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 PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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SECONDARY AUTHORITY

Court-appointed 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"), on behalf of themselves and the Class, respectfully submit this memorandum of points and authorities in support of their motion[1] for (i) final approval of the proposed settlement of this securities class action ("Settlement"), (ii) approval of the proposed plan for allocating the net settlement proceeds to the Class ("Plan of Allocation"), and (iii) final certification of the Class – that was preliminarily certified by the Court's Order Preliminarily Approving Settlement, Approving Notice to the Class, and Scheduling a Final Approval Hearing ("Preliminary Approval Order") (Dkt. No. 239) – for purposes of effectuating the Settlement.[2]

I. PRELIMINARY STATEMENT

Under the Stipulation, Lead Plaintiffs, through their counsel, have obtained a total of $20.5 million in cash for the benefit of the Class, in exchange for the dismissal of all claims brought in this Litigation and a full release of claims against Defendants[3] and the other Released Parties. The Settlement is a favorable result for the Class, providing a significant and certain recovery in a case

[1] Pursuant to D.C.COLO.L.CivR 7.1(a): Lead Plaintiffs' counsel have conferred with Defendants' Counsel prior to filing this motion. Lead Plaintiffs are authorized to state that Defendants do not oppose the relief Lead Plaintiffs seek in this motion, but Defendants do not endorse or join in Lead Plaintiffs' characterizations of their claims or the law governing class certification, other than in the specific context of a certification of the final settlement class. If the Settlement is not approved, Defendants would continue to vigorously challenge the merits of Lead Plaintiffs' claims and their request for class certification.

[2] 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 ("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 ("Joint Declaration" or "Joint Decl."), filed herewith. Unless otherwise noted, all emphasis in quotations is added, and citations and footnotes are omitted.

[3] Defendants are (i) the Individual Defendants (Mark A. Smith, James S. Allen, John F. Ashburn, Jr., Ross R. Bhappu, John L. Burba, Brian T. Dolan, Mark Kristoff, Charles R. Henry, Jack E. Thompson, Russell D. Ball and Alec Machiels), and (ii) the Underwriter Defendants (Morgan Stanley & Co. LLC, J.P. Morgan Securities LLC, Knight Capital Americas, L.P. n/k/a KCG Americas LLC, Dahlman Rose & Company, LLC n/k/a Cowen and Company, LLC, Stifel Nicholas & Company, Incorporated, BNP Paribus Securities Corp., CIBC World Markets Corp., Piper Jaffray & Co., and RBS Securities Inc.).

that presented numerous hurdles and risks. Notably, this recovery represents approximately 22% of the Class's total recoverable damages as estimated by Lead Plaintiffs' damages consultants – a percentage recovery that is nearly four times greater than recoveries obtained in recent similar securities class actions.[4]

In addition to providing a meaningful monetary recovery for the Class, the Settlement avoids the substantial risks and expense of continued litigation. As discussed herein and in the accompanying Joint Declaration, Defendants advanced considerable arguments to the Class's claims. For example, throughout the Litigation, Defendants maintained that Lead Plaintiffs would be unsuccessful in proving falsity regarding the presence of terbium and dysprosium at Molycorp, Inc.'s ("Molycorp" or the "Company") Mountain Pass facility. Further, the parties strongly disagreed regarding whether falsity existed if there were trace amounts of heavy rare earth elements ("HREEs") at the Mountain Pass facility, and whether any sale of those elements – no matter how small – would make them "principal products." Defendants also advanced significant defenses to loss causation and damages, asserting that the decrease in the prices of Molycorp's securities was due to factors other than, as Lead Plaintiffs alleged, the revelation that Molycorp's Mountain Pass facility lacked HREEs. While Lead Plaintiffs and their counsel believe that the claims asserted against Defendants are meritorious and that they would have been able to overcome the foregoing challenges (and others), there was no guarantee that Lead Plaintiffs would obtain class certification, defeat another motion for summary judgment or succeed at trial. And, even if they did, obtaining a recovery for the Class that exceeded the present Settlement Amount was far from certain and could have taken many years to achieve.

[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, and 4.5% of estimated damages in the same range for years 2006-2015).

Further continued litigation also would have resulted in considerable cost to both sides. At the time the Settlement was reached, the parties were in the early stages of formal fact discovery. Had the Litigation continued, Lead Plaintiffs would have incurred the significant costs of completing discovery, including the review and analysis of voluminous document productions and the taking of numerous fact and expert depositions. The costs of discovery were heightened as the vast majority of relevant documents and information was within the possession, custody or control of non-party (and former Defendant), Molycorp, and Lead Plaintiffs would continue to incur substantial costs in obtaining this evidence. Moreover, given the complex and specialized issues involved in this case, the parties would be required to rely heavily on experts in various disciplines, adding further expense to the Litigation.

Lead Counsel, firms with extensive experience prosecuting securities class actions and other complex litigation, believe that the Settlement is a highly favorable result and in the best interests of the Class. Before reaching the Settlement Lead Counsel had an appreciation of the strengths and weaknesses of the case. For example, they had: (i) conducted a thorough factual investigation into the Class's claims including interviews of several former Molycorp employees and other persons with knowledge of relevant information; (ii) drafted two detailed complaints; (iii) briefed two rounds of motions to dismiss by Defendants; (iv) briefed and successfully overcame a motion for summary judgment filed by the Individual Defendants; (v) initiated targeted and thorough discovery related to the merits of the case, including the review and analysis of thousands of pages of technical mining related documents and data; (vi) prepared comprehensive responses to discovery propounded by Defendants; (vii) litigated a motion to compel the United States Securities and Exchange Commission ("SEC") to comply with a subpoena seeking, *inter alia*, all documents produced by Molycorp in connection with the SEC's investigation into the accuracy of certain of Molycorp's public disclosures; (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 before the Honorable Layn R. Phillips (Ret.). *See generally* Joint Decl., ¶¶4, 18-74. As a result of these efforts, among others, Lead Plaintiffs and their counsel were well-informed when they negotiated the terms of the Settlement.

In addition, Lead Plaintiffs, who have supervised this Litigation from the outset, support approval of the Settlement.[5] The reaction of the Class thus far also supports the Settlement. In accordance with the Court's March 6, 2017 Preliminarily Approval Order (Dkt. No. 239), the Court-appointed Claims Administrator, Gilardi & Co. LLC ("Gilardi"), has mailed over 154,700 copies of the Notice and Proof of Claim to potential Class Members and nominees.[6] Additionally, the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire* on March 28, 2017. Sylvester Decl., ¶14. As ordered by the Court and stated in the Notice, the deadline for submitting requests for exclusion from the Class and objecting to the Settlement, the Plan of Allocation, and/or the request for attorneys' fees and expenses is May 22, 2017. To date, there have been no objections to any aspect of the Settlement, and only five requests for exclusion have been received by Gilardi. Joint Decl., ¶¶16, 86; *see also* Sylvester Decl., ¶15.[7]

In light of the considerations discussed below, Lead Plaintiffs and their counsel firmly believe that the $20.5 million Settlement is eminently fair, reasonable, and adequate, easily satisfies the standards of Rule 23, and provides a very favorable result for the Class. Accordingly, Lead Plaintiffs respectfully request that the Court grant final approval of the Settlement, approve the Plan

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[5] *See* declarations of Lead Plaintiffs filed herewith.

[6] *See* Declaration of Carole K. Sylvestor 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 at ¶¶4-11 ("Sylvester Decl."), filed herewith.

[7] Lead Counsel will address any objections received after the date of this submission, as well as all requests for exclusion received, in their reply papers to be filed with the Court on June 2, 2017.

of Allocation as a fair and reasonable method for distributing the Net Settlement Fund to the Class, and grant final certification of the Class for purposes of effectuating the Settlement.

II. FACTUAL BACKGROUND

The claims in this Litigation arise from alleged false or misleading statements by certain of the Defendants regarding the existence of HREEs at Molycorp's Mountain Pass facility and whether those HREEs were Molycorp's "principal products." Lead Plaintiffs alleged that these misrepresentations artificially inflated the prices of Molycorp's common and preferred stock during the Class Period (between February 7, 2011 and November 10, 2011, inclusive), resulting in damages to persons and entities that purchased or otherwise acquired these securities during this time. Joint Decl., ¶¶7-8.

The initial complaint in this Litigation was filed in February 2012 (Dkt. No. 1) and asserted violations of the federal securities laws, pursuant to §§10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, against Molycorp and certain of the Defendants. On July 31, 2012, following their appointment in May 2012 (Dkt. No. 49), Lead Plaintiffs, along with additional representative plaintiffs Iron Workers Mid-South Pension Fund, Joseph Martiny, Jayne McCarthy, Robert Grabowski, Marjorine Dowd, Kyle Hare, Robert DeStefano and Eugene R. Salmon, filed the Consolidated Class Action Complaint for Violations of Federal Securities Laws ("Consolidated Complaint") (Dkt. No. 60). The Consolidated Complaint brought additional claims pursuant to §§11, 12(a)(2) and 15 of the Securities Act of 1933 on behalf of persons who purchased or acquired Molycorp 5.50% Series A Mandatory Convertible Preferred Stock pursuant to the Company's February 2011 initial public offerings, as well as persons who purchased or acquired Molycorp common stock pursuant to the Company's June 2011 secondary offering. Joint Decl., ¶23. By Order dated March 31, 2015 (Dkt. No. 150), the Court dismissed the Consolidated Complaint without prejudice. *Id.*, ¶32.

On May 29, 2015, Lead Plaintiffs filed the operative complaint, the First Amended Consolidated Class Action Complaint for Violations of the Federal Securities Laws ("First Amended Complaint") (Dkt. No. 153), which contains additional, detailed allegations concerning falsity and scienter to address the pleading deficiencies identified in the Court's March 31, 2015 Order. Joint Decl., ¶33. Shortly thereafter, Molycorp declared Chapter 11 Bankruptcy with the United States District Court for the District of Delaware (Dkt. No. 161) and was voluntarily dismissed from the case (Dkt. No. 162). Joint Decl., ¶36. Thereafter, on January 20, 2016, the Court granted in part and denied in part Defendants' motion to dismiss the First Amended Complaint (Dkt. No. 169), dismissing Lead Plaintiffs' claims against defendants Craig Cogut, Pegasus Capital Advisors, L.P., RCF Management LLC, and T-II Holdings, LLC, but otherwise allowing all of Lead Plaintiffs' claims against the remaining Defendants to proceed. Joint Decl., ¶39.

The parties have been litigating this case for more than four years. *Id.*, ¶¶18-74. Throughout the Litigation, Defendants have vigorously denied, and continue to deny, all allegations of wrongdoing, or that they have committed any act or omission giving rise to any liability or violation of law. It was only after thoroughly exploring the merits of the Litigation and much deliberation, including two formal mediation sessions with the assistance of Judge Phillips as mediator, that the parties reached an agreement in principle to settle the Litigation for $20.5 million. *Id.*, ¶¶34, 74.

The accompanying Joint Declaration provides further detail regarding the efforts undertaken by Lead Plaintiffs and their counsel on behalf of the Class. For the sake of brevity and to avoid repetition, Lead Plaintiffs respectfully refer the Court to the Joint Declaration for a detailed discussion of the procedural history of the Litigation. *Id.*, §II.[8]

[8] In addition to the Joint Declaration, Lead Counsel are simultaneously submitting their Motion for an Award of Attorneys' Fees and Expenses and Memorandum of Points and Authorities in Support Thereof ("Fee Memorandum"). The Joint Declaration and Fee Memorandum are incorporated by reference in this memorandum.

III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Legal Standards for Final Approval of Class Action Settlement

It is firmly established in the Tenth Circuit that courts favor the settlement of controversies. *See Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, 749 F.2d 1451, 1455 (10th Cir. 1984); *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo. 1997). This is especially true in complex class actions such as this. *See Belote v. Rivet Software, Inc.*, No. 12-cv-02792-WYD-MJW, 2014 WL 3906205, at *3 (D. Colo. Aug. 11, 2014) ("settlements in class actions are favored"); *Diaz v. Romer*, 801 F. Supp. 405, 407 (D. Colo. 1992) (in approving class action settlement, the court explained that a "consensual resolution of a dispute is always preferred"), *aff'd*, 9 F.3d 116 (10th Cir. 1993). Further, the authority to grant or deny approval of a proposed settlement lies within the sound discretion of the Court. *See Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187 (10th Cir. 2002); *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993). In exercising its discretion, the Court should not adjudicate the merits of the action or substitute its judgment for that of the parties who negotiated the settlement. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 625 (D. Colo. 1976) (the court "need not, and should not, decide the merits of the controversy").[9]

In the Tenth Circuit, a class-action settlement is entitled to final approval under Rule 23(e) where it is "fair, reasonable and adequate." *Gottlieb*, 11 F.3d at 1014; *see also Lane v. Page*, 862 F. Supp. 2d 1182, 1245 (D.N.M. 2012); *Vaszlavik v. Storage Tech. Corp.*, No. 95-B-2525, 2000 U.S. Dist. LEXIS 21129, at *2, *4 (D. Colo. Mar. 9, 2000). To that end, the Tenth Circuit has set forth the following four factors that courts should consider in assessing whether a proposed settlement is

[9] "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole is fair, reasonable and adequate to all concerned. Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for a trial on the merits." *In re N.M. Nat. Gas Antitrust Litig.*, 607 F. Supp. 1491, 1497 (D. Colo. 1984).

fair, reasonable and adequate: "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable." *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984); *see also Belote*, 2014 WL 3906205, at *2 (affirming test); *In re Qwest Commc'ns. Int'l, Inc. Sec. Litig.*, No. 01-cv-01451-REB-CBS, 2006 U.S. Dist. LEXIS 71039, at *15 (D. Colo. Sept. 28, 2006) (same).[10] As demonstrated below, the Settlement here easily satisfies each of the foregoing *Jones* factors and, thus, warrants final approval.

B. The Settlement Is Fair, Reasonable and Adequate

1. The Settlement Was Fairly and Honestly Negotiated

"The fairness of the negotiating process is to be examined 'in light of the experience of counsel, the vigor with which the case was prosecuted, and [any] coercion or collusion that may have marred the negotiations themselves.'" *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008 WL 4816510, at *11 (W.D. Okla. Oct. 27, 2008). Moreover, where a settlement results from arm's-length negotiations between experienced counsel, "the Court may presume the settlement to be fair, adequate and reasonable." *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK, 2006 U.S. Dist. LEXIS 51439, at *22 (D. Colo. July 27, 2006).

Here, the Settlement is the product of hard-fought and protracted arms'-length negotiations between Lead Counsel and Defendants' Counsel, including two in-person mediation sessions conducted under the auspices of the Honorable Layn R. Phillips (Ret.), a nationally recognized mediator of complex cases and class actions, and the exchange of detailed mediation statements. Joint Decl., ¶¶34, 74, 76-77. Although the parties were still too far apart in their respective positions

[10] Additional relevant factors may include: (i) the risk of establishing damages at trial; (ii) the extent of discovery and the current posture of the case; (iii) the range of possible settlement; and (iv) the reaction of class members to the proposed settlement. *N.M. Nat. Gas*, 607 F. Supp. at 1504.

to resolve the Litigation at the second mediation session in June 2016, they continued their discussions through Judge Phillips and ultimately reached an agreement in principle to settle the Litigation on July 11, 2016 pursuant to a "double-blind" mediator proposal. *Id.*, ¶74. The arms'-length nature of the parties' negotiations and the active involvement of an independent mediator such as Judge Phillips provide strong support for approval of the Settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure"); *see also In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 679, 690 (D. Colo. 2014) (approving settlement and noting that the parties "engaged in extensive negotiations and mediation sessions for over a year" in front of "retired United States District Judge Layn R. Phillips, who has extensive experience mediating complex cases").[11] Following their agreement in principle to settle the Litigation, the parties spent additional months negotiating the specific terms of the Stipulation and related exhibits. Joint Decl., ¶77.

Throughout the settlement negotiations (and the Litigation), both sides vigorously advocated the positions of their respective clients. *See Wilkerson*, 171 F.R.D. at 284 (finding where the parties "vigorously advocated their respective positions throughout the pendency of the case" indicated the settlement negotiations were fair, honest and at arms'-length). Indeed, prior to reaching the Settlement, Lead Counsel had a solid understanding, both factually and legally, of the strengths and weaknesses of the Class's claims as well as the hurdles they would face if the Litigation continued. Lead Counsel's knowledge came from, among other things, reviewing voluminous publicly available information, interviewing former Molycorp employees, drafting two detailed amended complaints,

[11] *See also IBEW Local 697 Pension Fund v. Int'l Game Tech., Inc.*, No. 3:09-cv-00419-MMD-WGC, 2012 WL 5199742, at *2 (D. Nev. Oct. 19, 2012) (noting settlement was fair when it "was reached following arm's length negotiations between experienced counsel that involved the assistance of an experienced and reputable private mediator, retired Judge Phillips"); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (approving settlement when parties "engaged in extensive arm's length negotiations, which included multiple sessions mediated by retired federal judge Layn R. Phillips, an experienced and well-regarded mediator of complex securities cases").

briefing oppositions to two motions to dismiss and a motion for summary judgment, filing a motion to compel discovery from the SEC, reviewing and analyzing thousands of pages of technical mining related documents and data, and consulting with various consultants and experts. Joint Decl., ¶¶21-73. With this knowledge, Lead Counsel were able to carefully engage in a rigorous negotiation process with Defendants' Counsel that resulted in a favorable recovery for the Class. *Id.*, ¶74.

It is certainly the case here that the Settlement is the result of fair and honest negotiations by parties – through their experienced counsel – that understood the strengths and weaknesses of their respective cases. Accordingly, this *Jones* factor has been met and weighs in favor of the Court's final approval of the Settlement.

2. The Outcome of the Litigation Was Uncertain Because Serious Questions of Law and Fact Existed

The second factor considered by the Tenth Circuit in evaluating settlements is whether there were "serious questions of law and fact . . . [that] plac[ed] the ultimate outcome of the litigation in doubt." *Jones*, 741 F.2d at 324. In assessing the Settlement, the Court should balance the benefits of the substantial certain recovery for the Class against the risks of continued litigation. *See Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). Here, a balance of these factors strongly supports the Court's final approval of the Settlement.

Lead Plaintiffs and their counsel faced numerous risks in proving their case and recognized that, in the absence of a settlement, they faced substantial challenges to obtaining ***any*** recovery for the Class – let alone a recovery greater than the Settlement Amount. This risk was heightened as a result of Molycorp's Chapter 11 Bankruptcy filing in June 2015 and subsequent dismissal from the Litigation. Not only did the absence of the corporate defendant substantially affect the resources available to satisfy a future judgment, but it presented challenges to the Litigation generally and, in particular (as discussed at ¶¶58-65 of the Joint Declaration), to Lead Plaintiffs' discovery efforts. Specifically, because Molycorp was a bankrupt entity when discovery commenced, Lead Plaintiffs and their counsel devoted significant time conferring with Molycorp's counsel to ensure that

voluminous amounts of relevant electronic and hard-copy documents were preserved. In addition, because Molycorp was a non-party in the Litigation, Lead Plaintiffs were required to negotiate carefully with Molycorp's counsel to facilitate the production of responsive information, while avoiding the imposition of any undue burden or expense pursuant to Fed. R. Civ. P. 45(d)(1). Joint Decl., ¶¶58-65.

Although Lead Plaintiffs were able to overcome Defendants' motion to dismiss the First Amended Complaint as well as the motion for summary judgment filed by the Individual Defendants, there was no guarantee that Lead Plaintiffs would have obtained class certification or succeeded on additional summary judgment motions or at trial. At every stage of the Litigation, Defendants asserted numerous defenses to Lead Plaintiffs' claims and would continue to do so if the Settlement had not been reached. For example, Defendants challenged Lead Plaintiffs' ability to prove falsity regarding the presence of terbium and dysprosium at Molycorp's Mountain Pass facility, and the parties strongly disagreed as to whether falsity exists if there are trace amounts of HREEs at the Mountain Pass facility, and whether any sale of those elements – no matter how small – would make them "principal products." Defendants also asserted that Lead Plaintiffs would be unable to establish scienter.

Lead Plaintiffs also faced significant challenges to proving loss causation and damages. Defendants argued that Lead Plaintiffs could not establish loss causation and that the decrease in the prices of Molycorp's stock was due to factors other than the existence of HREEs, such as investors' disappointment with the Company's simultaneously reported financial results, ***e.g.***, contemporaneously reported financial results that were weaker than the market had anticipated. In addition, given the factually complex nature of the claims asserted, both sides would have been required to rely heavily on expert testimony, inevitably leading to a "battle of the experts" at trial. Success in such a battle before a jury is far from guaranteed. ***See, e.g.***, ***Lane***, 862 F. Supp. 2d at 1248 ("It is evident from this case's long and complex history that any jury trial could have resulted

in many different outcomes, and that a class victory was uncertain."); *In re Thornburg Mortg., Inc., Sec. Litig.*, 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.'").

On balance, considering all the circumstances and risks that Lead Plaintiffs would have faced if they continued to litigate through the completion of discovery, summary judgment and, if successful, trial, Lead Plaintiffs and their counsel concluded that the Settlement – which provides a highly favorable and certain payment of $20.5 million – was in the best interests of the Class. Thus, this *Jones* factor strongly supports the Settlement's final approval.

3. Immediate Settlement Is More Beneficial to the Class than the Possibility of Recovery in the Future

The third factor for evaluating whether a settlement is fair, reasonable and adequate is "whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation." *Jones*, 741 F.2d at 324; *see also Qwest*, 2006 U.S. Dist. LEXIS 71039, at *18-*19 (approving securities class action settlement and noting that immediate recovery outweighed the possibility of future relief). This factor is to be weighed "not against the net worth of the defendant, but against the possibility of some greater relief at a later time, taking into consideration the additional risks and costs that go hand in hand with protracted litigation." *Gottlieb*, 11 F.3d at 1015. Lead Plaintiffs and their counsel have no doubts that the benefits of settling this case now are far superior to the risk of continued litigation.[12]

Here, in addition to the particular risks faced in this Litigation, Lead Plaintiffs also considered the risks and expense inherent in litigating a securities class action through trial generally. Absent the Settlement, Lead Plaintiffs would have continued with their discovery efforts,

[12] *See Shaw v. Interthinx, Inc.*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *3 (D. Colo. Apr. 22, 2015) ("'[A] cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed relative to risks of pursuing the litigation to judgment.'").

including the review and analysis of voluminous document discovery and preparation for depositions. Following fact discovery, the parties would have engaged in expert discovery, often the most costly phase of complex litigation, and thereafter, briefed summary judgment and prepared for trial. Thus, the costs and risks associated with prosecuting the Class's claims against Defendants to a verdict, not to mention through the inevitable appeals that would follow, would have been high, and the process would require many hours of the Court's time and its resources. *See Lane*, 862 F. Supp. 2d at 1248 ("Pursuing the litigation further would require significant judicial and party resources to complete motions for summary judgment, motions under *Daubert v. Merrell Dow Pharmaceuticals*, and motions *in limine*. Any of those decisions could then be appealed to the Tenth Circuit along with any jury verdict that might be returned.").

Notwithstanding the risks and substantial costs of continued litigation, the recovery obtained at this juncture – ***on its own*** – reflects a significant benefit for the Class. Indeed, the Settlement Amount represents approximately 22% of the Class's total recoverable damages of $93.3 million as estimated by Lead Plaintiffs' damages consultants. Joint Decl., ¶81. This recovery exceeds the median securities class action settlement for years 2007-2016 in this Circuit as a percentage of estimated damages (*i.e.*, 1.6%) by a multiple of more than 13 and is more than double the median settlement amount for the same years (*i.e.*, $8.4 million).[13] Moreover, courts have found settlements representing substantially smaller percentages of maximum class-wide damages to be reasonable.[14]

Lead Plaintiffs and their counsel believe that a recovery for the Class now – especially one representing a substantial percentage of the Class's total estimated recoverable damage – is superior

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[13] *See* Cornerstone Research, at 23, App. 3.

[14] *See, e.g.*, *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) ("The [$40.3 million] 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 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (finding settlement representing 3.8% of plaintiffs' estimated damages to be within range of reasonableness).

to the risk of proceeding with the Litigation in the hope of a larger recovery at a later stage. Thus, the third *Jones* factor strongly supports the Settlement.

4. Lead Plaintiffs and Their Counsel Believe that the Settlement Is Fair and Reasonable

Lead Plaintiffs and their counsel believe that the Settlement is fair and reasonable in light of all of the circumstances of the case. *In re Qwest*, 2006 U.S. Dist. LEXIS 71039, at *19 (noting that judgment of plaintiffs' counsel is entitled to weight by the Court); *see also Marcus v. State of Kan.*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) ("When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable."). Further, a court is "'entitled to rely upon the judgment of experienced counsel for the parties [and] absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'" *Lopez v. City of Santa Fe*, 206 F.R.D. 285, 292 (D.N.M. 2002). Here, Lead Counsel – law firms with extensive experience in the area of complex and class action litigation, particularly securities class actions, and which are intimately familiar with the facts of this Litigation – believe the Settlement provides a fair, reasonable and adequate result for the Class, in light of the risks and costs of continued litigation. Joint Decl., ¶6. The Court-appointed Lead Plaintiffs also endorse the Settlement. *Id.*, ¶16; *see also* declarations of Lead Plaintiffs submitted herewith.

The reaction of the Class to the Settlement, to date, also supports approval of the Settlement. As of May 3, 2017, more than 154,700 copies of the Notice were mailed to potential Class Members and nominees and the Summary Notice was published in *The Wall Street Journal* and released electronically via the *PR Newswire.* Sylvester Decl., ¶¶4-11, 14. While the deadline set by the Court for members of the Class to object to the Settlement has not yet passed, to date, there have

been no objections to the Settlement. Joint Decl., ¶16.[15] In addition, as of May 3, 2017, Gilardi has received only five requests for exclusion from the Class. Sylvester Decl., ¶15.

IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

Following approval of the Settlement and the Effective Date, the Net Settlement Fund will be distributed to Authorized Claimants. The proposed Plan of Allocation contained in the Notice details the manner in which the Net Settlement Fund will be allocated. *See* Sylvester Decl., Ex. A at 8-10.

"Approval of a plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to the approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *Crocs*, 306 F.R.D. at 692; *see also Lucas*, 2006 U.S. Dist. LEXIS 51439, at *28; *Law v. NCAA*, 108 F. Supp. 2d 1193, 1196 (D. Kan. 2000), *aff'd*, 246 F.3d 681 (10th Cir. 2001). Further, a plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *Lucas*, 2006 U.S. Dist. LEXIS 51439, at *29; *Law*, 108 F. Supp. 2d at 1196 (noting that substantial weight is given to opinions of experienced counsel regarding the fairness of allocation).

Here, Lead Counsel prepared the Plan of Allocation after careful consideration and detailed analysis, and with the assistance of their economics and damages consultants and expert. Joint Decl., ¶85. The Plan of Allocation reflects an assessment of the damages that Lead Counsel and their consultants and expert believe could have been recovered by Class Members had Lead Plaintiffs prevailed at trial and reflects the risks of proving a violation of the federal securities law, including loss causation and damages. The Plan of Allocation is premised on the out-of-pocket measure of damages and is designed to measure the difference between the prices Class Members paid for Molycorp

[15] The deadline for submitting objections, as well as requests for exclusion from the Class, is May 22, 2017. As provided in the Preliminary Approval Order, Lead Counsel will file reply papers on June 2, 2017 that will address any objections received after this submission. Dkt. No. 239.

common and preferred stock during the Class Period and the prices had the allegedly omitted information regarding HREES at Molycorp's Mountain Pass facitlity been disclosed. *Id.*, ¶85.

Under the Plan of Allocation, claims for Molycorp common stock purchased or acquired during the relevant period (*i.e.*, February 7, 2011 through November 10, 2011) will be calculated based on a potential maximum claim per share of $2.03, and claims for Molycorp preferred stock purchased or acquired during the relevant period (*i.e.*, February 10, 2011 through November 10, 2011) will be calculated based on a potential maximum claim per share of $0.68. The $2.03 and $0.68 represent the estimated inflation attributable to Molycorp's November 11, 2011 price decline. Overall, if the total claims for all Authorized Claimants exceed the Net Settlement Fund, each Authorized Claimant's share of the Net Settlement Fund will be determined based on the percentage of the Net Settlement Fund that his, her or its claim bears to the total of the claims for all Authorized Claimants, *i.e.*, his, her or its *pro rata* share of the Net Settlement Fund. *See Newton v. Fortis Ins. Co.*, No. 04-cv-1650-PSF-OES, 2006 U.S. Dist. LEXIS 33965, at *4 (D. Colo. May 26, 2006) (approving plan of allocation where the allocation was pro rata across the class).

The Plan of Allocation was fully disclosed in the Notice that was mailed to potential Class Members and nominees. To date, there have been no objections to the Plan of Allocation. Joint Decl., ¶86. Accordingly, Lead Plaintiffs and their counsel believe that this method of allocation has a reasonable and rational basis and is fair and equitable and therefore, warrants the Court's approval.

V. THE COURT SHOULD FINALLY CERTIFY THE CLASS FOR PURPOSES OF EFFECTUATING THE SETTLEMENT

In presenting the Settlement to the Court for preliminary approval, Lead Plaintiffs requested that the Court certify the Class for settlement purposes only so that notice of the Settlement, the Final Approval Hearing and the rights of Class Members to object to the Settlement, request exclusion from the Class or submit Proofs of Claim could be issued. In the Recommendations of United States Magistrate Judge issued on February 15, 2017 (Dkt. No. 236), which was subsequently adopted by this Court on March 6, 2017 (Dkt. No. 238), Magistrate Judge Kathleen M. Tafoya

addressed the requirements for class certification set forth in Rules 23(a) and 23(b)(3) and found that Lead Plaintiffs had met the requirements for certification of the Class for purposes of settlement. By its Preliminary Approval Order, the Court preliminarily certified the following Class:

> All persons who purchased or otherwise acquired Molycorp securities from February 7, 2011 through November 10, 2011, inclusive, including all persons who purchased or acquired Molycorp common stock and/or Molycorp 5.50% Series A Mandatory Convertible Preferred Stock pursuant to the February 2011 offering, and all persons who purchased or acquired Molycorp common stock pursuant to the June 2011 offering, and who were damaged thereby.[16]

Since entry of the Preliminary Approval Order, nothing has changed to alter the propriety of the Court's preliminary certification of the Class and, for all the reasons stated in Lead Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Class and Memorandum of Points and Authorities in Support Thereof dated October 27, 2016 (*see* Dkt. No. 233 at 12-19), incorporated herein by reference, Lead Plaintiffs respectfully request that the Court affirm its preliminary certification and finally certify the Class for purposes of carrying out the Settlement pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) and appoint Lead Plaintiffs as Class Representatives and Lead Counsel as Class Counsel.

[16] Excluded from the Class are: (i) Defendants and their families, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which any of the above excluded persons have or had a majority ownership interest; (ii) Molycorp (including any parent, subsidiary or corporate successor of Molycorp); and (iii) any putative member of the Class who timely and validly excludes himself, herself, or itself from the Class in accordance with the requirements set forth in the Notice of Pendency and Proposed Settlement of Class Action and Rule 23 of the Federal Rules of Civil Procedure. The foregoing exclusion in (i) shall not cover "Investment Vehicles," which for these purposes shall mean any investment company or pooled investment fund, including, but not limited to, mutual fund families, exchange-traded funds, fund of funds, private equity funds, real estate funds, and hedge funds, in which any Underwriter Defendant or any of its affiliates or Molycorp or any Individual Defendant has or may have a direct or indirect interest or as to which any Underwriter Defendant or any of its affiliates may act as an investment advisor, general partner, managing member, or in other similar capacity, other than an investment vehicle of which the Underwriter Defendant or any of its affiliates is a majority owner or holds a majority beneficial interest and only to the extent of such Underwriter Defendant's or affiliate's ownership or interest.

VI. NOTICE TO THE CLASS COMPLIED WITH DUE PROCESS

Notice to the Class of the Settlement satisfies the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (notice need not be perfect or received by every class member, but instead be reasonable under the circumstances). "The standard for the settlement notice under Rule 23(e) is that it must 'fairly apprise' the class members of the terms of the proposed settlement and of their options." *Gottlieb*, 11 F.3d at 1013. The notice program utilized here, as set forth in the Court's Preliminary Approval Order, easily meets this standard.

The notice program was carried out by the Court-appointed Claims Administrator, Gilardi, under the supervision of Lead Counsel. *See generally* Sylvester Decl. As noted above, in accordance with the Preliminary Approval Order, as of May 3, 2017, Gilardi has mailed over 154,700 copies of the Notice and Proof of Claim via First-Class Mail to potential members of the Class and nominees. *Id.*, ¶11. Gilardi also caused the Summary Notice to be published in *The Wall Street Jounral* and transmitted over the *PR Newswire*. *Id.*, ¶14. In addition, a dedicated toll-free telephone number and website, www.molycorpincsecuritieslitigation.com, were established to assist potential Class Members with inquiries regarding the Litigation, the Settlement and the claims process. *Id.*, ¶¶12-13.

The Notice contains the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §78u-4(a)(7), including: (i) an explanation of the nature of the Litigation and the claims asserted; (ii) the definition of the Class preliminarily certified by the Court; (iii) a description of the basic terms of the Settlement, including the amount of the consideration and the releases to be given; (iv) the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlement; (vi) a

statement indicating the attorneys' fees and expenses that will be sought; (vii) a description of Class Members' right to request exclusion from the Class or to object to the Settlement, the Plan of Allocation, and/or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Class Members.[17] The Notice also provides recipients with information on how to submit a Proof of Claim in order to be potentially eligible to receive a distribution from the Net Settlement Fund. *See* Sylvester Decl., Ex. A.

To date, Lead Plaintiffs and their counsel have satisfied all of the elements of the notice plan approved by the Court. *See generally* Sylvester Decl. Accordingly, the notice program implemented in this Litigation constitutes "the best notice . . . practicable under the circumstances" and satisfies the requirements of due process, Federal Rule of Civil Procedure 23, and the PSLRA. *See* Fed. R. Civ. P. 23(c)(2)(B); *see also Crocs*, 306 F.R.D. at 693.

[17] The PSLRA also requires the notice of settlement to include: (1) "[t]he ***amount*** of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis"; (2) "[i]f the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title . . . a statement from each settling party concerning the issue or issues on which the parties disagree"; (3) "a statement indicating which parties or counsel intend to make . . . an application [for attorneys' fees or costs], the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought"; (4) "[t]he name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members"; and (5) "[a] brief statement explaining the reasons why the parties are proposing the settlement." 15 U.S.C. §78u-4(a)(7). The Notice includes all of the information required by the PSLRA.

VII. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court: (i) approve the proposed Settlement as fair, reasonable, and adequate; (ii) approve the Plan of Allocation as fair and reasonable; and (iii) finally certify the Class for settlement purposes pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3).

DATED: May 5, 2017

Respectfully submitted,

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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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- (No manual recipients)