgment, a lengthy trial and subsequent appeals.

The Settlement Amount also represents a substantial percentage of the Class's estimated damages. Based on Lead Plaintiffs' damages consultants' analyses, the Settlement Amount represents approximately 22% of the Class's total recoverable damages of $93.3 million. Joint Decl., ¶81. As noted above, this percentage recovery is significantly above most securities class action settlements, or nearly ***four times*** greater than the amount of estimated damages recovered in recent cases. Moreover, if Defendants were to prevail on any of their arguments at trial, the Class's total recoverable damages would likely be reduced, and, as such, the percentage of damages the Settlement Amount represents could be viewed as even greater. In evaluating proposed settlements, other courts have found much smaller percentage recoveries to be reasonable.[13]

Without Lead Counsel's dedication and hard work throughout the course of this four-plus-year Litigation, this recovery for the Class would not have been possible. Thus, this factor strongly supports Lead Counsel's fee request.

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[13] *See, e.g.*, *Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-cv-20880-UU, 2016 U.S. Dist. LEXIS 144133, at *9 (S.D. Fla. Oct. 17, 2016) (approving settlement representing 5.5% of the maximum damages and noting that the settlement is "an excellent recovery, returning more than triple the average settlement in cases of this size"); ***In re Merrill Lynch & Co. Research Reports Sec. Litig.***, No. 02 MDL 1484, 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Feb. 1, 2007) ("The [$40.3] settlement . . . represents a recovery of approximately 6.25% of estimated damages. This is at the ***higher end of the range*** of reasonableness of recovery in class action securities litigations."); ***Hicks v. Morgan Stanley***, No. 01 Civ. 10071(RJH), 2005 U.S. Dist. LEXIS 24890, at *19 (S.D.N.Y. Oct. 24, 2005) (finding settlement representing 3.8% of plaintiffs' estimated damages to be within range of reasonableness).

2. The Novelty and Difficulty of the Legal and Factual Issues

The novelty and difficulty of the issues in a case is a significant factor to be considered in making a fee award. *See Johnson*, 488 F.2d at 718. Courts have long recognized that securities class actions present inherently complex and novel issues. *See Miller v. Woodmoor Corp.*, No. 74-F-988, 1978 U.S. Dist. LEXIS 15234, at *12 (D. Colo. Sept. 28, 1978) ("Despite years of litigation, the area of securities law has gained little predictability. There are few "routine" or "simple" securities actions. Courts are continually modifying and/or reversing prior decisions in an attempt to interpret the securities law in such a way as to follow the spirit of the law while adapting to new situations which arise."); *see also In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009) ("The very nature of a securities fraud case demands a difficult level of proof to establish liability. Elements such as scienter, reliance, and materiality of misrepresentation are notoriously difficult to establish."); *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities action have become more difficult from a plaintiff's perspective in the wake of the PSLRA"); *Lane*, 862 F. Supp. 2d at 1252-53 ("There are 'few simple class action cases involving securities law' . . . ."). As discussed in the Joint Declaration and memorandum in support of the Settlement, substantial risks and uncertainties in this type of litigation under the PSLRA, and in this case in particular, made it far from certain that any recovery, let alone $20.5 million, would ultimately be obtained.

First, in addition to the complexities of securities cases generally, this Litigation involved issues related to the rare earth mining industry and, going forward, Plaintiffs would be required to rely heavily on experts in this industry, as well as experts typically retained in securities class actions. This Litigation also involved a bankrupt corporate defendant no longer a party to the case. Indeed, Molycorp's bankruptcy had already injected an additional level of complexity into the parties' discovery efforts (*see* Joint Decl., ¶¶58-65) and would continue to complicate Lead Counsel's efforts going forward.

Second, as the Court is aware, this Litigation involved a number of complex and disputed

questions of law and fact that placed the ultimate outcome of the case in doubt. With respect to liability, Defendants vigorously challenged Plaintiffs' ability to prove falsity as to the presence of terbium and dysprosium at Molycorp's Mountain Pass facility. In this regard, the parties disagreed regarding whether falsity exists if there are trace amounts of HREEs at Mountain Pass, and whether any sale of those elements – no matter how small – would make them "principal products." The risk was also present that the Court or a jury might find, as Defendants had asserted throughout this Litigation, that certain of their allegedly false and misleading statements were protected from liability by the Safe Harbor provision of the PSLRA. *Id.*, ¶9.

Defendants also argued that Plaintiffs would be unable to establish loss causation and, in particular, that the allegedly misrepresented information – the lack of HREEs at Molycorp's Mountain Pass facility – was ***never*** publicly disclosed, or that such disclosure caused Molycorp's stock prices to fall. *Id.*, ¶9. Further, Defendants argued that the decrease in the prices of Molycorp's stock was due to factors other than the existence of HREEs, such as contemporaneously reported financial results that were weaker than the market had anticipated. Accordingly, defeating Defendants' arguments regarding loss causation and damages at summary judgment, trial, and possibly on appeal would have been time-consuming and risky.[14]

3. The Skill Requisite to Perform the Legal Service Properly and the Experience, Reputation and Ability of Counsel

The skill required and the experience, reputation, and ability of the attorneys, also support the requested fee award. *Qwest*, 2006 U.S. Dist. LEXIS 71267, at *18-*19 ("Particularly in a case as complex as this [securities class action]. . .[t]his factor carries significant weight because the plaintiff

[14] *See In re Thornburg Mortg., Inc.*, 912 F. Supp. 2d 1178, 1242 (D.N.M. 2012) ("Damages in this case, as is common in securities class actions, would likely have been reduced to a 'battle of the experts,' and it is virtually impossible to predict with any certainty which testimony would be credited."); *see also Rowles v. Chase Home Fin., LLC*, No. 9:10-cv-01756-MBS, 2012 U.S. Dist. LEXIS 3264, at *7 (D.S.C. Jan. 10, 2012) (holding that the parties' "dispute [over damages] underscores not only the uncertainty of the outcome but also why the Court finds the [settlement] to be fair, reasonable, adequate, and in the best interests of the Class Members.").

class likely would not have obtained any relief without the assistance of counsel with a high level of skill and expertise."). Lead Counsel have extensive experience prosecuting securities class actions and other complex litigation. Joint Decl., ¶¶75, 93; *see also* firm resumes attached as Exhibits C and G to the Mustokoff and Smith Fee Declarations, respectively. That experience and skill was demonstrated during the prosecution and resolution of this Litigation. *See In re Checking Account*, 830 F. Supp. 2d 1330, 1359 (S.D. Fla. 2011) ("Class Counsel took on a great deal of risk in bringing this case, and turned a potentially empty well into a significant judgment. ***That kind of initiative and skill must be adequately compensated to insure that counsel of this caliber is available to undertake these kinds of risky but important cases in the future.***"). Court-appointed liaison counsel, Berens, and bankruptcy counsel, Lowenstein, are also skilled complex litigation firms that greatly assisted Lead Counsel in the successful prosecution of this matter. *See* firm resumes attached to the Berens Decl. and as Exhibit A to the Etkin Fee Declaration.

The quality of opposing counsel is also important in evaluating the quality of services rendered by Lead Counsel. *See Qwest*, 2006 U.S. Dist. LEXIS 71267, at *18 (finding that counsel for defendants were also "represented by lawyers of similar expertise and experience"). Defendants in this case were represented by skilled counsel from top-tier defense firms Gibson, Dunn & Crutcher LLP, Cooley LLP and Simpson Thacher & Bartlett LLP. These firms have considerable experience in litigating complex class actions and spared no effort in vigorously defending their respective clients. Notwithstanding this formidable opposition, Lead Counsel's ability to present a strong case and to demonstrate their willingness and ability to continue to prosecute the Litigation through trial and inevitable appeals helped secure the Settlement.

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

A determination of a fair fee must include consideration of the contingent nature of the fee and the significant risks of non-recovery. *See Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *9-*10; *see also Tuten v. United Airlines, Inc.*, 41 F. Supp. 3d 1003, 1009 (D. Colo. 2014) ("Class Counsel

took the case on a contingent basis, which permits a higher recovery to compensate for the risk of recovering nothing for their work."); *Qwest*, 2006 U.S. Dist. LEXIS 71267, at *22 (a contingent fee "is designed to reward counsel for taking the risk of prosecuting a case without payment during the litigation, and the risk that the litigation may be unsuccessful"). Here, Lead Counsel prosecuted this Litigation on a wholly contingent basis and bore all the risks of litigating the case through trial and likely appeals. This risk was heightened following Molycorp's Chapter 11 bankruptcy filing and subsequent dismissal from the case. Moreover, Lead Counsel understood from the outset that they were embarking on a complex, expensive and potentially lengthy litigation, which could (and did) require the investment of hundreds of thousands of dollars and many thousands of hours of attorney time, with no guarantee of ever being compensated for the investment of such time and resources. In undertaking this risk, Lead Counsel were obligated to, and did, ensure that sufficient resources were dedicated to prosecuting this Litigation.

The risks of contingent litigation are 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. The Supreme Court has shown great interest in securities cases over the past seven years. *See, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, __ U.S. __, 135 S. Ct. 1318 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, __ U.S. __, 134 S. Ct. 2398 (2014); *Comcast Corp. v. Behrend*, __ U.S. __, 133 S. Ct. 1426 (2013); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). As a result of these and other developments, many cases are lost after thousands of hours have been invested in successfully opposing motions to dismiss and pursuing discovery. Indeed, other cases demonstrate the real risks associated with such developments. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 524, 533 (S.D.N.Y. 2011) (after a verdict for class plaintiffs finding Vivendi acted recklessly with respect to 57 statements, granting defendants' motion for judgment as a matter of law following change of law in *Morrison*).

Lead Counsel are personally well aware of the great risks of contingent litigation. For example, in *In re Oracle Corp. Sec. Litig.*, No. C 01-00988 SI, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010), a case that Robbins Geller prosecuted, the court granted summary judgment to defendants after eight years of litigation, and after plaintiffs' counsel incurred over $6 million in expenses, and worked over 100,000 hours, representing a lodestar of approximately $40 million. And, even lawyers who defeat summary judgment and succeed at trial may find their client's judgment overturned on appeal or on a post-trial motion, as Kessler Topaz did in *In re BankAtlantic Bancorp, Sec. Litig.*, No. 07-61542-CIV-UNGARO, 2011 U.S. Dist. LEXIS 48057 (S.D. Fla. Apr. 25, 2011), *aff'd*, 688 F.3d 713 (11th Cir. 2012), where the court granted defendants' judgment as a matter of law on the basis of loss causation, overturning a jury verdict and award in plaintiff's favor. Thus, the risk that Lead Counsel would invest substantial financial resources and receive nothing militates in favor of approving the fee request.

Finally, the risks and delays inherent in securities litigation, even after a jury verdict in favor of the class, justify this fee request. *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding jury verdict of $2.46 billion after 13 years of litigation); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict after 19-day trial and dismissing case with prejudice); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *In re Apple Comp. Sec. Litig.*, No. C-84-20148, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991) ($100 million jury verdict vacated on post-trial motions); *Oracle*, 2009 U.S. Dist. LEXIS 50995 (granting summary judgment to defendants after eight years of litigation).

5. The "Undesirability" of the Case

Securities cases have often been recognized as "undesirable" due to the financial burden on counsel, and the time demands of litigating class actions of this size and complexity. *Qwest*, 2006 U.S. Dist. LEXIS 71267, at *27 (finding case undesirable, noting "[a]t a minimum, this case

required lead counsel to advance large amounts of time, money, and other resources to determine if any recovery might be had"); *Lucas v. Kmart Corp.*, No. 99-cv-1923-JLK-CBS, 2006 U.S. Dist. LEXIS 51420, at *20 (D. Colo. July 27, 2006) (finding complex class action to be "not a desirable case to take" given the risk of no recovery and legal issues involved).

This was a complex case that presented difficult issues. For instance, Lead Counsel recognized very early that the elements of loss causation and damages would pose a significant challenge throughout the prosecution of the Litigation. Indeed, when Lead Counsel undertook the representation of Lead Plaintiffs and the Class, it was with the knowledge that they would have to spend substantial time and resources and face significant risks without any assurance of compensation. These risks must be assessed as they existed at the time counsel undertook the case and not in light of the settlement ultimately achieved. *See, e.g.*, *Checking Account*, 830 F. Supp. 2d at 1364 (undesirability and relevant risks to be judged as of the time the suit was commenced). This *Johnson* factor supports approval of Lead Counsel's fee request.

6. The Time and Labor Expended by Plaintiffs' Counsel

While the time and labor required to successfully prosecute this Litigation and obtain the Settlement for the benefit of the Class fully justifies the requested fee, the Tenth Circuit has found this *Johnson* factor to be of less importance in a common fund case, such as this case.

> Although the *Johnson* factors are relevant in determining a reasonable fee in a common fund case, the inherent differences between statutory fee and common fund cases could justify a trial judge's decision to assign different relative weights to those factors in the two types of cases. For example, the first factor – the time and labor required – is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis. In a common fund case, however, although time and labor required are appropriate considerations, the ninth *Johnson* factor – the amount involved and the results obtained – may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing the recovery on behalf of the class.

Brown, 838 F. 2d at 456.[15]

For more than four years, Plaintiffs' Counsel dedicated substantial time and financial resources to litigating this case. Lead Counsel conducted a thorough investigation prior to filing each of the complaints, including the review of voluminous publicly available information concerning Molycorp and the Defendants and interviews of several former Molycorp employees and other persons with knowledge of relevant information. Joint Decl., ¶21. Lead Counsel also monitored developments pertaining to the SEC's investigation regarding the accuracy of certain of Molycorp's public disclosures and, following Molycorp's Chapter 11 bankruptcy filing in June 2015, monitored, with the assistance of experienced bankruptcy counsel, Molycorp's bankruptcy proceedings in the United States Bankruptcy Court for the District of Delaware. *Id.*, ¶¶36-37. In addition, Lead Counsel researched and drafted two comprehensive complaints; retained an expert on the issues of loss causation and damages; briefed two motions to dismiss and a motion for summary judgment; conferred with Molycorp's counsel to ensure relevant electronic and hard-copy documents were preserved; conducted discovery, including moving to compel discovery from the SEC and analyzing and reviewing thousands of pages of technical mining related documents and data; and engaged in protracted, arm's-length settlement negotiations with Defendants with the assistance of the Honorable Layn R. Phillips (Ret.), followed by additional months of negotiating the terms of the Stipulation and drafting the related settlement documents. *Id.*, ¶¶10, 21-74, 77.

Plaintiffs' Counsel and their paraprofessionals devoted over 7,000 hours to this Litigation with a resulting lodestar of $4,257,935.50.[16] Accordingly, under a lodestar cross-check Lead

[15] *See In re Harrah's Entm't*, No. 95-3925, 1998 U.S. Dist. LEXIS 18774, at *15 (E.D. La. Nov. 25, 1998) ("Because counsel prosecuted this action on a contingent fee basis, the Court would rather focus on results obtained. To overly emphasize the amount of hours spent on a contingency fee case would penalize counsel for obtaining an early settlement and would distort the value of the attorneys' services.").

[16] Plaintiffs' Counsel's time and expenses are detailed in the Declaration of Trig R. Smith Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Smith Fee Declaration"), the Declaration of Matthew L. Mustokoff Filed on

Counsel's 30% fee request represents a modest multiplier of 1.4 on Plaintiffs' Counsel's aggregate lodestar. This multiplier is fully justified here given Plaintiffs' Counsel's efforts, the risks involved in this Litigation and the result achieved for the Class and falls on the lower end of multipliers typically awarded in common fund cases. *See also In re Miniscribe Corp.*, 309 F.3d 1234, 1245 (10th Cir. 2002) (affirming application of a 2.57 multiplier).

In sum, Plaintiffs' Counsel's hard work secured this highly favorable recovery for the Class, and the time and labor expended by Plaintiffs' Counsel confirm that the requested fee is reasonable.

III. THE REQUESTED EXPENSES ARE REASONABLE

In addition to a reasonable attorneys' fee, Lead Counsel respectfully seek $249,327.83 for expenses and charges Plaintiffs' Counsel reasonably and necessarily paid or incurred in connection with investigating, prosecuting and resolving the claims against Defendants. These expenses are itemized in the declarations of Plaintiffs' Counsel submitted herewith and are properly sought.[17] *Vaszlavik*, 2000 U.S. Dist. LEXIS 21140, at *11 ("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.").

The expenses and charges for which Lead Counsel seek payment are the types of expenses and charges that are necessarily incurred in litigation and routinely charged to clients billed by the hour.

Behalf of Kessler Topaz Meltzer & Check, LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Mustokoff Fee Declaration"), the Declaration of Jeffrey A. Berens Filed on Behalf of Berens Law LLC in Support of Application for Award of Attorneys' Fees and Expenses ("Berens Fee Declaration"), and the Declaration of Michael S. Etkin on Behalf of Lowenstein Sandler LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Etkin Fee Declaration") submitted herewith. Plaintiffs' Counsel's combined lodestar does ***not*** include $25,000 that was paid to the Lowenstein Sandler firm from the litigation expense fund maintained by Robbins Geller as a retainer and which is included in the Smith Fee Declaration (at 11) as a litigation expense. Additional hours and resources necessarily will be expended assisting members of the Class, shepherding the claims process ad preparing for and appearing at the Final Approval Hearing. Lead Counsel have not included this time in their lodestar and will not seek additional fees.

[17] *See* Mustokoff Fee Decl., ¶8 and Ex. B; Smith Fee Decl., ¶¶6-7 and Exs. B-F; Berens Fee Decl., ¶7.

See Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42, 8 F. 3d 722, 725-26 (10th Cir. 1993) (expenses properly awarded if such charges would normally be billed to client). For example, the expenses sought here include charges for: (i) investigating the facts underlying the claims alleged in the complaints; (ii) factual and legal research; (iii) consultants and experts whose services Lead Counsel relied on during the investigation and prosecution of this case; (iv) the expenses of bankruptcy counsel, already reimbursed by Lead Counsel, including for travel, legal research, messenger and printer services, and transcript charges; (v) setting up and managing a database of documents (including photocopying, imaging and shipping documents) that included the initial documents produced to Lead Plaintiffs by Molycorp and Defendants; (vi) travel to hearings, meetings and the mediation sessions; and (vi) two mediation sessions with Judge Phillips. Joint Decl., ¶15. These expense items are billed separately by Plaintiffs' Counsel, and such charges are not duplicated in the firms' billing rates. *See* Mustokoff Fee Decl., ¶8; Smith Fee Decl., ¶7; Berens Fee Decl., ¶7.[18]

IV. PLAINTIFFS SHOULD BE AWARDED THEIR REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. §78u-4(a)(4)

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). Congress specifically acknowledged the importance of awarding appropriate reimbursement to class representatives. *See* H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995) ("The Conference Committee recognized that lead plaintiffs should be reimbursed for reasonable costs and expenses associated with service as lead plaintiff, including lost wages, and grants the court discretion to award fees."); *see also In re*

[18] A portion of these expenses were incurred, and paid, from the joint litigation fund maintained by Robbins Geller and created to fund the common litigation expenditures in this Litigation. *See* Smith Fee Decl., ¶7(j) and Ex. F.

NU Skin Enters., Inc. Sec. Litig., No. 2:14-cv-00033-JNP-BCW, 2016 WL 6916486, at *1 (D. Utah Oct. 13, 2016) (awarding $9,800.00 to lead plaintiff to "reimburse it for the time it dedicated to the prosecution of the Action on behalf of the Settlement Class"); *In re Qwest Commc'ns Int'l, Inc.*, 625 F. Supp. 2d 1143, 1155 (D. Colo. 2009) (awarding costs and expenses ranging from $1,350 to $3,600 to four plaintiffs).

As detailed in their respective declarations, certain of the Plaintiffs are seeking an aggregate amount of $10,251.69 (*i.e.*, $8,027.44 for Lead Plaintiff Randall Duck, $1,664.25 for Lead Plaintiff Donald E. McAlpin, and $560.00 for representative plaintiff Iron Workers Mid-South Pension Fund) in costs related to their participation and representation of the Class in the Litigation. *See* Declaration of Randall Duck, ¶5; Declaration of Donald E. McAlpin; ¶4, Declaration of Iron Workers Mid-South Pension Fund, ¶3, submitted herewith. The awards sought by these Plaintiffs are reasonable and fully justified under the PSLRA based on their involvement in the Litigation and, thus, Lead Counsel respectfully submit that the amount sought is eminently reasonable and should be granted.

V. CONCLUSION

For all the foregoing reasons, Lead Counsel respectfully request that the Court award attorneys' fees in the amount of 30% of the Settlement Amount and expenses in the amount of $249,327.83, plus accrued interest on both amounts at the same rate as earned on the Settlement Fund. Lead Counsel also request that Plaintiffs be reimbursed in the aggregate amount of $10,251.69 for the costs and expenses they incurred in connection with representing the Class in this Litigation.

DATED: May 5, 2017

Respectfully submitted,

s/ Trig R. Smith

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, 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 e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 5, 2017.

s/ Trig R. Smith

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