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**I. INTRODUCTION**

Direct Purchaser Plaintiffs (“Plaintiffs”), SchagrinGAS Co., SHV Gas Supply & Trading SAS and Parke J. Patten, Inc., on behalf of themselves and a proposed class of purchasers and traders of propane (the “Settlement Class” or “Class”), have entered into a Direct Purchaser Settlement Agreement (“Settlement Agreement”) with defendant BP America, Inc. (“BP”). Under the Settlement Agreement, a copy of which has been filed simultaneously herewith, BP has agreed to pay \$52,000,000 to the Class (“Settlement Amount”) in exchange for dismissal of the claims of the Class against BP and all other defendants,<sup>1</sup> which are BP-related entities. *See* Settlement Agreement at ¶ 4.

Plaintiffs now move the Court to grant preliminary approval of the proposed settlement (“Settlement”) and, incident thereto, to enter a preliminary approval order in the form filed separately herewith that, among other things:

- (1) finds the Settlement to be sufficiently fair, reasonable, and adequate to warrant dissemination of notice of the Settlement to the Direct Purchaser Class;
- (2) certifies the proposed Class for settlement purposes;
- (3) appoints Plaintiffs’ Interim Class Counsel (“Class Counsel”) as Counsel for the Class;
- (4) approves the plan for and forms of mailed notice and published “summary notice” of the Settlement, as well as directs the plan’s implementation;
- (5) sets a schedule leading to the Court’s consideration of final approval of the Settlement, including:

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<sup>1</sup> The defendants (collectively “Defendants”), in addition to BP, are BP Corporation North America Inc., BP International Services Company, BP Products North America Inc. (“BP Products”), BP Energy, and BP America Production Company.

- a. the deadline for Plaintiffs to move for final approval of the Settlement and to submit related petitions for attorneys' fees, reimbursement of expenses, and incentive awards to named plaintiffs,
  - b. the deadline for Class members to exclude themselves (*i.e.*, opt out) from the Class and Settlement,
  - c. the deadline for Class members to object to the Settlement and any of the related petitions,
  - d. the deadline for any reply papers by Plaintiffs or Defendants, and
  - e. the date, time, and place for a hearing on final approval of the Settlement and the related petitions (the "Hearing");
- (6) sets the deadline for submission of proofs of claim; and
- (7) stays all direct purchaser actions consolidated under Case No. 06-cv-3621 in this Court, except matters related to the Settlement, related to this motion, or occurring in three other, pending cases.<sup>2</sup>

At the Hearing, Class Counsel will request the entry of a final order and judgment ("Final Order") dismissing the Direct Purchaser Class Action and retaining jurisdiction for the implementation and enforcement of the Settlement.

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<sup>2</sup> *Amerigas Propane, L.P. and Ferrellgas, L.P. v. BP America, Inc., et al.*, N.D. Ill., No. 08-3362; *Thompson's Gas & Electric Service, Inc. et. al v. BP America, Inc. et. al.*, N.D. Ill., No. 08-CV-2693; and *Koch Supply & Trading, L.P. v. BP Products North America, Inc.*, N.D. Ill. No. 08-CV-03362.

## **II. BACKGROUND**

### **A. SUMMARY OF PLAINTIFFS' ALLEGATIONS**

In their Amended and Consolidated Complaint (“Amended Complaint”) filed on February 29, 2008 (No. 06-CV-3621, # 42), Plaintiffs allege that Defendants violated § 2 of the Sherman Act, 15 U.S.C. § 2, § 22 of the Commodity Exchange Act, 7 U.S.C. § 25, and the common law doctrines of restitution, disgorgement, and unjust enrichment when they monopolized the supply of “TET Propane”<sup>3</sup> for delivery in February 2004 (“February 2004 TET Propane”) through a manipulation of the market for February 2004 TET Propane. Plaintiffs contend that, as a result of this unlawful behavior, they and the others similarly situated were injured when they were forced to pay supra-competitive prices for propane and/or suffered losses on propane trades.

Plaintiffs also allege that Defendants attempted to monopolize the supply of TET Propane for delivery in April 2003 (“April 2003 TET Propane”) and thereby gained knowledge that they then used in their subsequent successful manipulation of the February 2004 TET Propane price.

### **B. PROCEDURAL HISTORY OF THE LITIGATION**

This litigation was commenced in 2006 with the filing of a number of class action lawsuits against Defendants by purchasers and traders of propane. In its Order of November 16, 2006 (No. 06-CV-3541, # 78), the Court appointed Freed, Kanner, London & Millen, LLC; Morris and Morris LLC Counselors at Law; and Weinstein Kitchenoff & Asher LLC to serve as Interim Class Counsel for the direct purchasers. Then, in Case Management Order No. 1, dated

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<sup>3</sup> “TET Propane” is propane stored in the Texas Eastern Products Pipeline Co. LLC’s (“TEPPCO”) Mont Belvieu Texas caverns and/or shipped through the TEPPCO’s system. Settlement Agreement, ¶ 38.

March 27, 2007 (No. 06-CV-3621, # 55), the Court consolidated all direct purchaser claims under the above caption.

On March 15, 2007, Plaintiffs filed a consolidated complaint against the Defendants. Four days later, on March 19, 2007, the U.S. Department of Justice (“DOJ”) moved for a stay (No. 06-CV-3621, #47), which the Court granted on March 27, 2007 (No. 06-CV-3621, # 50) and extended on September 28, 2007 (No. 06-CV-3621, # 61). The stay expired on November 26, 2007, and Plaintiffs filed their Amended Complaint on February 29, 2008. In connection with preparation of both the consolidated complaint and the Amended Complaint, Class Counsel engaged in extensive investigation of the pertinent facts and economics relating to the propane market, including consulting with experts in the market and in the applicable economics.

On May 9, 2008, Defendants moved to dismiss certain of Plaintiffs’ claims, including those asserted under the antitrust laws (No. 06-CV-3621, # 88). Subsequently, on July 28, 2008, Plaintiffs filed their brief in opposition to the motion to dismiss (No. 06-CV-3621, # 96), and Defendants filed their reply brief on September 26, 2008 (No. 06-CV-3621, # 102).

**C. RELATED GOVERNMENT PROCEEDINGS**

On October 25, 2007, BP entered into a Deferred Prosecution Agreement (“DPA”) with the U.S. Department of Justice (“DOJ”), pursuant to which BP agreed to pay, in addition to \$125,000,000 in civil monetary penalties, \$53,503,000 to a fund for victim restitution (“Restitution Fund”). In connection with the DPA, BP entered into a stipulation regarding the asserted propane manipulation. In exchange, the DOJ agreed to defer prosecuting a criminal information against BP based on BP’s manipulation of the market for February 2004 TET Propane. The information was also filed on October 25, 2007, and is designated Case No. 07-cr-683 in

the Court. On October 17, 2008, the Court in the criminal case approved a plan of restitution for distribution of the Restitution Fund based on criteria specified in the DPA.

The U.S. Commodity Futures Trading Commission commenced a civil enforcement action (No. 06-cv-3503) in this Court against BP Products on June 28, 2006, alleging that it had manipulated the price of February 2004 TET Propane and attempted to manipulate the price of April 2003 TET Propane. On October 25, 2007, the CFTC case was resolved by the entry of a Consent Decree. Under the Consent Decree, BP North America Products, Inc. agreed to pay a \$125,000,000 civil monetary penalty.

**D. SETTLEMENT NEGOTIATIONS**

Beginning even while this litigation was formally stayed, the parties evaluated the potential damages to the various direct purchasers and in 2007 commenced meaningful settlement negotiations. Pursuant to a confidentiality agreement, BP produced to Class Counsel certain pricing and transactional data that they had requested. Each side, working with consulting experts, evaluated these data in detail. Class Counsel also conducted third-party discovery, as well as continued their investigation into the mechanics of the relevant industries (*e.g.*, propane production, trading, and distribution).

As with their investigation for the consolidated complaint and the Amended Complaint, in preparation for and participation in the negotiations, Class Counsel worked closely with their experts in marshalling and analyzing the detailed market and transactional data they had developed and received. In this process, they identified two broad categories of market activity where damage resulted from Defendants' manipulation of February 2004 propane: (i) purchases of physical propane for consumption, and (ii) trading of propane in the over-the-counter and futures markets. In collaboration with their consulting experts, Class Counsel recognized that a different

approach was required for estimating damages in each of these two categories. The Settlement now before the Court accounts for the damages suffered in these two categories.

In addition to this detailed damages analysis, Class Counsel also undertook extensive legal and factual investigation and research. The legal analysis addressed numerous issues that counsel anticipated might be central points of contention in any continued litigation of the claims in the class action. Among many others, these issues included (i) whether BP's conduct in cornering TET propane constituted a violation of Sherman Act § 2; (ii) whether BP's conduct caused inflated prices for propane; (iii) the scope of recovery under the Commodity Exchange Act claim; (iv) the legal challenges for claims based on purchases in states off of the TEPPCO pipeline; (v) the identity of the entities that have standing to pursue the antitrust and commodity manipulation claims in the case; (vi) evidentiary issues related to proving the claims, even with the benefit of BP's admissions in the DPA; and (vii) the definition of the class to be certified for trial.

The parties eventually agreed to exchange the results of their respective analyses of transactional data as well as their differing theories for estimating aggregate damages in the case. This process extended over more than eighteen months and permitted the parties to analyze in detail their respective calculation methodologies and to identify their divergent damage and legal theories underlying their different aggregate damage estimates. During this process, the parties identified areas in which their respective theories regarding potential damages converged, and others where the parties remained apart. Plaintiffs estimated damages to be approximately \$102 million, based on Plaintiffs' expert's analysis employing reasonable assumptions developed by Class Counsel. BP's aggregate damage estimate was far lower.

In agreeing to the Settlement in the principal amount of \$52 million, the parties also took into account that BP had agreed, in connection with the DPA, to pay approximately \$53.5 million into the Restitution Fund. Based on Plaintiffs' detailed analysis, in consultation with experts, of the propane market and the eligibility criteria for participation in the Restitution Fund, Class Counsel believe that BP's combined payments to the Settlement Fund and the Restitution Fund are likely to provide substantial compensation to the direct purchasers who are members of the Settlement Class.

The settlement negotiations concluded with the execution of the Settlement Agreement on January 7, 2009. The negotiations, conducted by experienced and able counsel, were vigorous and at all times at arm's length based on each party's informed view of the legal and factual risks each faced moving forward to trial in the litigation.

The Settlement is thus the result of a detailed investigation into the scope of the alleged monopolistic and manipulative activities, as well as the many complex issues surrounding the legal sufficiency of the antitrust claim, the scope of the Commodity Exchange Act claim, class certification, the economic dynamics of the affected markets and segments thereof, and potential provable damages.

### **III. SUMMARY OF THE SETTLEMENT AGREEMENT**

#### **A. THE SETTLEMENT FUND**

The Settlement Agreement provides that BP will pay \$52,000,000 into the Settlement Fund for the benefit of the Class within 14 business days of the execution of the Settlement Agreement. Settlement Agreement at ¶ 40. This money will be placed in escrow and all interest earned on the \$52 million will become a part of the Settlement Fund. Settlement Agreement at ¶¶ 44 (escrow), 41 (interest).

**B. NOTICE**

Notice will be provided by mail and publication. Individual notice (the “Settlement Notice”) will be sent via first class mail to all entities identified by BP, as well as by Plaintiffs’ independent investigation, as being within the Settlement Class. The Settlement Notice will also include a copy of the proposed plan of allocation (with exhibits) and the proposed proof of claim form (with exhibits). *See* proposed Settlement Notice (with exhibits), provided as Exhibit C to the Settlement Agreement. Notice will also be made by publication twice (in successive weeks) in the national edition of *The Wall Street Journal*. *See* proposed Summary Notice, provided as Exhibit D to the Settlement Agreement.

The Settlement Agreement also provides that Class Counsel are authorized to make reasonable disbursements from the Settlement Fund (following the Court’s preliminary approval of the Settlement) for expenses associated with providing notice, as well as administration of the Settlement Fund (including claims administrator, consultant, and bank fees), and tax matters. Settlement Agreement at ¶ 42.

**C. RELEASE AND DISCHARGE**

The Settlement Agreement provides for Plaintiffs (and all “Releasors” as defined in the Settlement Agreement at ¶ 23) to release and discharge BP (and all “BP Releasees” as defined in the Settlement Agreement at ¶ 4) upon the “Effective Date”<sup>4</sup> of the Settlement Agreement. The release and discharge language in the Settlement Agreement is as follows:

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<sup>4</sup> The “Effective Date” is defined in ¶ 9 of the Settlement Agreement as the latest of the following dates: (i) if no appeal from the Final Order and Judgment is filed, the date of expiration of the time for the filing or noticing of any appeal from the Final Order and Judgment; or (ii) if an appeal from the Final Order and Judgment is filed, and the Court of Appeals affirms the Final Order and Judgment or dismisses the appeal, and (a) a petition for a writ of certiorari review is filed and denied, the date such petition is denied, or (b) if no writ of certiorari review is filed, the

Plaintiffs covenant and agree and each Direct Purchaser Class Member and the Direct Purchaser Class shall be deemed to covenant and agree, that, upon the occurrence of the Effective Date and in consideration of payment of the Settlement Amount and for other valuable consideration as provided for in this Agreement, the Releasers hereby release and forever discharge the BP Releasees, individually and collectively, from liability for any and all claims, demands, actions, suits, obligations, promises, liabilities or costs of any kind, including but not limited to any tort claims, contract claims, statutory claims, controversies, actions, causes of action, declaratory judgment actions, cross-claims, counterclaims, demands, debts, claims for damages, liquidated damages, trebled, punitive or exemplary damages, fines or penalties, equitable relief, expenses and/or attorneys' fees, or liabilities of any nature whatsoever in both law or in equity, whether class, individual, or otherwise in nature, that Releasers, or each of them, ever had, now has, or hereafter can, shall, or may have, against the BP Releasees, whether known or unknown, suspected or claimed, on account, or arising out of, relating to, or based on conduct alleged or asserted in the Action. Subject to the limitations stated in this paragraph 38 [of the Settlement Agreement], upon the Effective Date of the settlement, for consideration provided for herein, Plaintiffs covenant and agree, and each Direct Purchaser Class Member and the Direct Purchaser Class shall be deemed to covenant and agree that he, she or it shall not, at any time, institute, cause to be instituted, assist in instituting or permit to be instituted on his, her or its behalf any proceeding in any state or federal court, in or before any administrative agency, or any other proceeding or otherwise allege or assert against the BP Releasees, individually or collectively, any of the claims released in this Section D. This covenant and agreement is subject to the limitations that in no event will a breach of such covenant and agreement be, or be deemed to be: (i) a material breach of this Agreement; (ii) grounds for limitation or termination of this Agreement and/or the Final Order and Judgment; and/or (iii) grounds for reduction of any money to be paid by BP pursuant to this Agreement or for repayment to BP of any money paid by it.

Upon the occurrence of the Effective Date and in consideration of the Release and Discharge described in this Section D, and for other valuable consideration, Plaintiffs, the Direct Purchaser Class, Direct Purchaser Class Members, and Class Counsel shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits and causes of action, whether class, individual, or otherwise in nature, that the BP Releasees ever had, now has, or hereafter can, shall, or may have against Plaintiffs, the Direct Purchaser Class, Direct

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date of expiration of the time for the filing of such petition passes; or (iii) if a petition for a writ of certiorari is filed and granted, the date of final affirmance of the Final Judgment and Order or final dismissal of the review proceeding initiated by the petition for a writ of certiorari. The Parties agree that neither the provisions of Rule 60 of the Federal Rules of Civil Procedure nor the All Writs Act, 28 U.S.C. §1651 shall be taken into account in determining the above-stated times.

Purchaser Class Members, and/or Class Counsel, whether known or unknown, on account of or arising out of or resulting from the commencement and/or prosecution of this Action.

Settlement Agreement at ¶¶ 38-39.

**D. STIPULATION TO CLASS CERTIFICATION**

The Settlement Agreement contemplates that for settlement purposes only, the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure are satisfied, subject to Court approval, and that the following Settlement Class shall be certified for settlement purposes as to BP:

All persons or entities, including but not limited to, individuals, companies, corporations, partnerships, joint ventures, agents, principals, and employees who:

- Purchased TET Propane, Non-TET Propane, and/or Propane purchased or sold at a price tied to OPIS Mont Belvieu TET Pricing or OPIS Mont Belvieu Non-TET Pricing from a Producer for delivery in April 2003 or during the period February 1, 2004 through March 15, 2004; and/or
- Purchased or sold or financially settled a purchase or sale obligation for TET Propane or Non-TET Propane in the over-the-counter market for delivery in April 2003, February 2004, or March 2004 (if March 2004 settled based on February 2004 OPIS Mont Belvieu TET Pricing or OPIS Mont Belvieu Non-TET Pricing); and/or
- Entered into propane futures contracts for April 2003 TET Propane and/or February 2004 TET Propane.

Excluded from the Direct Purchaser Class are BP and any of its current or former parents, subsidiaries, corporate affiliates, joint ventures, officers, directors, or employees. *See* Settlement Agreement at ¶ 7.

**IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, JUSTIFYING NOTICE TO THE CLASS.**

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**A. GOVERNING STANDARDS**

There is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (“Federal courts naturally favor the settlement of class action litigation.”); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986) (noting that there is a general policy favoring voluntary settlements of class action disputes); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) (“It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement.”), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *Armstrong*, 616 F.2d at 313 (*citing Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). However, a class action may be settled only with court approval. And, before the court may give that approval, all class members must be given notice of the proposed settlement in the manner the court directs. Fed. R. Civ. P. 23(e).

Generally, before directing that notice be given to the class members, the court makes a preliminary evaluation of the proposed class action settlement. The Manual For Complex Litigation (Fourth) § 21.632 (2004) explains:

Review of a proposed class action settlement generally involves two hearings. First counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation . . . If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined . . . The Judge must make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and the date of the [formal Rule 23(e)] fairness hearing.

See also 2 NEWBERG ON CLASS ACTIONS, §11.24 (3d ed. 1992); *Armstrong*, 616 F.2d at 314; *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002); *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). A court's authorization to disseminate notice constitutes its recognition that the settlement is within the range of possible approval. See *Armstrong*, 616 F.2d at 309-310; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981); *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1402 (D. Minn. 1987); *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 313 (D. Md. 1979). As one court has noted, approving dissemination of notice "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Assoc.-Eastern R.R.*, 627 F.2d 631, 634 (2d Cir. 1980).

A proposed settlement falls within the "range of possible approval" under Rule 23(e) when it is conceivable that the proposed settlement will meet the standards applied for final approval. The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e); see *Uhl v. Thoroughbred Tech. & Telecomms, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby*, 75 F.3d at 1198-99.

When authorizing the dissemination of notice, a court does not conduct a "definitive proceeding on the fairness of the proposed settlement, and the judge must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable and adequate." *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (quoting *Montgomery County*, 83 F.R.D. at 315-16). That determina-

tion must await the final hearing where the fairness, reasonableness, and adequacy of the settlement are assessed under the factors set forth in *Armstrong*.<sup>5</sup>

**B. THE SETTLEMENT IS FAIR AND RESULTED FROM ARM’S LENGTH NEGOTIATIONS.**

The requirement that class action settlements be fair is designed to protect against collusion among the parties. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.2d at 1383. There is usually an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm’s length negotiations. *See* 2 NEWBERG ON CLASS ACTIONS, § 11.40 at 451 (2d ed. 1985); *Goldsmith v. Tech. Solutions Co.*, No. 92-C-4374, 1995 U.S. Dist. Lexis 15093, at \*10 n.2 (N.D. Ill. October 10, 1995) (“it may be presumed that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm’s-length negotiations”). Settlements proposed by experienced counsel and which result from arm’s length negotiations are entitled to deference from the court. *See, e.g., id.* at \*10 n.2; *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) (“A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.”) (*quoting Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). The initial presumption in favor of such settlements reflects courts’ understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness concerns of Rule 23(e).

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<sup>5</sup> The *Armstrong* factors that a court considers on a motion for final approval of a class settlement as fair, reasonable, and adequate include: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendants’ ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of class members to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery completed. *Armstrong*, 616 F.2d at 314.

The Settlement reached here is the product of extensive analyses and intensive settlement negotiations, which extended over more than 18 months and involved numerous face-to-face meetings between counsel in Chicago, Houston, New York City, and Washington, D.C., as well as many telephone conferences. Class Counsel undertook an extensive factual investigation and legal analysis in connection with the drafting of the Amended Complaint and its predecessor pleadings. This investigation included development of a cohesive description of the entire propane market, a determination of the types of transactions and regions of the country principally affected by BP's conduct, identification of a price unaffected by Defendants' unlawful conduct that would serve as a benchmark against which to measure the price inflation caused by that conduct in both the physical propane and trading markets, and a detailed pricing investigation to determine who among the multiple categories of market participants were potentially affected by Defendants' activities. Class Counsel employed a consulting economist and a propane market expert to help develop a sophisticated and nuanced understanding of the complex issues of causation and measurement of damages.

While this in-depth investigation and economic analysis were being pursued, Class Counsel obtained detailed transactional data from BP for Class Counsel's analysis. These data and the parties' respective damages analyses were exchanged and vetted. This extensive negotiation allowed the parties to understand in detail the calculation methodologies and, most importantly, to identify the different economic and legal theories underlying the parties' divergent aggregate damage estimates. Over the course of this extended process, the parties were able to identify areas in which their theories and estimates tended to converge, and others where the parties remained apart.

In negotiating the Settlement, Class Counsel also took into account their exploration of numerous and significant legal issues presented by this case. In this process, they evaluated both the strengths and the various risks presented by each of these issues. The Settlement was thus ultimately reached based on each party's highly informed view of the risks each faced moving forward in the litigation.

Moreover, the amount of the Settlement — \$52 million — is substantial. It is greater than 100% of the total damages estimated by BP and its experts. Likewise, even without regard for the entitlement of some Class members to recover from the DOJ's Restitution Fund,<sup>6</sup> the Settlement is more than 50% of total damages estimated by Plaintiffs' expert.<sup>7</sup> Since many Class members will be entitled to separate recoveries out of both funds, there is no doubt that this Settlement is at least sufficiently fair, reasonable, and adequate to warrant preliminary approval and notice to the Class. *See In Re: Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 402-03 (D.N.J. 2006) (stating that settlement was between 50-100% of actual damages, where exact calculation not made); *In re Remeron Direct Purchaser Litg.*, Civil No. 03-0085, 2005 U.S. Dist. Lexis 27013, at \*25 (D.N.J. Nov. 9, 2005) (noting that “the Settlement represents 56% to 69% of the maximum single damages Plaintiffs could hope to recover” based on estimates by plaintiffs' expert economist); *In re Remeron End-Payor Antitrust Litg.*, Civil Nos. 02-2007 and 04-5126, 2005 U.S. Dist. Lexis 27011, at \*70 (D.N.J. Sept. 13, 2005) (observing that “the Settlement Consideration represents about one-third of single damages, quite a substantial recovery”); *In re Linerboard Antitrust Litig.*, Nos. 98-5055 and 99-1341, 2004 U.S. Dist. LEXIS 10532, at \*15

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<sup>6</sup> To achieve parity among Class members, the plan of allocation is designed to deduct recoveries from the Restitution Fund in arriving at the net uncompensated losses to be compensated out of the Settlement.

<sup>7</sup> Assuming that, for trading damages, gains obtained from trading at inflated prices are offset against losses resulting from the market manipulation, this estimate is approximately \$102 million.

(E.D. Pa. June 2, 2004) (“The settlements represent approximately 55 percent of the claimed damages, as calculated by plaintiffs’ expert for the statute of limitations period, and approximately 42 percent of the damages for the full period.”). Standing alone the Settlement is substantial when compared to similar cases; it is made even more significant when viewed in conjunction with the Restitution Fund.

#### **V. THE PROPOSED NOTICE TO THE CLASS**

Federal Rule of Civil Procedure 23(e)(1) provides that “[t]he Court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” While the Court has discretion as to the form and content of the notice, the notice must meet certain due process requirements. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-177 (1974). The notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [settlement] and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice must be given, moreover, “in a form and manner that does not systematically leave an identifiable group without notice.” *Mendoza v. Tucson School District*, 623 F.2d 1338, 1351 (9th Cir. 1980) (quoting *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 853 (9th Cir. 1976)). The content of the notice “may consist of a very general description of the proposed settlement” and should provide a fair recital of its terms. *Id.*

The content and proposed method of dissemination of notice in this case fulfill the requirements of Rule 23(e)(1) and due process. *See generally In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283, 326-27 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999); *Mangone v. First USA Bank*, 206 F.R.D. 222, 233-234 (S.D. Ill. 2001); *In re Lithotripsy Antitrust Litig.*, No. 98 C 8394, 2000 U.S. Dist. LEXIS 8143, at \*6 (N.D. Ill. June 12, 2000); *In re Warfarin So-*

*dium Antitrust Litig.*, 212 F.R.D. at 252-53. Plaintiffs propose mailing an individual notice with the plan of allocation and a claim form (the “Settlement Notice”) via first class mail, postage pre-paid, to all entities identified as potential members of the Class by Defendants and by Plaintiffs’ independent investigation. *See* Exhibit C to the Settlement Agreement.

In addition, a summary notice will be published on two occasions in the national edition of *The Wall Street Journal* (“Summary Notice”). *See* Exhibit D to the Settlement Agreement. *See also In re Sulfuric Acid Antitrust Litig.*, No. 03-C-4576, (N.D. Ill. June 13, 2007) (Order granting preliminary approval and authorizing notice by First Class Mail and publication in *The Wall Street Journal*). The Summary Notice will explain how additional information, including a copy of the Settlement Notice as well as the proof of claim form, can be obtained by a Class member.

Both the Settlement Notice and the published summary notice will refer to a website where Class members can view relevant materials, including the Settlement Agreement, the Amended Complaint, the Court’s Orders relating to the Settlement, the full Settlement Notice, the plan of allocation, and the proof of claim form. In addition, both forms of notice will include a toll-free telephone number for Class members to contact the Claims Administrator to obtain additional information about the Settlement and the claims process.

The proposed notice will apprise Class members of the material terms of the Settlement and outline the available procedures and related deadlines. These include how a Class member may exclude itself from the Class or object to the Settlement’s terms and to applications that will be made for attorneys’ fees, reimbursement of expenses, and incentive awards to named plaintiffs. The notice also informs Class members of the date and place of the Hearing at which the Court will consider final approval of the Settlement and the applications. Further, the mailed Set-

tlement Notice will advise the Class members that Class Counsel will use a portion of the Settlement Fund to pay for reasonable expenses associated with the costs of giving notice and administration of the Settlement Fund and claims process. Importantly, the mailed notice will inform the Class of the investigation, analyses, and other work performed by Class Counsel in determining that the Settlement is desirable for the Class.

## **VI. CERTIFICATION OF THE SETTLEMENT CLASS**

Before the Court can authorize notice to the Class, the Court must first determine that the Class should be certified for settlement purposes. Rule 23 permits certification of a class action for settlement purposes. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Certification of a settlement class must satisfy each requirement set forth in Rule 23(a), as well as at least one of the separate provisions of Rule 23(b). *Id.* at 613-14. *See also In re Community Bank of Northern Virginia & Guaranty Nat'l Bank of Tallahassee Second Mortgage Loan Litig.*, 418 F. 3d 277, 299 (3d Cir. 2005) (“certification of classes for settlement purposes only [is] consistent with Fed. R. Civ. P. 23, provided that the district court engages in a Rule 23(a) and (b) inquiry”). As demonstrated below, this action meets all of the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(3) for settlement purposes.

### **A. THE REQUIREMENTS OF RULE 23(A) ARE SATISFIED.**

Rule 23(a) permits an action to be maintained as a class action if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). Here, the Class numbers at least in the hundreds, and likely, the thousands; the issues with respect to the unlawfulness of Defendants' actions under

Sherman Act § 2, the Commodity Exchange Act, and Plaintiffs' common law claims are common to the claims of all members of the Class; the claims of the Plaintiffs arise from the same factual matrix and are based on the same legal theory as the claims of all Class members and thus are typical of the claims of Class members; and the Plaintiffs and their counsel, who have extensive experience in class and antitrust litigation, will fairly and adequately represent the Class.

### 1. Numerosity

“There is no magic number which satisfies the numerosity requirement, and plaintiffs do not have to allege the precise number or identity of the class members.” *In re Plastic Cutlery Antitrust Litig.*, No. 96-CV-728, 1998 U.S. Dist. Lexis 3628, at \*7 (E.D. Pa. Mar. 20, 1998); *see also Levitan v. McCoy*, No. 00-C-5096, 2003 U.S. Dist. Lexis 5078, \*8-\*9 (N.D. Ill. 2003). The requirement that joinder be impracticable does not mean that joinder is impossible, but “that it is extremely difficult or inconvenient to join all members of the class.” *Levitan*, 2003 U.S. Dist. Lexis 5078, at \*10 (quoting C.A. Wright, A. Miller & N. Kane, *FEDERAL PRACTICE AND PROCEDURE*, § 1762 at 159 (2d ed. 1986)); *see also In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 149 (E.D. Pa. 1979). Joinder is impracticable where, for example, there is “significant geographical distribution among the class members.” *Id.* at 149-150; *see also Jerry Enters. of Gloucester County v. Allied Bev. Group, L.L.C.*, 178 F.R.D. 437, 442 (D.N.J. 1998); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 477 (W.D. Pa. 1999).

Here, the data provided by BP and information Class Counsel have developed show that Class members certainly number in the hundreds and likely the thousands. Based on an investigation of participants in the propane market, the Claims Administrator will send the Settlement Notice to approximately 8,000 entities. Further, there is significant geographic dispersion among Class members, since the Class includes principally members who purchased TET Propane for

delivery into many states and the District of Columbia. The Class representatives themselves are located in Delaware, New Hampshire, and France. Clearly, joinder of the numerous and geographically scattered Class members is impracticable.

The Class thus satisfies Rule 23(a)(1).

## **2. Common Questions of Law and Fact**

The commonality requirement “is easily met because it may be fulfilled by a single common issue.” *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 205 (E.D. Pa. 2001); *see also In re Prudential*, 148 F.3d at 310 (commonality satisfied if named plaintiffs share at least one question of fact or law with prospective class). Here, there are numerous legal and factual issues common to members of the Class. These include, among others:

- a. whether Defendants monopolized or attempted to monopolize the market for February 2004 TET Propane in violation of Sherman Act § 2;
- b. the duration and extent of the monopolization or attempt to monopolize;
- c. whether the Defendants’ conduct constitutes a violation of Sherman Act § 2, is actionable under the Commodity Exchange Act, or is within the ambit of the common law doctrines of restitution, disgorgement, and unjust enrichment;
- d. whether Defendants’ conduct in fact caused the Class’s damages arising from their purchases and/or trading of propane;
- e. the scope of recovery under the Commodity Exchange Act;
- f. the appropriate measure of the Class’s damages; and
- g. whether the Class is entitled to injunctive and other equitable relief.

In antitrust and Commodity Exchange Act cases such as this, courts have consistently held that claims for monopolization and attempted monopolization involve common questions that meet the requirements of Rule 23(a)(2). *See, e.g., Amchem Prods.*, 521 U.S. at 609, 625 (recognizing that “Rule 23(a)(2)’s ‘commonality’ requirement is subsumed under, or superseded

by, the more stringent Rule 23(b)(3) requirement that questions common to the class ‘predominate over’ other questions” and concluding that “[p]redominance is a test readily met in certain cases alleging . . . violations of antitrust laws”); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004) (allegations of violation of § 2 of Sherman Act “naturally raise several questions of law and fact common to the entire class”); *Southeast Mo. Hosp. v. C.R. Bard, Inc.*, No. 1:07cv0031 TCM, 2008 WL 4372741, at \*6 (E.D. Mo. Sept. 22, 2008) (common questions of law or fact may be found in antitrust case by scrutinizing conduct of defendant); *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 117 (C.D. Cal. 2007) (in case alleging monopolization and attempted monopolization, court found common legal and factual issues included market definition, monopoly power, and anticompetitive conduct).

Accordingly, the Class satisfies Rule 23(a)(2).

### **3. Typicality**

Typicality under Rule 23(a)(3) does not mean that the claims of the plaintiff and the putative class members have to be identical. *See In re Prudential*, 148 F.3d at 311 (neither the commonality nor the typicality requirement mandates that the claims be identical). Rather, a “plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998).

Here, the claims of the proposed class representative Plaintiffs are typical because they arise from the same events or course of conduct and are based on the same legal theory as the antitrust, Commodity Exchange Act, and common law claims of other Class members — namely Defendants’ manipulation of the February 2004 TET Propane market. *See Jerry Enters.*, 178 F.R.D. at 442 (typicality met where claim arises from the same event or course of conduct that

gives rise to the claims of the class members). All members of the Class, including the representative Plaintiffs, seek redress for the overcharges they paid as a result of their having purchased and/or traded propane at prices that were artificially inflated by Defendants' manipulation. Because these are the same elements that both Plaintiffs and the other Class members would have to prove separately if they brought individual actions, *In re Plastic Cutlery Antitrust Litig.*, 1998-1 Trade Cas. (CCH) ¶ 72,107, 1998 U.S. Dist. Lexis 3628, at \*11 (E.D. Pa. 1998), the typicality requirement of Rule 23(a)(3) is satisfied.

#### 4. Adequacy

It is well established that named plaintiffs satisfy the adequacy requirements when they retain adequate counsel and do not have interests antagonistic to those of the class. *See In re Prudential*, 148 F.3d at 312 (quoting *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 800 (3d Cir. 1995) (testing qualifications of counsel)) and *Amchem Prods.*, 521 U.S. at 625 (uncovering conflicts of interest)).

Plaintiffs here are represented by experienced counsel thoroughly familiar with class and antitrust litigation. Interim Class Counsel appointed by the Court have served in leadership roles in numerous major antitrust and other class actions in courts throughout the United States.<sup>8</sup> In addition, there are no conflicts between the Plaintiffs and the members of the Class concerning the subject matter of this litigation. The Plaintiffs all engaged in propane transactions whose prices were affected by Defendants' conduct. The same is true of Class members, and thus, the Class representatives' interest in proving liability and damages is entirely aligned with that of Class members.

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<sup>8</sup> *See* the firm biographies of Plaintiffs' Interim Class Counsel submitted in connection with the motion to appoint lead counsel (No. 1:06-CV-3541, # 38).

Class Counsel have diligently represented the interests of the Class in this litigation and will continue to do so. Accordingly, the requirements of Rule 23(a)(4), as well as the requirements of Rule 23(g)<sup>9</sup> relating to qualifications of class counsel, have been satisfied.

**B. THE REQUIREMENTS OF RULE 23(B)(3) ARE SATISFIED.**

Once it is determined that the proposed class satisfies Rule 23(a), a class should be certified under Rule 23(b)(3) if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Here, because questions of law or fact common to the Class clearly predominate over any individualized questions, and a class action is manifestly the superior method of adjudicating this controversy, the requirements of Rule 23(b)(3) are satisfied, and the Class should be certified.

Courts have repeatedly held that, in cases alleging monopolization or Commodity Exchange Act violations, questions common to the members of the class will predominate over questions affecting only individual members. *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 337 (N.D. Ill. 1997) (finding that Rule 23(b)(3) requirements had been met because “[t]he question of

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<sup>9</sup> Fed. R. Civ. P. 23(g)(1) provides that “[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel.” Rule 23(g)(4) provides that “[a]n attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.” Rule 23(g)(1)(A) provides that “[i]n appointing class counsel, the court (i) must consider: the work counsel has done in identifying or investigating potential claims in the action, counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel’s knowledge of the applicable law, and the resources counsel will commit to representing the class; (ii) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class; (iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and (iv) may make further orders in connection with the appointment.”

whether [defendant] engaged in a ‘willful acquisition’ of monopoly power is . . . common to all members of the class because of its susceptibility to common proof or disproof”); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int’l, Ltd.*, 247 F.R.D. 253, 269-70 (D. Mass. 2008) (“In anti-trust cases, ‘common liability issues such as . . . monopolization have, almost invariably, been held to predominate over individual issues.’”) (quoting 6 Herbert B. Newberg & Alba Conte, *NEWBERG ON CLASS ACTIONS* § 18.25 (4th ed. 2002)); *Kohen v. Pac. Inv. Mgmt. Co.*, 244 F.R.D. 469, 480 (N.D. Ill. 2007) (observing that “the common legal grievance, violation of the CEA, depends upon proof and findings pertaining to defendants’ course of conduct and favorable findings would prove the claims of all class members who purchased the [contract]”); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 90-91 (S.D.N.Y. 1998) (“The common factual questions of the who, what, when, where, and how of the conspiracy, and the common legal questions of the application of the law, particularly the Commodity Exchange Act, to the facts proven predominate over the individual questions of whether the conspiracy caused each class member some injury.”). Moreover, the impact of the asserted antitrust violation, as well as the damages arising out of the misconduct, can be shown on a class-wide basis.

Finally, as numerous courts have held, a class action is a superior method of adjudicating multiple claims in monopolization and Commodity Exchange Act cases like this one. Consequently, courts around the country have consistently certified class actions in such cases. *See, e.g., Kohen*, 244 F.R.D. at 480-81; *In re Natural Gas Commodities Litig.*, 231 F.R.D. 171, 185 (S.D.N.Y. 2005); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, 225 F.R.D. 208, 220 (S.D. Ohio 2003); *In re Sumimoto Copper Litig.*, 189 F.R.D. at 279, 284. Clearly, a class action is superior to other available methods for the fair and efficient adjudication of this controversy, given the

prohibitive and wasteful expense of duplicative prosecution and trial of the claims of thousands of geographically dispersed Class members on a non-class basis.

Accordingly, the requirements of Rule 23(b)(3), like those of Rule 23(a), are satisfied, and certification of the Class for purposes of settlement is appropriate.<sup>10</sup>

## **VII. THE REQUESTED PROCEDURES AND TIMETABLE**

### **A. BACKGROUND**

As the above discussion reflects, a number of procedures and deadlines will need to be fixed in the event the Court preliminarily approves the Settlement. Specifically, such approval should be decided along with certification of the Class and authorization of notice to the Class. The Court should also address, in that event, the setting of a date certain for the hearing on final Settlement approval.

At that hearing, Class Counsel intend to request final approval of the Settlement. In addition, Class Counsel will request the Court to award from the Settlement Fund attorneys' fees, reimbursement of counsel's expenses, and incentive awards to named plaintiffs as the Class representatives. Class Counsel intend to file petitions for these awards in advance of the hearing and, indeed, before the deadline for Class members to file any objections they may have to the Settlement or to Class Counsel's petitions for such awards. The pertinent papers will be posted for Class members' consideration on the special website to be established if the Court grants preliminary approval of the Settlement.

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<sup>10</sup> In the Settlement Agreement, BP has agreed not to oppose class certification for settlement purposes only. The Settlement Agreement expressly provides that it shall not constitute an admission by BP that class certification in this or any other action is appropriate for trial purposes. Should the Settlement Agreement not become effective, BP reserves the right to contest class certification, and the Settlement Agreement shall not constitute an admission or be admissible into evidence on the propriety of class certification. *See* Settlement Agreement at ¶¶ 32, 37.

The Court should set the deadline for Class members to request exclusion from the Class if they so desire, the deadline for filing proofs of claim, and deadlines for the submission of Class Counsel's petitions and for Class members' objections. Finally, the Court should set the deadline for any reply submissions by the parties to any objections submitted by Class members.

Plaintiffs propose that Class members be given 55 days from the Court's entry of an order granting preliminary approval of the settlement – which will then provide at least 45 days from the date notice is mailed – to opt out of the settlement. A putative Class member requesting exclusion should be required to send written notice of its opt out to the Claims Administrator. *See* Settlement Notice, provided at Exhibit C to the Settlement Agreement. Similarly, any Class member that objects to the terms of the Settlement Agreement, plan of allocation, request for attorneys' fees and expenses, and/or incentive awards to Plaintiffs should be required to file the objections with the Court and serve them on the parties' counsel within fifty-five (55) days of the Court's entry of an order granting preliminary approval of the settlement. *Id.* Under this approach, described in the following proposed timetable, each Class member will have the same amount of time – at least 45 days – to decide whether to exclude itself from the Class or, if it does not opt out, whether to submit any objections to the Settlement or any of the related procedures and applications.

#### **B. Proposed Timetable**

Class Counsel propose the following schedule to be reflected in the Court's order granting preliminary approval of the Settlement.

##### **Notice**

- (1) Within ten (10) days after the date of entry of the preliminary approval order, the Settlement Notice, with the plan of allocation, proof of claim form

and all exhibits, will be sent by first class mail to all potential Class members whom Class Counsel have identified.

- (2) Summary Notice to be published twice (at least six days apart) in the national edition of *The Wall Street Journal* commencing no later than seventeen (17) days after the date of entry of the preliminary approval order, or as soon thereafter as is feasible.

#### **Exclusion from Class and Objections to Settlement**

- (3) Not later than thirty-five (35) days after the date of entry of the preliminary approval order, Class Counsel shall file and serve on Defendants' counsel their memorandum in support of final approval of the proposed settlement and any petitions for attorneys' fees, reimbursement of expenses, or incentive awards to named plaintiffs that are to be heard at the hearing on final Settlement approval.
- (4) Any requests for exclusion from the Class must be received by the Claims Administrator no later than fifty-five (55) days after the date the preliminary approval order is entered. Promptly after this deadline, the Claims Administrator will inform counsel for the parties of the identities of the opt-outs.<sup>11</sup>
- (5) Any objections to the Settlement must be filed with the Court and served on Class Counsel and counsel for Defendants no later than fifty-five (55) days after the date of entry of the preliminary approval order.

#### **Final Approval**

- (6) A hearing before the Court on final approval of the Settlement is to be set for approximately ninety-eight (98) days after the date the preliminary approval order is entered, or as soon thereafter as comports with the Court's calendar.
- (7) No later than seven (7) days before the date set for the hearing on final approval of the Settlement, Class Counsel shall file with the Clerk of the Court affidavits or declarations attesting to the mailing and publication of the Settlement Notice and Summary Notice in accordance with the preliminary approval order.

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<sup>11</sup> The Settlement Agreement provides that BP has the right to nullify the Settlement Agreement under certain conditions if the opt-outs exceed a mutually-agreed threshold. BP must exercise the right to withdraw no later than twenty-one (21) days after it receives notice of all of the opt-outs. See Settlement Agreement ¶¶ 48-53, 57-58 and Withdrawal Agreement (to be filed under seal).

- (8) All reply papers in support of final approval of the Settlement or any of the petitions by Class Counsel must be filed at least seven (7) days before the date of the hearing on final approval of the settlement.

See [Proposed] Preliminary Approval Order, submitted herewith.

The foregoing timetable has been designed to coordinate the proceedings related to the Settlement with the notice and claim processes that will be occurring in connection with the DOJ's Restitution Fund. This will promote the efficient distribution of the Settlement Fund and help to minimize confusion among Class members concerning their rights in the Settlement as well as under the Restitution Fund.

### **VIII. CONCLUSION**

Based on the foregoing, Interim Class Counsel respectfully request that Direct Purchaser Plaintiffs' Motion for Settlement Class Certification, Appointment of Settlement Class Counsel, Preliminary Approval of Proposed Settlement, Authorization to Disseminate Notice, and Setting a Hearing on Final Settlement Approval be granted.

Dated: January 7, 2009

Respectfully submitted,  
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